





A TREATISE  
ON THE  
CONSTITUTIONAL LIMITATIONS  

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VOLUME ONE





A T R E A T I S E  
ON THE  
CONSTITUTIONAL LIMITATIONS

WHICH REST UPON

THE LEGISLATIVE POWER OF THE STATES  
OF THE AMERICAN UNION

BY  
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EIGHTH EDITION  
WITH LARGE ADDITIONS, CONSIDERATION OF AMENDMENTS, AND  
GIVING THE RESULTS OF THE RECENT CASES

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IN TWO VOLUMES  
VOLUME ONE

BOSTON  
LITTLE, BROWN, AND COMPANY  
1927

Entered according to Act of Congress, in the year 1868, by  
LITTLE, BROWN, AND COMPANY,  
In the Clerk's Office of the District Court of the District of Massachusetts.

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## PREFACE TO THE EIGHTH EDITION

THE twenty-four years that have elapsed since the previous edition of this work have been peculiarly fruitful in questions requiring constitutional interpretation. It has been a period characterized by great social and industrial developments and readjustments, and by many discoveries and inventions. Much of the legislation made necessary by the new conditions thus arising has been subjected to the scrutiny of the courts to determine its conformity to constitutional requirements. Many State Constitutions have been altered or amended and four amendments have been added to the Constitution of the United States. It follows that many of the constitutional questions decided are entirely novel. Under these circumstances it was not possible to treat all of them in annotations to Judge *Cooley's* text, and, therefore, new text has been added. But this has been done with a sparing hand and only where deemed essentially necessary, and in order to differentiate the new text from the old the former has been enclosed in brackets.

No change has been made in Judge *Cooley's* text except the occasional substitution or elimination of a word where the addition of new text made this essential to continuity. In the remarkably few instances in which the greater weight of subsequent judicial opinion does not sustain the text attention is called to that fact in the added text or in an appended note.

No attempt has been made to cite every case having any bearing upon a constitutional question. This would not have been consistent with either the purpose or scope of the work. A careful selection has been made of all important cases that are within the purview of the treatise as defined by Judge *Cooley* in his preface to the second edition. These include all such cases reported prior to June 1, 1926.

Immediately following the list of cases will be found a comparative table of pages of the text of the Seventh and present editions, which will be found useful in locating citations to the text of the former edition. The Constitution of the United States has also been added as an appendix and will be found in Vol. 2, p. 1421.

WALTER CARRINGTON.

OCTOBER, 1926.



## PREFACE TO THE SECOND EDITION

IN the Preface to the first edition of this work, the author stated its purpose to be, to furnish to the practitioner and the student of the law such a presentation of elementary constitutional principles as should serve, with the aid of its references to judicial decisions, legal treatises, and historical events, as a convenient guide in the examination of questions respecting the constitutional limitations which rest upon the power of the several State legislatures. In the accomplishment of that purpose, the author further stated that he had faithfully endeavored to give the law as it had been settled by the authorities, rather than to present his own views. At the same time, he did not attempt to deny — what he supposed would be sufficiently apparent — that he had written in full sympathy with all those restraints which the caution of the fathers had imposed upon the exercise of the powers of government, and with faith in the checks and balances of our republican system, and in correct conclusions by the general public sentiment, rather than in reliance upon a judicious, prudent, and just exercise of authority, when confided without restriction to any one man or body of men, whether sitting in legislative capacity or judicial. In this sympathy and faith, he had written of jury trials and the other safeguards to personal liberty, of liberty of the press, and of vested rights; and he had also endeavored to point out that there are on all sides definite limitations which circumscribe the legislative authority, independent of the specific restrictions which the people impose by their State constitutions. But while not predisposed to discover in any part of our system the rightful existence of any unlimited power, created by the Constitution, neither on the other hand had he designed to advance new doctrines, or to do more than state clearly and with reasonable conciseness the principles to be deduced from the judicial decisions.

The unexpected favor with which the work has been received having made a new edition necessary, the author has reviewed every part of it with care, but without finding occasion to change in any important particular the conclusions before given. Further reflection has only tended to confirm him in his previous views of the need

of constitutional restraints at every point where agents are to exercise the delegated authority of the people; and he is gratified to observe that in the judicial tribunals the tendency is not in the direction of a disregard of these restraints. The reader will find numerous additional references to new cases and other authorities; and some modifications have been made in the phraseology of the text, with a view to clearer and more accurate expression of his views. Trusting that these modifications and additions will be found not without value, he again submits his work "to the judgment of an enlightened and generous profession."

THOMAS M. COOLEY.

UNIVERSITY OF MICHIGAN,  
ANN ARBOR, July, 1871.

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Aikman v. Edwards	92, 319	Alexandria &c. Co. v. Alexandria, &c.		Air-Way Electric Appliance Corp.		Co.	1192	v. Day, 1005, 1011, 1013, 1014, 1020		Alford v. State	298	Aitken v. Wells River	444, 1111, 1313	Alfred Phosphate Co. v. Duck River		Akron v. Chamberlain Co.	439	Phosphate Co.	1127, 1140, 1143	Akron, &c. R. Co. v. United States	767	Allbyer v. State	137, 772	Alabama, &c. Co. v. Kenney	576	Alleghany City v. McClurkan	476	Alabama, &c. Ins. Co. v. Boykin	784	Allegheny Co. v. Gibson	506	Alabama Great Southern R. Co. v.		v. Warfield	323	Hill	61, 609	Allegheny County Home's Case	305, 309	Alabama Industrial School v. Addler	23	Allen v. Aldrich	711	Alabama Interstate Power Co. v.		v. Archer	775	Mt. Vernon, &c. Co.	1113, 1115,	v. Arguimbau	37	1117, 1145, 1202		v. Armstrong	768, 769, 791	Alabama Power Co. v. Keystone		v. Board of State Auditors	181, 291	Lime Co.	1215	v. B. & O. R. R. Co.	24	Alabama R. R. Co. v. Kidd	467	v. Cape Fear, &c. Ry. Co.	889	Alaska Fish Salting & By-Products		v. Chippewa Falls	448	Co. v. Smith	1045	v. Commonwealth	1259, 1263	Alaska Salmon Co. v. Standard		v. Crofoot	922	Box Co.	204	v. District of Columbia	1053	Albany v. Sikes	451	v. Drew	1074, 1079	Albany County v. Hooker	23	v. Georgia	844	Albany Co. Super's v. Stanley	339	v. Glynn	1360	Albany St., Matter of	341, 370, 744,	v. Hanks	752	1124, 1146, 1148, 1205, 1216		v. Jay	461, 467, 1029,	Albershart v. Donaldson	531		1033, 1039, 1136	Albertson v. Landon	204, 770	v. Jones	1119	Alberty v. State	550, 551	v. Lafayette	404	Albie v. Jones	112	v. Louisiana	363	Albrecht v. State	294, 296, 1045, 1050	v. McCalman	529	Albright v. Sussex Co. Lake, &c.		v. McKeen	524	Com.	1140	v. Pioneer Press Co.	811, 948	Albrittin v. Huntsville	518	v. Raleigh	379	Alcock v. Cooke	745	v. Riley	13, 14	Alcorn v. Hamer	245, 1081	v. Southern Pac. R. Co.	37	Albuquerque Nat. Bk. v. Perea	1049, 1107	v. Staples	620	Alderding v. Allison	111	v. State	674, 686, 688, 690	Alderman v. School Directors	386	v. Taunton	462	Alderson v. Com'rs	1408	v. Tison	304	Aldis v. Union El. R. Co.	1174	v. United States	685	Aldrich v. Aldrich	275	v. West Bay City	522	v. Cheshire R. R. Co.	1152,	v. Wyckoff	843	1209, 1220		Allen, &c. Co. v. Shreveport Water-		v. Kinney	58, 60, 856	works Co.	446	v. Printing Co.	914	Allen Co. Com'rs v. Silvers	363, 372	v. Sharp	864	v. Simons	13, 989	v. Youngstown	452, 453, 518	Allen's Application	725	Aldridge v. Railroad Co.	772, 1144	Allentown v. Henry	1071	v. Williams	143	v. Western U. T. Co.	1343	Alexander v. Alexander	752, 887	Allerton, <i>In re</i> ,	1094	v. Bennett	180	Alley v. Edgecomb	481	v. Baltimore	1071	Allgeyer v. Louisiana	* 12, 254, 1233	v. Chicago, &c. R. Co.	806	Allied Architects Ass'n v. Payne		v. Lane	44		264, 265, 817, 1028																				
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Alabama Interstate Power Co. v.		v. Archer	775	Mt. Vernon, &c. Co.	1113, 1115,	v. Arguimbau	37	1117, 1145, 1202		v. Armstrong	768, 769, 791	Alabama Power Co. v. Keystone		v. Board of State Auditors	181, 291	Lime Co.	1215	v. B. & O. R. R. Co.	24	Alabama R. R. Co. v. Kidd	467	v. Cape Fear, &c. Ry. Co.	889	Alaska Fish Salting & By-Products		v. Chippewa Falls	448	Co. v. Smith	1045	v. Commonwealth	1259, 1263	Alaska Salmon Co. v. Standard		v. Crofoot	922	Box Co.	204	v. District of Columbia	1053	Albany v. Sikes	451	v. Drew	1074, 1079	Albany County v. Hooker	23	v. Georgia	844	Albany Co. Super's v. Stanley	339	v. Glynn	1360	Albany St., Matter of	341, 370, 744,	v. Hanks	752	1124, 1146, 1148, 1205, 1216		v. Jay	461, 467, 1029,	Albershart v. Donaldson	531		1033, 1039, 1136	Albertson v. Landon	204, 770	v. Jones	1119	Alberty v. State	550, 551	v. Lafayette	404	Albie v. Jones	112	v. Louisiana	363	Albrecht v. State	294, 296, 1045, 1050	v. McCalman	529	Albright v. Sussex Co. Lake, &c.		v. McKeen	524	Com.	1140	v. Pioneer Press Co.	811, 948	Albrittin v. Huntsville	518	v. Raleigh	379	Alcock v. Cooke	745	v. Riley	13, 14	Alcorn v. Hamer	245, 1081	v. Southern Pac. R. Co.	37	Albuquerque Nat. Bk. v. Perea	1049, 1107	v. Staples	620	Alderding v. Allison	111	v. State	674, 686, 688, 690	Alderman v. School Directors	386	v. Taunton	462	Alderson v. Com'rs	1408	v. Tison	304	Aldis v. Union El. R. Co.	1174	v. United States	685	Aldrich v. Aldrich	275	v. West Bay City	522	v. Cheshire R. R. Co.	1152,	v. Wyckoff	843	1209, 1220		Allen, &c. Co. v. Shreveport Water-		v. Kinney	58, 60, 856	works Co.	446	v. Printing Co.	914	Allen Co. Com'rs v. Silvers	363, 372	v. Sharp	864	v. Simons	13, 989	v. Youngstown	452, 453, 518	Allen's Application	725	Aldridge v. Railroad Co.	772, 1144	Allentown v. Henry	1071	v. Williams	143	v. Western U. T. Co.	1343	Alexander v. Alexander	752, 887	Allerton, <i>In re</i> ,	1094	v. Bennett	180	Alley v. Edgecomb	481	v. Baltimore	1071	Allgeyer v. Louisiana	* 12, 254, 1233	v. Chicago, &c. R. Co.	806	Allied Architects Ass'n v. Payne		v. Lane	44		264, 265, 817, 1028																																																																
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878 —	1313-1319	905 —	1367, 1368	931 —	1400, 1401
879 —	1319	906 —	1368, 1369	932 —	1402, 1403
880 —	1321	907 —	1369, 1370	933 —	1403, 1404
881 —	1321, 1322	908 —	1370-1372	934 —	1404, 1405
882 —	1322-1324	909 —	1372, 1373	935 —	1405-1407
883 —	1324-1327	910 —	1373, 1374	936 —	1407, 1408
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885 —	1328, 1329	912 —	1376	938 —	1410, 1411
886 —	1329	913 —	1378	939 —	1411, 1412
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888 —	1335-1337	915 —	1381, 1382	941 —	1413-1415
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# CONSTITUTIONAL LIMITATIONS

## VOLUME ONE



# CONSTITUTIONAL LIMITATIONS

## VOLUME ONE

### CHAPTER I

#### DEFINITIONS

A STATE is a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.<sup>1</sup> The terms *nation* and *State* are frequently employed, not only in the law of nations, but in common parlance, as importing the same thing;<sup>2</sup> but the term *nation* is more strictly synonymous with *people*, and while a single State may embrace different nations or peoples, a single nation will sometimes be so divided politically as to constitute several States.

In American constitutional law the word *State* is applied to the several members of the American Union, while the word *nation* is applied to the whole body of the people embraced within the jurisdiction of the Federal government.

*Sovereignty*, as applied to States, imports the supreme, absolute, uncontrollable power by which any State is governed.<sup>3</sup> A State is called a sovereign State when this supreme power resides within itself, whether resting in a single individual, or in a number of individuals, or in the whole body of the people.<sup>4</sup> In the view of international law, all sovereign States are and must be equal in rights, because from the very definition of sovereign State, it is impossible that there should be, in respect to it, any political superior.

<sup>1</sup> Vattel, b. 1, c. 1, § 1; Story on Const. § 207; Wheat. Int. Law. pt. 1, c. 2, § 2; Halleck, Int. Law, 63; Bouv. Law Dict. "State." See Hyde International Law, Vol. I, 16. "A multitude of people united together by a communion of interest, and by common laws, to which they submit with one accord." Burlamaqui, Politic Law, c. 5. See *Chisholm v. Georgia*, 2 Dall. 457, 1 L. ed. 440; *Georgia v. Stanton*, 6 Wall. 65, 18 L. ed. 721.

<sup>2</sup> *Thompson, J.*, in *Cherokee Nation v. Georgia*, 5 Pet. 1, 52, 8 L. ed. 43; *Chase, Ch. J.*, in *Texas v. White*, 7

Wall. 700, 720, 19 L. ed. 227, 236; Vattel, *supra*.

<sup>3</sup> Story on Const. § 207; 1 Black. Com. 49; Wheat. Int. Law, pt. 1, c. 2, § 5; Halleck, Int. Law, 63, 64; Austin, Province of Jurisprudence, Lec. VI.; Chipman on Government, 137. "The right of commanding finally in civil society." Burlamaqui, Politic Law, c. 5.

<sup>4</sup> Vattel, b. 1, c. 1, § 2; Story on Const. § 207; Halleck, Int. Law, 65. In other words, when it is an *independent* State. Chipman on Government, 137.

The sovereignty of a State commonly extends to all the subjects of government within the territorial limits occupied by the associated people who compose it; and, except upon the high seas, which belong equally to all men, like the air, and no part of which can rightfully be appropriated by any nation,<sup>1</sup> the dividing line between sovereignties is usually a territorial line. In American constitutional law, however, there is a division of the powers of sovereignty between the national and State governments by subjects: the former being possessed of supreme, absolute, and uncontrollable power over certain subjects throughout all the States and Territories, while the States have the like complete power, within their respective territorial limits, over other subjects.<sup>2</sup> In regard to certain other subjects, the States possess powers of regulation which are not sovereign powers, inasmuch as they are liable to be controlled, or for the time being to become altogether dormant, by the exercise of a superior power vested in the general government in respect to the same subjects.

A *constitution* is sometimes defined as the fundamental law of a State, containing the principles upon which the government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confided, and the manner in which it is to be exercised.<sup>3</sup> Perhaps an equally complete and accurate definition would be, that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised.

<sup>1</sup> Vattel, b. 1, c. 23, § 281; Wheat. Int. Law, pt. 2, c. 4, § 10.

<sup>2</sup> *McLean*, J., in *License Cases*, 5 How. 504, 588, 12 L. ed. 256, 293. "The powers of the general government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye." *Taney*, Ch. J., in *Ableman v. Booth*, 21 How. 506, 516, 16 L. ed. 169, 173. See *Tarble's Case*, 13 Wall. 397, 20 L. ed. 597. That the general division of powers between the Federal and State governments has not been

disturbed by the new amendments to the Federal Constitution, see *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

<sup>3</sup> 1 Bouv. Inst. 9; Duer, *Const. Juris.* 26. See also *State v. Thompson*, 149 Wis. 488, 137 N. W. 20, 43 L. R. A. (N. S.) 339. "By the constitution of a State I mean the body of those written or unwritten fundamental laws which regulate the most important rights of the higher magistrates and the most essential privileges of the subjects." Mackintosh on the Study of the Law of Nature and Nations. For other definitions, see *Holding v. Feldman*, 269 Fed. 306; *Fairhope Single Tax Corp. v. Melville*, 193 Ala. 289, 69 So. 466; *State v. Alderson*, 49 Mont. 387, 409, 142 Pac. 210, Ann. Cas. 1916 B, 39; *People v. New York Cent. R. Co.*, 24 N. Y. 485; *Matter of Silkman*, 88 App. Div. (N. Y.) 102,

In a much qualified and very imperfect sense every State may be said to possess a constitution; that is to say, some leading principle has prevailed in the administration of its government, until it has become an understood part of its system, to which obedience is expected and habitually yielded; like the hereditary principle in most monarchies, and the custom of choosing the chieftain by the body of the people, which prevails among some barbarous tribes. But the term *constitutional government* is applied only to those whose fundamental rules or maxims not only locate the sovereign power in individuals or bodies designated or chosen in some prescribed manner, but also define the limits of its exercise so as to protect individual rights, and shield them against the assumption of arbitrary power.<sup>1</sup> The number of these is not great, and the protection they afford to individual rights is far from being uniform.<sup>2</sup>

In American constitutional law, the word *constitution* is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or of any one of the States, as the absolute rule of action and decision for all departments and officers of the government, in respect to all the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or regulation of any such department or officer, or even of the people themselves, will be altogether void.

The term *unconstitutional law* must have different meanings in different States, according as the powers of sovereignty are or are not possessed by the individual or body which exercises the powers of ordinary legislation. Where the law-making department of a State is restricted in its powers by a written fundamental law, as in the American States, we understand by unconstitutional law one which, being opposed to the fundamental law, is therefore in excess of legislative authority, and void. Indeed, the term *unconstitutional*

84 N. Y. Supp. 1025; *Ex parte Corliss*, 16 N. D. 470, 114 N. W. 962; *Frantz v. Antry*, 18 Okla. 561, 91 Pac. 193; *State v. Harden*, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394.

<sup>1</sup> Calhoun's *Disquisition on Government*, Works, I. p. 11.

<sup>2</sup> Absolute monarchs, under a pressure of necessity, or to win the favor of their people, sometimes grant them what is called a constitution; but this, so long as the power of the monarch is recognized as supreme, can be no more than his promise that he will observe its provisions, and conduct

the government accordingly. The mere grant of a constitution does not make the government a constitutional government, until the monarch is deprived of power to set it aside at will. The grant of Magna Charta did not make the English a constitutional monarchy; it was only after repeated violations and confirmations of that instrument, and when a further disregard of its provisions had become dangerous to the Crown, that fundamental rights could be said to have constitutional guaranties, and the government to be constitutional.

*law*, as employed in American jurisprudence, is a misnomer, and implies a contradiction; that enactment which is opposed to the Constitution being in fact no law at all.<sup>1</sup> But where, by the theory of the government, the exercise of complete sovereignty is vested in the same individual or body which enacts the ordinary laws, any enactment, being an exercise of power by the sovereign authority, must be obligatory, and, if it varies from or conflicts with any existing constitutional principle, it must have the effect to modify or abrogate such principle, instead of being nullified by it. This must be so in Great Britain with every law not in harmony with pre-existing constitutional principles; since, by the theory of its government, Parliament exercises sovereign authority, and may even change the constitution at any time, as in many instances it has done, by declaring its will to that effect.<sup>2</sup> And when thus the power to control and modify the constitution resides in the ordinary law-making power of the State, the term *unconstitutional law* can mean no more than this; a law which, being opposed to the settled maxims upon which the government has habitually been conducted, *ought not* to be, or to have been, adopted.<sup>3</sup> It follows, therefore, that in Great Britain constitutional questions are for the most part to be discussed before the people or the Parliament, since the declared will of the Parliament is the final law; but in America, after a constitutional question has been passed upon by the legislature, there is generally a right of appeal to the courts when it is attempted to put the will of the legislature in force. For the will of the people, as declared in the Constitution, is the final law; and the will of the legislature is law only when it is in harmony with, or at least is not opposed to, that controlling instrument which governs the legislative body equally with the private citizen.<sup>4</sup>

<sup>1</sup> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is in legal contemplation, as inoperative as though it had never been passed." *People v. Horan*, 34 Col. 304, 86 Pac. 252; *People ex rel. Farrington v. Menschling*, 187 N. Y. 8, 79 N. E. 884, 10 L. R. A. (N. S.) 625, 10 Ann. Cas. 101. See also *Minnesota Sugar Co. v. Iverson*, 91 Minn. 30, 97 N. W. 454.

<sup>2</sup> 1 Black. Com. 161; De Tocqueville, *Democracy in America*, c. 6; Broom, *Const. Law*, 795; Fischel, *English Constitution*, b. 7, c. 5.

In the Dominion of Canada, where the powers of sovereignty are confided

for exercise, in part to the Dominion Parliament and in part to the Provincial Parliaments, with a superintending authority over all in the imperial government, the term *unconstitutional law* has a meaning corresponding to its use in the United States. *Severn v. Regina*, 2 Sup. Ct. R. (Ont.) 70; *Leprohn v. Ottawa*, 2 App. R. 522.

<sup>3</sup> Mr. Austin, in his *Province of Jurisprudence*, Lec. VI., explains and enlarges upon this idea, and gives illustrations to show that in England, and indeed under most governments, a rule prescribed by the law-making authority may be unconstitutional, and yet legal and obligatory.

<sup>4</sup> See Chapter VII. *post*.

## CHAPTER II

### THE CONSTITUTION OF THE UNITED STATES

THE government of the United States is the existing representative of the national government which has always in some form existed over the American States. Before the Revolution, the powers of government, which were exercised over all the colonies in common, were so exercised as pertaining either to the Crown of Great Britain or to the Parliament; but the extent of those powers, and how far vested in the Crown and how far in the Parliament, were questions never definitely settled, and which constituted subjects of dispute between the mother country and the people of the colonies, finally resulting in hostilities.<sup>1</sup> That the power over peace and war, the general direction of commercial intercourse with other nations, and the general control of such subjects as fall within the province of international law, were vested in the home government, and that the colonies were not, therefore, sovereign States in the full and proper sense of that term, were propositions never seriously disputed in America, and indeed were often formally conceded; and the disputes related to questions as to what were or were not matters of internal regulation, the control of which the colonists insisted should be left exclusively to themselves.

Besides the tie uniting the several colonies through the Crown of Great Britain, there had always been a strong tendency to a more intimate and voluntary union, whenever circumstances of danger threatened them; and this tendency led to the New England Confederacy of 1643, to the temporary Congress of 1690, to the plan of union agreed upon in Convention of 1754, but rejected by the Colonies as well as the Crown, to the Stamp Act Congress of 1765, and finally to the Continental Congress of 1774. When the difficulties with Great Britain culminated in actual war, the Congress of 1775 assumed to itself those powers of external control which before had been conceded to the Crown or to the Parliament, together with such

<sup>1</sup> 1 Pitkin's Hist. U. S. c. 6; Life and Works of John Adams, Vol. I. pp. 122, 161; Vol. II. p. 311; Works of Jefferson, Vol. IX. p. 294; 2 Marshall's Washington, c. 2; Declaration of Rights by Colonial Congress of 1765;

Ramsay's Revolution in South Carolina, pp. 6-11; 5 Bancroft's U. S. c. 18; 1 Webster's Works, 128; Von Holst, Const. Hist. c. 1; Story on Const. § 183 *et seq.*

other powers of sovereignty as it seemed essential a general government should exercise, and thus became the national government of the United Colonies. By this body, war was conducted, independence declared, treaties formed, and admiralty jurisdiction exercised. It is evident, therefore, that the States, though declared to be "sovereign and independent", were never strictly so in their individual character, but were always, in respect to the higher powers of sovereignty, subject to the control of a central authority, and were never separately known as members of the family of nations.<sup>1</sup> The Declaration of Independence made them sovereign and independent States, by altogether abolishing the foreign jurisdiction, and substituting a national government of their own creation.

But while national powers were assumed by and conceded to the Congress of 1775-76, that body was nevertheless strictly revolu-

<sup>1</sup> "All the country now possessed by the United States was [prior to the Revolution] a part of the dominions appertaining to the Crown of Great Britain. Every acre of land in this country was then held, mediately or immediately, by grants from that Crown. All the people of this country were then subjects of the King of Great Britain, and owed allegiance to him; and all the civil authority then existing or exercised here flowed from the head of the British empire. They were in a strict sense fellow-subjects, and in a variety of respects one people. When the Revolution commenced, the patriots did not assert that only the same affinity and social connection subsisted between the people of the colonies, which subsisted between the people of Gaul, Britain, and Spain, while Roman provinces, namely, only that affinity and social connection which result from the mere circumstance of being governed by one prince; different ideas prevailed, and gave occasion to the Congress of 1774 and 1775.

"The Revolution, or rather the Declaration of Independence, found the people already united for general purposes, and at the same time providing for their more domestic concerns by State conventions and other temporary arrangements. From the Crown of Great Britain the sovereignty of their country passed to the people of it; and

it was not then an uncommon opinion that the unappropriated lands which belonged to the Crown passed, not to the people of the colony or State within whose limits they were situated, but to the whole people. On whatever principles this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the Revolution, combined with local convenience and considerations; the people, nevertheless, continued to consider themselves, in a national point of view, as one people; and they continued without interruption to manage their national concerns accordingly. Afterwards, in the hurry of the war, and in the warmth of mutual confidence, they made a confederation of the States the basis of a general government. Experience disappointed the expectations they had formed from it; and then the people, in their collective capacity established the present Constitution." Per *Jay*, Ch. J., in *Chisholm v. Georgia*, 2 Dall. 419, 470, 1 L. ed. 440, 462. See this point forcibly put and elaborated by Mr. A. J. Dallas, in his *Life and Writings* by G. M. Dallas, 200-207. Also in *Texas v. White*, 7 Wall. 724, 19 L. ed. 227. Professor Von Holst, in his *Constitutional History of the United States*, c. 1, presents the same view clearly and fully. Compare Hurd, *Theory of National Existence*, 125.



tionary in its character, and, like all revolutionary bodies, its authority was undefined, and could be limited only, *first*, by instructions to individual delegates by the States choosing them; *second*, by the will of the Congress; and *third*, by the power to enforce that will.<sup>1</sup> As in the latter particular it was essentially feeble, the necessity for a clear specification of powers which should be exercised by the national government became speedily apparent, and led to the adoption of the Articles of Confederation. But those articles did not concede the full measure of power essential to the efficiency of a national government at home, the enforcement of respect abroad, or the preservation of the public faith or public credit; and the difficulties experienced induced the election of delegates to the Constitutional Convention held in 1787, by which a constitution was formed which was put into operation in 1789. As much larger powers were vested by this instrument in the general government than had ever been exercised in this country by either the Crown, the Parliament, or the Revolutionary Congress, and larger than those conceded to the Congress under the Articles of Confederation, the assent of the people of the several States was essential to its acceptance, and a provision was inserted in the Constitution that the ratification of the conventions of nine States should be sufficient for the establishment of the Constitution between the States so ratifying the same. In fact, the Constitution was ratified by conventions of delegates chosen by the people in eleven of the States, before the new government was organized under it; and the remaining two, North Carolina and Rhode Island, by their refusal to accept, and by the action of the others in proceeding separately, were excluded altogether from that national jurisdiction which before had embraced them. This exclusion was not warranted by anything contained in the Articles of Confederation, which purported to be articles of "perpetual union"; and the action of the eleven States in making radical revision of the Constitution, and excluding their associates for refusal to assent, was really revolutionary in character,<sup>2</sup> and only to be defended on the same ground of necessity on which all revolutionary action is justified, and which in this case was the absolute need, fully demonstrated by experience, of a more efficient general government.<sup>3</sup>

<sup>1</sup> See remarks of *Iredell*, J., in *Penhallow v. Doane's Adm'r*, 3 Dall. 54, 91, 1 L. ed. 507, 531, and of *Blair*, J., in the same case, p. 111. The true doctrine on this subject is very clearly explained by *Chase*, J., in *Ware v. Hylton*, 3 Dall. 199, 231, 1 L. ed. 568, 582.

<sup>2</sup> Mr. Van Buren has said of it that it was "an heroic, though perhaps a lawless, act." *Political Parties*, p. 50.

<sup>3</sup> "Two questions of a very delicate nature present themselves on this occasion: 1. On what principle the confederation, which stands in the form of

Left at liberty now to assume complete powers of sovereignty as independent governments, these two States saw fit soon to resume their place in the American family, under a permission contained in the Constitution ; and new States have since been added from time to time, all of them, with a single exception, organized by the consent of the general government, and embracing territory previously under its control. The exception was Texas, which had previously been an independent sovereign State, but which, by the conjoint action of its government and that of the United States, was received into the Union on an equal footing with the other States.

Without, therefore, discussing, or even designing to allude to any abstract theories as to the precise position and actual power of the several States at the time of forming the present Constitu-

a solemn compact among the States, can be superseded without the unanimous consent of the parties to it; 2. What relation is to subsist between the nine or more States, ratifying the Constitution, and the remaining few who do not become parties to it. The first question is answered at once by recurring to the absolute necessity of the case ; to the great principle of self-preservation ; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed. *Perhaps*, also, an answer may be found without searching beyond the principles of the compact itself. It has been heretofore noted, among the defects of the confederation, that in many of the States it had received no higher sanction than a mere legislative ratification. The principle of reciprocity seems to require that its obligation on the other States should be reduced to the same standard. A compact between independent sovereigns, founded on acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties, that all of the articles are mutually conditions of each other ; that a breach of any one article is a breach of the whole treaty ; and that a breach committed by either of the parties absolves the others, and authorizes them, if they please, to pro-

nounce the compact violated and void. Should it unhappily be necessary to appeal to these delicate truths for a justification for dispensing with the consent of particular States to a dissolution of the Federal pact, will not the complaining parties find it a difficult task to answer the multiplied and important infractions with which they may be confronted? The time has been when it was incumbent on us all to veil the ideas which this paragraph exhibits. The scene is now changed, and with it the part which the same motives dictate. The second question is not less delicate, and the flattering prospect of its being merely hypothetical forbids an over-curious discussion of it. It is one of those cases which must be left to provide for itself. In general it may be observed, that although no political relation can subsist between the assenting and dissenting States, yet the moral relations will remain uncanceled. The claims of justice, both on one side and on the other, will be in force, and must be fulfilled ; the rights of humanity must in all cases be duly and mutually respected ; whilst considerations of a common interest, and above all the remembrance of the endearing scenes which are past, and the anticipation of a speedy triumph over the obstacles to reunion, will, it is hoped, not urge in vain *moderation* on one side, and *prudence* on the other." *Federalist*, No. 43 (by *Madison*).

tion,<sup>1</sup> it may be said of them generally that they have at all times been subject to some common national government, which has exercised control over the subjects of war and peace, and other matters pertaining to external sovereignty; and that when the only three States which ever exercised complete sovereignty accepted the Constitution and came into the Union, on an equal footing with all the other States, they thereby accepted the same relative position to the general government, and divested themselves permanently of those national powers which the others had never exercised. And the assent once given to the Union was irrevocable. "The Constitution in all its provisions looks to an indestructible Union composed of indestructible States."<sup>2</sup>

The government of the United States is one of *enumerated powers*; the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess.<sup>3</sup> In this respect

<sup>1</sup> See this subject discussed in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23.

<sup>2</sup> *Chase*, Ch. J., in *Texas v. White*, 7 Wall. 700, 725, 19 L. ed. 227, 237. See *United States v. Cathcart*, 1 Bond, 556.

<sup>3</sup> "The government of the United States can claim no powers which are not granted to it by the Constitution; and the powers actually granted must be such as are expressly given, or given by necessary implication." Per *Marshall*, Ch. J., in *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326, 4 L. ed. 97, 103.

"This instrument contains an enumeration of the powers expressly granted by the people to their government." *Marshall*, Ch. J., in *Gibbons v. Ogden*, 9 Wheat. 1, 187, 6 L. ed. 23, 68. See *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 9 L. ed. 709; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *United States v. Cruikshank*, 92 U. S. 542, 550, 551, per *Waite*, Ch. J., 23 L. ed. 588, 590, 591; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; *Weister v. Hade*, 52 Pa. St. 474; *Sporrer v. Eifer*, 1 Heisk. 633.

"Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal govern-

ment. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced." *Linder v. United States*, 268 U. S. 5, 69 L. ed. 819, 45 Sup. Ct. Rep. 446, 39 A. L. R. 229.

The tenth amendment to the Constitution provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." No power is conferred by the Constitution upon Congress to establish mere police regulations within the States. *United States v. Dewitt*, 9 Wall. 41, 19 L. ed. 593. See also *In re Antonio Guerra*, 94 Vt. 1, 110 Atl. 224, 10 A. L. R. 1560. Nor is power conferred to provide for copyrighting trademarks. *Trademark Cases*, 100 U. S. 82, 25 L. ed. 550.

The fourteenth amendment does not take from the States police powers reserved to them at the time of the adoption of the Constitution. See *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 394; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct.

it differs from the constitutions of the several States, which are not grants of powers to the States, but which apportion and impose restrictions upon the powers which the States inherently possess. The general purpose of the Constitution of the United States is declared by its founders to be, "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."<sup>1</sup> To accomplish these purposes, the Congress is empowered by the eighth section of Article I:—

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States. But all duties, imposts, and excises shall be uniform throughout the United States.<sup>2</sup>

2. To borrow money on the credit of the United States.

3. To regulate commerce with foreign nations and among the several States, and with the Indian tribes.<sup>3</sup>

Rep. 357; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273. But it prevents their making, under the guise of police regulations, rules which abridge the liberty of the citizen to acquire contract rights outside his own State and to enjoy the same. *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427, rev. 48 La. Ann. 104, 18 S. W. 904.

As to the general division of powers between the Dominion of Canada and the provinces, see *Citizens' Ins. Co. v. Parsons*, 4 Can. Sup. Ct. 215.

<sup>1</sup> In *Truax v. Corrigan*, 257 U. S. 312, 66 L. ed. 254, 42 Sup. Ct. Rep. 124, the court said: "The Constitution was intended — its very purpose was — to prevent experimentation with the fundamental rights of the individual."

<sup>2</sup> Some interesting legal questions have grown out of the acquisition of the island of Porto Rico under the treaty with Spain, following the Spanish War, and among them the status of the island under the revenue clauses of the Constitution.

In *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770, it is held that by the treaty of cession Porto Rico became territory appurtenant to the United States but not a

part of it within the meaning of those clauses of the Constitution. That Section 8 of Article 1, requiring duties, imposts, and excises to be uniform "throughout the United States" did not apply to the island of Porto Rico.

The other "Insular Cases", so called, involving the status of Porto Rico under the revenue clauses of the Constitution are *De Lima v. Bidwell*, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743; *Goetze v. United States* and *Crossman v. United States*, 182 U. S. 221, 45 L. ed. 1065, 21 Sup. Ct. Rep. 742; *Dooley v. United States*, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762; *Armstrong v. United States*, 182 U. S. 243, 45 L. ed. 1086, and *Huus v. New York & Porto Rico Steamship Company*, 182 U. S. 392, 45 L. ed. 1146, 21 Sup. Ct. Rep. 827.

The same doctrine with reference to the Philippine Islands is announced in *Dooley v. United States*, 183 U. S. 151, 46 L. ed. 128, 22 Sup. Ct. Rep. 62, and *Fourteen Diamond Rings v. United States*, 183 U. S. 176, 46 L. ed. 138, 22 Sup. Ct. Rep. 59.

<sup>3</sup> An interstate shipment is governed by the acts of Congress and the decisions of the United Supreme Court construing the same. *Jonesboro, L. C. & E. R. Co. v. Maddy*, 157 Ark. 484, 248 S. W. 911, 28 A. L. R. 498.

4. To establish a uniform rule of naturalization,<sup>1</sup> and uniform laws on the subject of bankruptcy, throughout the United States.

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

6. To provide for the punishment of counterfeiting the securities and current coin of the United States.

7. To establish post-offices and post-roads.<sup>2</sup>

8. To promote the progress of science and the useful arts, by securing for limited terms to authors and inventors the exclusive right to their respective writings and discoveries.<sup>3</sup>

See also *Ginsberg v. Wabash R. Co.*, 219 Mich. 665, 189 N. W. 1018, 28 A. L. R. 518.

Commerce on the high seas, though between ports of the same State, is held to be under the controlling power of Congress. *Lord v. Steamship Co.*, 102 U. S. 541, 26 L. ed. 224. See cases *infra*, 1002, 1252.

Acts committed by Indians within the limits of their reservations are not subject to the criminal laws of the State wherein the reservation lies. *State v. Campbell*, 53 Minn. 354, 55 N. W. 553, 21 L. R. A. 169, and note on jurisdiction to punish crimes by or against Indians. As to what lands of tribal Indians cannot be taxed by State, see *Allen Co. Commrs. v. Simons*, 129 Ind. 193, 28 N. E. 420, 13 L. R. A. 512.

<sup>1</sup> Naturalization may be by treaty, and also by organic act creating a State. *Boyd v. Nebraska*, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375, and cases there cited. But such naturalization applies only to those who were citizens of the admitted territory or country at the time of such admission. *Contzen v. United States*, 179 U. S. 191, 45 L. ed. 148, 21 Sup. Ct. Rep. 98.

The requirement that the rule of naturalization shall be uniform means that the mode or manner of naturalization prescribed shall have uniform operation in all the States. The act of Congress conferring citizenship upon foreign-born women who are married to citizens of the United States does not violate the requirement. *Dorsey v. Brigham*, 177 Ill. 250, 52 N. E. 303, 42 L. R. A. 809.

The purpose of granting to Congress the power to establish a uniform rule of naturalization was to deprive the several States of that power, and the reason was that if the power remained with the different States, the terms and conditions of citizenship would depend upon the will and pleasure of each of the States, and might be widely and materially different. *Dorsey v. Brigham*, 177 Ill. 250, 52 N. E. 303, 42 L. R. A. 809.

It follows that the power of Congress is exclusive. There is no concurrent power in the States. *Hampden County v. Morris*, 207 Mass. 167, 93 N. E. 579, Ann. Cas. 1912 A, 815; *Andres v. Ottawa Circuit Judge*, 77 Mich. 85, 43 N. W. 857, 6 L. R. A. 238; *Rushworth v. Judges of Inferior Court of Common Pleas of Hudson County*, 58 N. J. L. 97, 32 Atl. 743, 30 L. R. A. 761; *State v. Superior Ct.*, 75 Wash. 239, 134 Pac. 916, Ann. Cas. 1915 C, 425; *In re Wahlitz*, 16 Wis. 443, 84 Am. Dec. 700.

<sup>2</sup> As to the power to exclude matter from the mail, see *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877.

<sup>3</sup> Until Congress legislates upon the subject, a State may make reasonable regulations governing the sale or assignment of rights arising under a patent, designed for the protection of its citizens against imposition and fraud. *Allen v. Riley*, 203 U. S. 347, 51 L. ed. 216, 27 Sup. Ct. Rep. 95, 8 Ann. Cas. 137, affirming 71 Kan. 378, 80 Pac. 952, 6 Ann. Cas. 158.

Prior to this decision of the Supreme Court there were decisions in lower Federal courts and in the courts of

9. To constitute tribunals inferior to the Supreme Court; to define and punish piracies and felonies committed upon the high seas, and offences against the law of nations.

10. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

11. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.

12. To provide and maintain a navy.

13. To make rules for the government and regulation of the land and naval forces.

14. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.<sup>1</sup>

15. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.<sup>2</sup>

some of the States which seem to have held that the States cannot pass any laws regulating the sale of patent rights. *Ex parte Robinson*, 2 Biss. 309; *Woolen v. Banker*, 2 Flipp. 33; *Hal-lida v. Hunt*, 70 Ill. 109; *Cransan v. Smith*, 37 Mich. 309, 26 Am. Rep. 514; *Crittenden v. White*, 23 Minn. 24, 23 Am. Rep. 676.

State statutes requiring that notes given for a patent right shall express their purpose on the face of the paper have been held valid. *Tod v. Wick*, 36 Ohio St. 370; *Herdic v. Roessler*, 109 N. Y. 127, 16 N. E. 198; *Shires v. Com.*, 120 Pa. St. 368, 14 Atl. 251; *New v. Walker*, 108 Ind. 365, 9 N. E. 386; *Mason v. McLeod*, 57 Kan. 105, 45 Pac. 76, 41 L. R. A. 548, 57 Am. St. 327; *Bohon's Assignee v. Brown*, 101 Ky. 354, 41 S. W. 273, 38 L. R. A. 503; *Marsh v. Nichols*, 140 U. S. 344, 35 L. ed. 413, 11 Sup. Ct. Rep. 798; *Woods v. Carl*, 203 U. S. 358, 51 L. ed. 219, 27 Sup. Ct. Rep. 99; *Ozan Lumber Co. v. Union County National Bank*, 207 U. S. 251, 52 L. ed. 195, 28 Sup. Ct. Rep. 89; *Allen v. Riley*, 203 U. S. 347, 51 L. ed. 216, 27 Sup. Ct. Rep. 95, 8 Ann. Cas. 137; *Ozan Lumber Co. v. Union County National Bank*, 145 Fed. 344, 76 C. C. A. 218, 7 Ann. Cas. 390; *Woods v. Carl*, 75 Ark. 328, 87 S. W. 621, 5 Ann. Cas.

423; *Michener v. Watts*, 170 Ind. 376, 96 N. E. 127, 36 L. R. A. (N. S.) 142; *Crittenden v. White*, 23 Minn. 24, 23 Am. Rep. 676; *State v. Cook*, 107 Tenn. 499, 64 S. W. 720, 62 L. R. A. 174; *J. H. Clark Co. v. Rice*, 127 Wis. 451, 106 N. W. 231, 7 Ann. Cas. 505. The States may pass laws regulating the use of patented articles. *Patterson v. Kentucky*, 11 Bush, 311; 21 Am. Rep. 220; s. c. in error, 97 U. S. 501, 24 L. ed. 1115; *State v. Telephone Co.*, 36 Ohio St. 296, 38 Am. Rep. 583.

State cannot require vendor of patent rights to take out license. *Com. v. Petty*, 96 Ky. 452, 29 S. W. 291, 29 L. R. A. 786. But one who peddles articles made under a patent may be required to comply with an ordinance requiring licenses for all peddlers. *People v. Russell*, 49 Mich. 617, 14 N. W. 578.

<sup>1</sup>*Martin v. Mott*, 12 Wheat. 19, 6 L. ed. 537; *Sweetser v. Emerson*, 236 Fed. 161, 149 C. C. A. 351, Ann. Cas. 1917 B, 244; *In re Wahlitz*, 16 Wis. 443, 84 Am. Dec. 700; *Dreucker v. Solomon*, 21 Wis. 621, 94 Am. Dec. 571.

<sup>2</sup>*Houston v. Moore*, 5 Wheat. 1, 5 L. ed. 19; *Martin v. Mott*, 12 Wheat. 19, 6 L. ed. 537; *Kneedler v. Lane*, 45 Pa. St. 238; *Dunne v. People*, 94 Ill.

16. To exercise exclusive legislation in all cases whatsoever, over such district not exceeding ten miles square as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.<sup>1</sup>

17. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.<sup>2</sup>

120, 34 Am. Rep. 213; *Sweetser v. Emerson*, 236 Fed. 161, 149 C. C. A. 351, Ann. Cas. 1917 B, 244; *In re Spangler*, 11 Mich. 305; Opinion of Justices, 14 Gray, 614; *People v. Hill*, 59 Hun, 624, 13 N. Y. Supp. 637, affirmed 126 N. Y. 497, 27 N. E. 789; *Ansley v. Timmons*, 3 M'Cord, L. (S. C.) 329.

<sup>1</sup> Perjury committed in a State court holden by permission of State law and of Federal officials in a Federal building, is not outside the jurisdiction of the State to punish. *Exum v. State*, 90 Tenn. 501, 17 S. W. 107, 15 L. R. A. 381.

<sup>2</sup> Within the legitimate scope of this grant Congress can determine for itself what is necessary. *Ex parte Curtis*, 106 U. S. 371, 27 L. ed. 232.

The grant vests in Congress a wide range of discretion as to the means by which the powers granted are to be carried into execution. This matter was at an early day presented to the Supreme Court of the United States, and it was affirmed that there could be no narrow and technical limitation or construction. In the course of the opinion *Marshall*, Ch. J., said: "The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate and which were conducive to the end.

This provision is made in a Constitution intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation, to circumstances. . . .

"We admit, as all must admit, that the powers of the government are limited and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

Congress is also empowered by the thirteenth, fourteenth, and fifteenth amendments to the Constitution to enforce the same by appropriate legislation. The thirteenth amendment abolishes slavery and involuntary servitude, except as a punishment for crime, throughout the United States and all places subject to their jurisdiction. The fourteenth amendment has several objects. 1. It declares all persons born or naturalized in the United States, and subject to the jurisdiction thereof, to be citizens of the United States and of the State wherein they reside; and it forbids any State to make or enforce any law which shall abridge the privileges

*McCulloch v. Maryland*, 4 Wheat. 316, 415, 4 L. ed. 579, 603. See also *Hepburn v. Griswold*, 8 Wall. 603, 19 L. ed. 513; *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; *Fairbank v. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648; *Overshiner v. State*, 156 Ind. 187, 59 N. E. 468, 51 L. R. A. 748; *People v. Brady*, 271 Ill. 100, 110 N. E. 864, Ann. Cas. 1917 C, 1093; *First National Bank v. Fellows*, 244 U. S. 416, 61 L. ed. 1233, 37 Sup. Ct. Rep. 734, L. R. A. 1918 C, 283 Ann. Cas. 1918 D, 1169; *James Everard's Breweries v. Day*, 265 U. S. 545, 68 L. ed. 1174, 44 Sup. Ct. Rep. 628.

But "if the means employed have no real substantial relation to public objects which government may legally accomplish, if they are arbitrary and unreasonable, beyond the necessities of the case", the authority of the courts to interfere and declare such action unconstitutional is beyond doubt. *Chicago, etc., R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367.

The Federal Supreme Court may not inquire into the degree of the necessity of the means adopted, nor as to the wisdom of the legislation, but may consider whether Congress has gone beyond the constitutional limits upon its legislative discretion. *James Everard's Breweries v. Day*, 265 U. S. 454, 68 L. ed. 1174, 44 Sup. Ct. Rep. 628. "Congress as the legislature of a sovereign nation, being expressly empowered by the Constitution 'to lay

and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States', and 'to borrow money on the credit of the United States', and 'to coin money and regulate the value thereof and of foreign coin'; and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the undoubted powers of Congress, consistent with the letter and spirit of the Constitution, and, therefore, within the meaning of that instrument, 'necessary and proper for carrying into execution the powers vested by this Constitution in the government of the United States.'" *Gray, J., in Legal Tender Case*, 110 U. S. 421, 28 L. ed. 204.

Congress has implied power to protect voters at Federal elections from intimidation: *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274; to protect the right to make homestead entry upon public lands. *United States v. Waddell*, 112 U. S. 76, 28 L. ed. 673.



or immunities of citizens of the United States,<sup>1</sup> or to deprive any person of life, liberty, or property, without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws.<sup>2</sup> 2. It provides that when the right to vote at any election for the choice of electors<sup>3</sup> for President or Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or is in any way abridged, except for participation in rebellion or other crime, the basis of congressional representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. 3. It disqualifies from holding Federal or State offices certain persons who shall have engaged in insurrection or rebellion against the United States, or given aid or comfort to the enemies thereof. 4. It declares the inviolability of the public debt of the United States, and forbids the United States or any State assuming or paying any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave.<sup>4</sup> The fifteenth amendment declares

<sup>1</sup> As to this clause, see p. 822, note 1, *infra*.

<sup>2</sup> See p. 822, n. 1.

<sup>3</sup> The appointment and mode of appointment of electors from a State are within the power of the State acting in such manner as its legislature may direct; and a law directing that one elector and one alternate shall be elected from each congressional district, and one elector and one alternate shall be elected at large in each of two districts into which the legislature divides the State for the purpose of electing the remaining two electors, is a valid exercise of the power of the legislature in this regard. *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3, aff. 92 Mich. 377, 52 N. W. 469, 16 L. R. A. 475, 31 Am. St. 587.

<sup>4</sup> "That amendment was undoubtedly proposed for the purpose of fully protecting the newly-made citizens of the African race in the enjoyment of their freedom, and to prevent discriminating State legislation against them. The generality of the language

used necessarily extends its provisions to all persons, of every race and color. Previously to its adoption, the Civil Rights Act had been passed, which declared that citizens of the United States of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, should have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, own, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and should be subject to like punishments, pains, and penalties, and to none other. The validity of this act was questioned in many quarters, and complaints were made that, notwithstanding the abolition of slavery and involuntary servitude, the freedmen were in some portions of the country subjected to disabilities from which others were exempt. There were also complaints

that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State, on account of race, color, or previous condition of servitude.<sup>1</sup>

of the existence in certain sections of the Southern States of a feeling of enmity, growing out of the collisions of the war, towards citizens of the North. Whether these complaints had any just foundation is immaterial; they were believed by many to be well founded, and to prevent any possible legislation hostile to any class from the causes mentioned, and to obviate objections to legislation similar to that embodied in the Civil Rights Act, the fourteenth amendment was adopted. This is manifest from the discussions in Congress with reference to it. There was no diversity of opinion as to its object between those who favored and those who opposed its adoption." Mr. Justice *Field* in *San Mateo County v. Sou. Pac. R. R. Co.*, 13 Fed. Rep. 722.

"A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever by virtue of public position under a State government deprives another of property, life, or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's authority, his act is that of the State. This must be so, or the constitutional prohibition has no meaning." *Strong, J.*, in *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676. Approved, *Neal v. Delaware*, 103 U. S. 370, 397, 26 L. ed. 567.

An act of Congress declaring that certain acts committed by individuals shall be deemed offenses and punished in the United States courts is invalid. The fourteenth amendment does not "invest Congress with power to legislate upon subjects which are within the

domain of State legislation; but to provide modes of relief against State legislation or State action of the kinds referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws and the action of State officers, executive and judicial, when these are subversive of the fundamental rights specified in the amendment." *Bradley, J.*, in *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18. See also *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; *Baldwin v. Franks*, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656. But Congress may punish the intimidation by individuals of voters at Federal elections. *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152.

<sup>1</sup> See, as to these amendments, *Story* on Const. (4th ed.) c. 46, 47, 48, and App. to Vol. II.

An interesting article on the amendments will be found in *Am. Bar Assoc. Journ.* Vol. 10, 192.

The adoption of an amendment to the Federal Constitution has the effect to nullify all provisions of State constitutions and State laws which conflict therewith. *Ex parte Turner*, Chase Dec. 157; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Wood v. Fitzgerald*, 3 Oreg. 568; *Portland v. Bangor*, 65 Me. 120, 20 Am. Rep. 681. See *Griffin's Case*, Chase Dec. 368.

These amendments do not prevent a State forbidding a body to parade without license from the Governor. The privilege of citizens of the United States is not thereby infringed. *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580.

The fourteenth amendment does not entitle persons as of right to sell intoxicating drinks against the prohibitions of State laws; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; nor is property taken without due process of

law by such a law, although without compensation an existing brewery is rendered valueless thereby: *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; it is not violated by the grant by a State, under its police power, of an exclusive right for a term of years to have and maintain slaughter-houses, landings for cattle, and yards for inclosing cattle intended for slaughter, within certain specified parishes: *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 394; nor by denying the right of jury trial in State courts. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; it does not preclude a State from taxing its citizens for debts owing to them from foreign debtors: *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; nor from regulating warehouse charges: *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; nor charges for the transportation of freight and passengers by common carriers: *Chicago, B. & Q. R. R. Co. v. Iowa*, 94 U. S. 155, 24 L. ed. 94; *Railroad Com. Cases*, 116 U. S. 807, 29 L. ed. 636, 6 Sup. Ct. Rep. 388; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 8 Sup. Ct. Rep. 1028; nor from making railroads, and not other masters, liable to servants for the negligence of fellow-servants: *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. Ry. Co. v. Herrick*, *id.* 210; nor from giving double damages for killing stock through failure to fence: *Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 3; nor from requiring a railroad to pay for examination of its servants for color-blindness: *Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 9 Sup. Ct. Rep. 28; *contra Louisville & N. R. Co. v. Baldwin*, 85 Ala. 619, 5 So. 311.

The fourteenth amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities may and do exist in these respects in different States. One may have the common law and trial by jury; another the civil law and trial

by the court. But like diversities may also exist in different parts of the same State. The States frame their laws and organize their courts with some regard to local peculiarities and special needs, and this violates no constitutional requirement. All that one can demand under the last clause of § 1 of the fourteenth amendment is, that he shall not be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. *Missouri v. Lewis*, 101 U. S. 22, 25 L. ed. 989; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350.

So railroads, as a class, may be taxed differently from other property, and if the law provides for a hearing and judicial contest, it is due process of law. *Kentucky R. R. Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57.

The fourteenth amendment not only gave citizenship to colored persons, but by necessary implication it conferred upon them the right to exemption from unfriendly legislation against them distinctively as colored, — exemption from discriminations imposed by public authority which imply legal inferiority in civil society, lessen the security of their rights, and are steps towards reducing them to the condition of a subject race. The denial by State authority of the right and privilege in colored persons to participate as jurors in the administration of justice is a violation of this amendment. *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Bush v. Kentucky*, 107 U. S. 110, 27 L. ed. 354, 1 Sup. Ct. Rep. 625; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; *Carter v. Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687.

On negroes as grand jurors see note to 44 L. ed. U. S. 839.

State may require negroes and whites to occupy separate compartments in passenger cars on roads

The executive power is vested in a president, who is made commander-in-chief of the army and navy, and of the militia of the several States when called into the service of the United States; and who has power, by and with the consent of the Senate, to make treaties, provided two-thirds of the Senate concur, and, with the same advice and consent, to appoint ambassadors and other public ministers and consuls, judges of the Supreme Court, and other officers of the United States, whose appointments are not otherwise provided for.<sup>1</sup>

The judicial power of the United States extends to all cases in law and equity arising under the national Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;<sup>2</sup> to all cases affecting ambassadors, other

operating wholly within the State. *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138, aff. 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639.

A trial jury may be made up entirely of whites, if negroes are not excluded from jury lists, but an indictment is bad, if found by a grand jury on which whites only are allowed by law. *Bush v. Kentucky*, 107 U. S. 110, 27 L. ed. 354, 1 Sup. Ct. Rep. 625. See, further, *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *Lewis v. State*, 29 Tex. App. 201, 15 S. W. 642, 25 Am. St. 720.

Negroes called for jury-service may be peremptorily challenged if peremptory challenges are not yet exhausted. *Whitney v. State*, 43 Tex. Cr. App. 197, 63 S. W. 879.

A law prohibiting adultery between a white and a negro under heavier penalty than between two whites or two blacks, is valid. *Pace v. Alabama*, 106 U. S. 583, 27 L. ed. 207, 1 Sup. Ct. Rep. 637. See *Plunkard v. State*, 67 Md. 364, 10 Atl. 225, 309.

Since these amendments, as before, sovereignty for the protection of life and personal liberty within the respective States rests alone with the States; and the United States cannot take cognizance of invasions of the privilege of suffrage when race, color, or previous condition is not the ground thereof. *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *United States v. Cruikshank*, *id.* 542.

Police regulations which affect alike

all persons similarly situated are valid: *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; so of regulations of the practice of medicine: *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *State v. Knowles*, 90 Md. 646, 45 Atl. 877, 49 L. R. A. 695; but the administration of such police ordinances so as to deny to Chinese rights accorded to whites in similar circumstances is prohibited. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Corporations are "persons" within the meaning of the amendment. *Santa Clara Co. v. Southern Pac. R. R. Co.*, 118 U. S. 394, 30 L. ed. 220, 6 Sup. Ct. Rep. 1132; *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Hawley v. Hurd et al.*, 72 Vt. 122, 47 Atl. 401. But are not "citizens" within the meaning of that term as used in the fourteenth amendment. *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Hawley v. Hurd et al.*, *supra*; but a foreign corporation is not deprived of equal protection of the laws because it is taxed by the State at as high a rate as are corporations of that State in its home State. *Phila. Fire Ass. v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108.

<sup>1</sup> U. S. Const. art. 2.

<sup>2</sup> A proceeding for mandamus is a "case" within the meaning of the

public ministers and consuls;<sup>1</sup> to all cases of admiralty and maritime jurisdiction;<sup>2</sup> to controversies to which the United States shall be a party;<sup>3</sup> to controversies between two or more States;<sup>4</sup> between a State and citizens of another State;<sup>5</sup> between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State or citizens thereof and foreign States, citizens or subjects.<sup>6</sup> But a State

Constitution. *Am. Express Co. v. Michigan*, 177 U. S. 404, 44 L. ed. 823, 20 Sup. Ct. Rep. 695, reversing 118 Mich. 682, 77 N. W. 317.

Application of Interstate Commerce Commission to a Federal court for the punishment of disobedience of the command of the subpoena of the commission is not a "case" within the meaning of the Constitution, and the court has not jurisdiction. *Re Inter-State Commerce Commission*, 53 Fed. 476.

Congress may vest exclusive jurisdiction in Federal courts of suits arising from acts done under color of authority of the United States, and may regulate all incidents of such suits. *Mitchell v. Clark*, 110 U. S. 633, 28 L. ed. 279, 4 Sup. Ct. Rep. 170.

Federal courts have jurisdiction in a case of conspiracy, charging persons with conspiring to kill one in the custody of the United States Marshal. *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617.

<sup>1</sup> If a consul wishes to enjoy his exemption from the jurisdiction of a State court, he must specially plead it, and must plead it at the proper time. *Wilcox v. Luco*, 118 Cal. 639, 45 Pac. 676, 50 Pac. 758, 45 L. R. A. 579, 62 Am. St. 305, upon privileges and exemptions of consuls, see note to this case in L. R. A. And upon jurisdiction of consuls over actions between citizens of their own nations, temporarily in a State, to the exclusion of the State courts, see *Tellefsen v. Fee*, 168 Mass. 188, 46 N. E. 562, 45 L. R. A. 481 and note, 60 Am. St. 379.

<sup>2</sup> A bill to enforce a lien for towage by foreclosure of the lien on a raft of lumber in complainant's possession, the suit being brought against individual defendants and seeking a decree against them and in default of payment a sale of the lumber to satisfy it

is not a proceeding *in rem* within exclusive admiralty jurisdiction, but is a suit *in personam* and may be brought in a State court. *Knapp, Stout, & Co. v. McCaffrey*, 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 824, aff. 178 Ill. 107, 52 N. E. 898; 69 Am. St. 290.

<sup>3</sup> This includes a suit by the United States against a State. *United States v. Texas*, 143 U. S. 621, 36 L. ed. 285, 12 Sup. Ct. Rep. 488.

<sup>4</sup> As to what constitutes a justiciable controversy between States in the sense of the Constitution, see *Commonwealth of Pennsylvania v. State of West Virginia*, 262 U. S. 553, 67 L. ed. 1117, 43 Sup. Ct. Rep. 658, 32 A. L. R. 300.

<sup>5</sup> *North Carolina Pub. Serv. Co. v. Southern Power Co.*, 282 Fed. 837, 33 A. L. R. 626.

<sup>6</sup> U. S. Const. art. 3, § 2.

A mere maladministration of the quarantine laws of one State to the injury of the citizens of another does not constitute a controversy among States. *Louisiana v. Texas*, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251.

A State cannot make it a condition to the doing of business by a foreign corporation within its limits that the corporation shall agree not to remove cases against it to the Federal courts. *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915, 7 Sup. Ct. Rep. 931; *Goodrel v. Kreichbaum*, 70 Iowa, 362, 30 N. W. 872. See *Elston v. Piggott*, 94 Ind. 14.

Federal jurisdiction, having been invoked upon substantial grounds of Federal law, extends to the determination of all questions involved in the case, whether resting upon State or Federal laws. *Silver v. Louisville, etc., R. Co.*, 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451; *Ohio Tax Cases*, 232 U. S. 576, 58 L. ed. 738, 34 Sup. Ct.

is not subject to be sued in the courts of the United States by citizens of another State, or by citizens or subjects of any foreign State.<sup>1</sup>

Rep. 372; *Louisville etc. R. Co. v. Greene*, 244 U. S. 683, 61 L. ed. 1291; 37 Sup. Ct. Rep. 683, Ann. Cas. 1917 E, 97; *Texas Co. v. Brown*, 258 U. S. 466, 66 L. ed. 428, 42 Sup. Ct. Rep. 375.

"The effect of this provision is not to vest jurisdiction in the inferior courts over the designated cases and controversies, but to delimit those in respect of which Congress may confer jurisdiction upon such courts as it creates." *Kline v. Burke Construction Co.*, 260 U. S. 226, 67 L. ed. 226, 43 Sup. Ct. Rep. 79, 24 A. L. R. 1077. "And the jurisdiction having been conferred, may, at the will of Congress, be taken away in whole or in part; and, if withdrawn without a saving clause, all pending cases, though cognizable when commenced must fall." *Kline v. Burke Construction Co.*, 260 U. S. 226, 67 L. ed. 226, 43 Sup. Ct. Rep. 79, 24 A. L. R. 1077.

The provision is not a limitation upon, but leaves unrestricted the grant contained in § 1 of art. 3, which provides that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish", and which has been held to grant the entire judicial power of the nation. *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655. Mr. Justice *Brewer*, who delivered the opinion of the court in this case, said: "Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, and the parties to which or the property involved in which may be reached by judicial process, and, when the judicial power of the United States was vested in the Supreme and other courts, all judicial power which the nation was capable of exercising was vested in those tribunals; and unless there be some limitations expressed in the Constitution it must be held to embrace all controversies of a justiciable nature

arising within the territorial limits of the nation, no matter who may be parties thereto."

<sup>1</sup> U. S. Const. 11th Amendment. But a suit in a State court, to which a State is a party, may be removed to the Federal court for trial if a Federal question is involved. *Railroad Co. v. Mississippi*, 102 U. S. 135, 26 L. ed. 96. But "Judicial power of United States extends only to the trial and determination of 'cases' in courts of record, and . . . Congress is still at liberty to authorize the judicial officers of the several States to exercise such power as is ordinarily given to officers of courts, not of record; such, for instance, as the power to take affidavits, to arrest and commit for trial offenders against the laws of the United States to naturalize aliens, and to perform such other duties as may be regarded as incidental to the judicial power rather than a part of the judicial power itself." *Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326, holding that Congress may authorize justices of the peace to arrest deserting seamen and return them to their ships.

That States are not suable except with their own consent, see *Railroad Co. v. Tennessee*, 101 U. S. 337, 25 L. ed. 960; *Railroad Co. v. Alabama*, 101 U. S. 832, 25 L. ed. 973; *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. ed. 448; 24 Sup. Ct. Rep. 269; *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep. 252; *General Oil Co. v. Crain*, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475; *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458; *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 55 L. ed. 890, 31 Sup. Ct. Rep. 654, 35 L. R. A. (N. S.) 243; *Palmer v. Ohio*, 248 U. S. 32, 63 L. ed. 108, 39 Sup. Ct. Rep. 16; *Public Service Co. v. Corboy*, 250 U. S. 153, 63 L. ed. 905, 39 Sup. Ct. Rep. 440; *Ex parte New York*, 256 U. S. 490, 65

L. ed. 1057, 41 Sup. Ct. Rep. 588; Alabama Industrial School *v.* Addler, 144 Ala. 555, 42 So. 116; Caldwell *v.* Donaghey, 108 Ark. 60, 156 S. W. 839, 45 L. R. A. (n. s.) 721, Ann. Cas. 1915 B, 133; Miller *v.* Pillsbury, 164 Cal. 199, 128 Pac. 327, Ann. Cas. 1914 B, 886; State *v.* New York Mut. L. Ins. Co., 175 Ind. 59, 93 N. E. 213, 42 L. R. A. (n. s.) 256; State *v.* Martensen, 69 Neb. 376, 95 N. W. 831, 5 Ann. Cas. 291; State *v.* Kelly, 27 N. M. 412, 202 Pac. 524, 21 A. L. R. 156; Albany County *v.* Hooker, 204 N. Y. 1, 97 N. E. 403, Ann. Cas. 1913 C, 663; State *v.* Southern R. Co., 145 N. C. 495, 59 S. E. 570, 13 L. R. A. (n. s.) 966; Sandel *v.* State, 115 S. C. 168, 104 S. E. 567, 13 A. L. R. 1268; General Oil Co. *v.* Crain, 117 Tenn. 82, 95 S. W. 824.

A State by appearing in a suit against it may waive its immunity. Clark *v.* Barnard, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878; Gunter *v.* Atlantic Coast Line R. Co., 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep. 252.

If in an action against third persons the State auditor appears and is made a party, and pleads to the complaint, he cannot thereafter avoid a judgment on the ground that he represented the State. Stauer *v.* Rice, 121 Ind. 51, 22 N. E. 968, 6 L. R. A. 387.

A State may attach any conditions it pleases to its consent. DeSaussure *v.* Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053, State *v.* New York Mut. L. Ins. Co., 175 Ind. 59, 93 N. E. 213, 42 L. R. A. (n. s.) 256. But apart from such conditions its liability must be determined like that of an individual. Green *v.* State, 73 Cal. 29, 11 Pac. 602, 14 Pac. 610; Bowen *v.* State, 108 N. Y. 166, 15 N. E. 56.

Statutes permitting suits against the State are to be strictly construed. Miller *v.* Pillsbury, 164 Cal. 199, 128 Pac. 327, Ann. Cas. 1914 B, 886; Smith *v.* State, 227 N. Y. 405, 125 N. E. 841, 13 A. L. R. 1264.

A State can be impleaded in its own courts only in the manner, to the extent and for the causes expressed in the statute granting consent thereto.

Murray *v.* Wilson Distilling Co., 213 U. S. 151, 53 L. ed. 742, 29 Sup. Ct. Rep. 458; McArthur Bros. Co. *v.* Commonwealth, 197 Mass. 137, 83 N. E. 334; Burroughs *v.* Commonwealth, 224 Mass. 28, 112 N. E. 491, Ann. Cas. 1917 A, 38; Riddoch *v.* State, 68 Wash. 329, 123 Pac. 450, 42 L. R. A. (n. s.) 251, Ann. Cas. 1913 E, 1033.

Interest is not allowable on the claim unless the statute expressly so provides. Western & A. R. Co. *v.* State, (Ga.), 14 L. R. A. 438.

And upon suits against a State, see in general, Carr *v.* State, 127 Ind. 204, 26 N. E. 778, 11 L. R. A. 370 and note; 22 Am. St. 624; Hans *v.* Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; North Carolina *v.* Temple, 134 U. S. 22, 33 L. ed. 849, 10 Sup. Ct. Rep. 509.

A suit by one State against another will not lie, if in legal effect prosecuted in the name of the State by citizens thereof as the real parties in interest. New Hampshire *v.* Louisiana, 108 U. S. 76, 27 L. ed. 656.

A suit nominally against an officer, but really against a State, to enforce performance of its obligation in its political capacity, will not lie. Louisiana *v.* Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; Hagood *v.* Southern, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; *In re* Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 104; Smith *v.* Reeves, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919; Hopkins *v.* Clemson Agricultural College, 221 U. S. 636, 55 L. ed. 890, 31 Sup. Ct. Rep. 654, 35 L. R. A. (n. s.) 243; *Ex parte* New York, 256 U. S. 490, 65 L. ed. 1057, 41 Sup. Ct. Rep. 588; Patcock *v.* State, 91 Ark. 527, 121 S. W. 742, 134 A. S. R. 88; Sanders *v.* Saxton, 182 N. Y. 477, 75 N. E. 529, 108 A. S. R. 826, 1 L. R. A. (n. s.) 727; Love *v.* Filtsch, 33 Okla. 131, 124 Pac. 30, 44 L. R. A. (n. s.) 212; Lankford *v.* Schroeder, 47 Okla. 279, 147 Pac. 1049, L. R. A. 1915 F, 623; General Oil Co. *v.* Crain, 117 Tenn. 82, 95 S. W. 824, 121 A. S. R. 967; Butler *v.* Printing Com'rs, 68 W. Va. 493, 70 S. E. 119, 38 L. R. A. (n. s.) 653.

And as to suits against States, see notes to 33 L. ed. U. S. 842; 11 L. R. A. 370; 8 L. R. A. 399. See also *Fitts v. McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269.

But a suit will lie against a public officer or agent who, while claiming to act as such, invades private right under color of an unconstitutional law. *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Cunningham v. Macon, &c. R. R. Co.*, 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292; *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Scott v. Donald*, 165 U. S. 58, 107, 41 L. ed. 632, 17 Sup. Ct. Rep. 265, 262; *Reagan v. Farmers' L & T. Co.*, 154 U. S. 362, 38 L. ed. 1014, 14 Sup. Ct. Rep. 1047; *Ex parte Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 55 L. ed. 890, 31 Sup. Ct. Rep. 654, 35 L. R. A. (N. S.) 243.

The State's immunity from suit cannot be availed of by public officers or agents when sued for their own torts though committed under color of their office. *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 55 L. ed. 890, 31 Sup. Ct. Rep. 654, 35 L. R. A. (N. S.) 243; *Johnson v. Lankford*, 245 U. S. 541, 62 L. ed. 460, 38 Sup. Ct. Rep. 203; *Martin v. Lankford*, 245 U. S. 547, 62 L. ed. 464, 38 Sup. Ct. Rep. 205; *Elmore v. Fields*, 153 Ala. 345, 45 So. 66, 127 A. S. R. 31; *Joos v. Illinois National Guard*, 257 Ill. 138, 100 N. E. 505, 43 L. R. A. (N. S.) 1214. And such an officer or agent may be enjoined from enforcing an unconstitutional statute to the injury of plaintiff's rights. *Graham v. Folsom*, 200 U. S. 248, 50 L. ed. 464, 26 Sup. Ct. Rep. 245; *Gunter v. Atlantic Coast Line R. Co.*, 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep. 252; *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 28 Sup. Ct. Rep. 441, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; *Hopkins v. Clemson Agricultural College*, 221 U. S. 636, 55 L. ed.

890, 31 Sup. Ct. Rep. 654, 35 L. R. A. (N. S.) 243; *Harrison v. St. Louis, etc., R. Co.*, 232 U. S. 318, 58 L. ed. 621, 34 Sup. Ct. Rep. 333, L. R. A. 1915 F, 1187; *Truax v. Raich*, 239 U. S. 33, 60 L. ed. 131, 36 Sup. Ct. Rep. 7, L. R. A. 1916 D, 545, Ann. Cas. 1917 B, 283; *Greene v. Louisville, etc., R. Co.*, 244 U. S. 499, 61 L. ed. 1280, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917 E, 88; *Public Service Co. v. Corboy*, 250 U. S. 153, 63 L. ed. 905, 39 Sup. Ct. Rep. 440; *Scottish Union, etc., Ins. Co. v. Herriott*, 109 Iowa, 606, 80 N. W. 665, 77 A. S. R. 548; *Herr v. Central Kentucky Lunatic Asylum*, 97 Ky. 458, 30 S. W. 971, 28 L. R. A. 394, 53 A. S. R. 414; *Love v. Filtsch*, 33 Okla. 131, 124 Pac. 30, 44 L. R. A. (N. S.) 212.

An owner of real property may prosecute an action of ejectment against a State official unjustly and wrongfully withholding the property, although the official is holding it for the State and for State uses. *Weyler v. Gibson*, 110 Md. 636, 73 Atl. 261, 17 Ann. Cas. 731.

Where individuals claiming to be in possession as officers of a State, holding for the State, are sued in an action of ejectment and the State does not intervene and become a party to the record, the suit is not one against the State. *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770. See *Antoni v. Greenhow*, 107 U. S. 769, 27 L. ed. 468, 2 Sup. Ct. Rep. 91; *Allen v. Baltimore & O. R. R. Co.*, 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 425, 962.

An action lies to compel an officer to do what the statute requires. *Rolston v. Missouri Fund Com'rs*, 120 U. S. 390, 30 L. ed. 721, 7 Sup. Ct. Rep. 599; *Houston v. Ormes*, 252 U. S. 469, 64 L. ed. 667, 40 Sup. Ct. Rep. 369; *State v. Toole*, 26 Mont. 22, 66 Pac. 496, 55 L. R. A. 644, 91 A. S. R. 386; *Ehrlich v. Jennings*, 78 S. C. 269, 58 S. E. 922, 13 Ann. Cas. 1166, 125 A. S. R. 795.

No claim arises against any government in favor of an individual, by reason of the misfeasance, laches, or unauthorized exercise of power by its officers or agents. *Gibbons v. United*



The Constitution and the laws of the United States, made in pursuance thereof, and all treaties made under the authority of the United States, are declared to be the supreme law of the land;<sup>1</sup> and the judges of every State are to be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.<sup>2</sup>

States, 8 Wall. 269, 19 L. ed. 453; *Clodfelter v. State*, 86 N. C. 51, 53; *Langford v. United States*, 101 U. S. 341, 25 L. ed. 1010.

Demands founded on the neglect or tort of ministerial officers engaged as servants in the performance of duties which the State as a sovereign has undertaken to perform, have never been recognized as the foundation of State obligations. *Burroughs v. Com.*, 224 Mass. 28, 112 N. E. 491, Ann. Cas. 1917 A, 38.

Upon what claims constitute valid demands against a State, see *Northwestern & P. H. Bank v. State*, 18 Wash. 73, 50 Pac. 586, 42 L. R. A. 33, and note. See, on suits against a State, 34 Am. L. Rev. 670.

<sup>1</sup> "The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it for a moment the cognizance of any subject which that instrument has committed to it." *Strong, J.*, in *Tennessee v. Davis*, 100 U. S. 257, 263, 25 L. ed. 648, 650. See also *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *Mondon v. New York, etc., R. Co.*, 223 U. S. 1, 56 L. ed. 327, 32 Sup. Ct. Rep. 169, 38 L. R. A. (N. S.) 44; *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; *Standard Computing Scale Co. v. Farrell*, 249 U. S. 571, 63 L. ed. 780, 39 Sup. Ct. Rep. 380, *Rhode Island v. Palmer*, 253 U. S. 350, 64 L. ed. 946, 40 Sup. Ct. Rep. 486, 588; *People v. Western Union Tel. Co.*,

70 Colo. 90, 198 Pac. 146, 15 A. L. R. 326; *Atkinson v. Woodmansee*, 68 Kan. 71, 74 Pac. 640, 64 L. R. A. 325; *Illinois Cent. R. Co. v. Doherty*, 153 Ky. 363, 155 S. W. 1119, 47 L. R. A. (N. S.) 31; *Hill v. Woodward*, 100 Miss. 879, 57 So. 294, 39 L. R. A. (N. S.) 538, Ann. Cas. 1914 A, 390; *L. N. Dantzer Lumber Co. v. Texas, etc., R. Co.*, 119 Miss. 328, 80 So. 770, 4 A. L. R. 1669; *Wren v. Dixon*, 40 Nev. 170, 161 Pac. 722, 167 Pac. 324, Ann. Cas. 1918 D, 1064; *State v. Williams*, 146 N. C. 618, 61 S. E. 61, 17 L. R. A. (N. S.) 299, 14 Ann. Cas. 562; *State v. Miller*, 87 Ohio St. 12, 99 N. E. 1078, 44 L. R. A. (N. S.) 712, Ann. Cas. 1913 E, 761; *In re Guerra*, 94 Vt. 1, 110 Atl. 224, 10 A. L. R. 1560.

A treaty, if in force, is the supreme law of the land and supersedes all local laws inconsistent with its terms. *Techt v. Hughes*, 229 N. Y. 222, 128 N. E. 185, 11 A. L. R. 166, petition for certiorari denied, 254 U. S. 643, 65 L. ed. 454, 41 Sup. Ct. Rep. 14; *Trott v. State*, 41 N. D. 614, 171 N. W. 827, 4 A. L. R. 1372.

<sup>2</sup> U. S. Const. art. 6; Hyde *International Law*, Vol. II, 12 *et seq.*; *Owings v. Norwood's Lessee*, 5 Cranch, 344, 3 L. ed. 120; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. ed. 415, 435; *Cook v. Moffat*, 5 How. 295, 12 L. ed. 159; *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *Sanitary Dist. of Chicago v. United States*, 266 U. S. 405, 69 L. ed. 352, 45 Sup. Ct. Rep. 176; *Ex parte Tervi*, 187 Cal. 20, 200 Pac. 954, 17 A. L. R. 630; *People v. Western Union Tel. Co.*, 70 Colo. 90, 198 Pac. 146, 15 A. L. R. 326; *Kintz v. Harriger*, 99 Ohio St. 240, 124 N. E. 168, 12 A. L. R. 1240; *Com. v. Nickerson*, 236 Mass. 281, 128 N. E. 273, 10 A. L. R. 1568.

A State constitution cannot pro-

hibit Federal judges from charging juries as to matters of fact. *St. Louis, I. M. &c. Ry. Co. v. Vickers*, 122 U. S. 360, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1216.

Congress may empower a corporation to take soil under navigable water between two States for the building of a bridge for use in interstate commerce, although the legislature of one of the States protests against it. *Decker v. Baltimore, &c. R. R. Co.*, 30 Fed. Rep. 723.

A provision of a State constitution against limitation of liability for injuries resulting in death is overridden by an act of Congress permitting such limitation in maritime affairs. *Loughin v. McCaulley*, 186 Pa. St. 517, 40 Atl. 1020, 48 L. R. A. 33, 65 Am. St. 872.

Injuries falling within the Federal maritime jurisdiction cannot be included within the Workmen's Compensation Act of a State. *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 61 L. ed. 1086, 37 Sup. Ct. Rep. 524; *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 64 L. ed. 834, 40 Sup. Ct. Rep. 438.

National banks, though instrumentalities of the Federal government and subject to the paramount authority of the United States, are, nevertheless, subject to the laws of a State, unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as Federal agencies, or conflict with the paramount law of the United States. *First National Bank v. Missouri*, 263 U. S. 640, 68 L. ed. 486, 44 Sup. Ct. Rep. 213. See also *Easton v. Iowa*, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. Rep. 288; *First National Bank v. California*, 262 U. S. 366, 67 L. ed. 1030, 43 Sup. Ct. Rep. 602.

A State constitutional provision or a State statute in conflict with a treaty must give way to its superior authority. *Ware v. Hylton*, 3 Dall. 99, 1 L. ed. 568; *Carver v. Jackson*, 4 Pet. 1, 7 L. ed. 761; *Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483; *Sinnot v. Davenport*, 22 How. 227, 16 L. ed. 243; *Haver v. Yaker*, 9 Wall. 32, 19 L. ed. 571; *United States v. 43 Gallons of Whiskey*, 93 U. S. 188, 23 L. ed. 846; *Hauen-*

*stein v. Lynham*, 100 U. S. 483, 25 L. ed. 628; *Geofroy v. Riggs*, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; *House v. Mayes*, 219 U. S. 270, 55 L. ed. 213, 31 Sup. Ct. Rep. 234; *Hamilton v. Eaton*, 1 Hughes, 249, Fed. Cas. No. 5,980; *Gordon v. Kerr*, 1 Wash. C. C. 322, Fed. Cas. No. 5,611; *In re Sheazle*, 1 Woodb. & M. 66, Fed. Cas. No. 12,734; *In re Matzger*, Fed. Cas. No. 9,511; *In re Ah Fong*, 3 Sawy. 144, Fed. Cas. No. 102; *Baker v. Portland*, 5 Sawy. 566, Fed. Cas. No. 777; *In re Parrott*, 6 Sawy. 349, 1 Fed. 481; *In re Ah Chong*, 6 Sawy. 451, 2 Fed. 733; *Love v. Pampalin*, 21 Fed. 755; *Bahnand v. Bize*, 105 Fed. 485; *In re Holmberg*, 193 Fed. 260; *United States v. Rockefeller*, 260 Fed. 346; *Terrace v. Thompson*, 274 Fed. 841; *People ex rel. Att'y General v. Gerke*, 5 Cal. 381; *Blythe v. Hinckley*, 127 Cal. 431, 59 Pac. 787, affirmed 180 U. S. 333, 45 L. ed. 557, 21 Sup. Ct. Rep. 390; *Ex parte Tervi*, 187 Cal. 20, 200 Pac. 954, 17 A. L. R. 630; *Doe ex dem. Dockstader v. Roe*, 4 Penn. (Del.) 398, 55 Atl. 341; *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195; *Scharpf v. Schmidt*, 172 Ill. 255, 50 N. E. 182; *Lehman v. State*, 45 Ind. App. 330, 88 N. E. 365; *Opel v. Shoup*, 100 Iowa, 407, 69 N. W. 560, 37 L. R. A. 583; *Ahrens v. Ahrens*, 144 Iowa, 486, 123 N. W. 164, Ann. Cas. 1912 A, 1098; *In re Anderson*, 166 Iowa, 617, 147 N. W. 1098, 52 L. R. A. (n. s.) 686, affirmed 245 U. S. 170, 62 L. ed. 225, 38 Sup. Ct. Rep. 109; *McKeown v. Brown*, 167 Iowa, 489, 491 N. W. 593; *In re Moynahan*, 172 Iowa, 571, 151 N. W. 504, 154 N. W. 904, L. R. A. 1916 D, 1127; *Brown v. Daly*, 172 Iowa, 379, 154 N. W. 602; *Brown v. Peterson*, 185 Iowa, 314, 170 N. W. 444; *Vietti v. George K. Mackie Fuel Co.*, 109 Kan. 179, 197 Pac. 881; *Yeaker v. Yeaker*, 4 Metc. (Ky.) 33, 81 Am. Dec. 530, affirmed 9 Wall. 32, 19 L. ed. 571; *Succession of Rixner*, 48 La. Ann. 552, 19 So. 597, 32 L. R. A. 177; *Sala's Succession*, 50 La. Ann. 1009, 24 So. 674; *Choyssikos v. Demarco*, 134 Md. 533, 107 Atl. 358; *In re Wyman*, 191 Mass. 276, 77 N. E. 379, 114 Am. St. Rep.

It is essential to the protection of the national jurisdiction, and to prevent collision between State and national authority,<sup>1</sup> that the

601; *Riddell v. Fuhrman*, 233 Mass. 669, 123 N. E. 237; *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (N. S.) 105; *In re Infelise*, 51 Mont. 18, 149 Pac. 635; *Butschkowski v. Brecks*, 94 Neb. 532, 143 N. W. 923, Ann. Cas. 1915 C, 965; *Erickson v. Carlson*, 95 Neb. 182, 145 N. W. 352; *Jackson ex dem. Folliard v. Wright*, 4 Johns. (N. Y.) 75; *Techt v. Hughes*, 229 N. Y. 222, 128 N. E. 185, 11 A. L. R. 166, petition for certiorari denied, 254 U. S. 643, 65 L. ed. 454, 41 Sup. Ct. Rep. 14; *Trott v. State*, 41 N. D. 614, 171 N. W. 827, 4 A. L. R. 1372; *Baker v. Shy*, 9 Heisk. (Tenn.) 85; *Ehrlich v. Weber*, 114 Tenn. 711, 88 S. W. 188; *Poon v. Miller*, (Tex. Civ. App.) 234 S. W. 573; *Bondi v. MacKay*, 87 Vt. 271, 89 Atl. 228, Ann. Cas. 1916 C, 130; *In re Stixrud*, 58 Wash. 339, 109 Pac. 343, 33 L. R. A. (N. S.) 632, Ann. Cas. 1912 A, 850; *State ex rel. Tanner v. Staeheli*, 112 Wash. 344, 192 Pac. 991. A treaty in conflict with a State statute does not nullify the statute, but suspends it in its application to citizens of the country with which the treaty is made. *Ahrens v. Ahrens*, 144 Iowa, 486, 123 N. W. 168, Ann. Cas. 1912 A, 1098; *In re Stixrud*, 58 Wash. 339, 109 Pac. 343, 33 L. R. A. (N. S.) 632, Ann. Cas. 1912 A, 850.

An act of Congress may supersede a prior treaty, and if it is repugnant to it, it, to that extent, abrogates it. *Hyde International Law*, Vol. II, p. 59; *The Cherokee Tobacco*, 11 Wall. 616, 20 L. ed. 227; *Head Money Cases*, 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; *Whitney v. Robertson*, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. Rep. 456; *Chinese Exclusion Case*, 130 U. S. 561, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623; *Thomas v. Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340; *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *United States v. Thompson*, 258 Fed. 257; *Ex parte Pettine*, 259 Fed. 733; *Ex parte Gin Kato*, 270 Fed. 343; *Techt v. Hughes*, 229 N. Y. 222, 128 N. E. 185, 11 A. L. R. 166.

And a treaty may supersede a prior act of Congress. *Hyde International Law*, Vol. II, p. 59; *Thomas v. Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340. But a treaty cannot change the Constitution of the United States or be held valid if it be in violation of that instrument. *Thomas v. Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340.

When a treaty has been ratified by the proper formalities the courts have no power to inquire into the authority of the persons by whom it was entered into on behalf of the foreign nation. *Doe v. Braden*, 16 How. 635, 657, 14 L. ed. 1090; or the powers or rights recognized by it in the nation with which it was made. *Maiden v. Ingersoll*, 6 Mich. 373.

The question whether power remains in a foreign State to carry out its treaty obligations to the United States is in its nature political and not judicial, and the courts ought not to interfere with the conclusions of the political department of the government in that regard. *Terlinden v. Ames*, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484, 12 Am. Crim. Rep. 424.

The force of a treaty is such that it may even take away private property without compensation. *Cornet v. Winton*, 2 Yerg. 143. It may operate retroactively. *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628.

Iowa statute excluding aliens from holding lands is overridden by treaty with Bavaria. *Opel v. Shoup*, 100 Iowa, 407, 69 N. W. 560, 37 L. R. A. 583. And the Louisiana statute taxing inheritances and legacies received by foreigners is overridden by the treaty with Italy. *Succession of Rixner*, 48 La. Ann. 552, 19 So. 597, 32 L. R. A. 177; upon effect of treaties upon aliens' right to inherit, see note hereto in L. R. A.

<sup>1</sup>"The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables

other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and State courts. *Peck v. Jenness*, 7 How. 612, 12 L. ed. 841; *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; *Central Nat'l Bank v. Stevens*, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403; *Harkrader v. Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119." Per *Shiras, J.*, in *Farmers' Loan & T. Co. v. Lake St. Elevated R. Co.*, 177 U. S. 51, 44 L. ed. 667, 20 Sup. Ct. Rep. 564, rev. 173 Ill. 439, 51 N. E. 55; *Williams v. Neeley*, 134 Fed. 1, 67 C. C. A. 171, 69 L. R. A. 232; *Young v. Hamilton*, 135 Ga. 339, 69 S. E. 593, 31 L. R. A. (N. S.) 1057; *Crosby v. Spear*, 98 Me. 542, 57 Atl. 881, 99 A. S. R. 424; *State v. Reynolds*, 209 Mo. 161, 107 S. W. 487, 15 L. R. A. (N. S.) 963, 14 Ann. Cas. 198, 123 A. S. R. 468; *Parsons Min. Co. v. McClure*, 17 N. M. 694, 133 Pac. 1063, 47 L. R. A. (N. S.) 744; *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153, 94 A. S. R. 932.

In an action *in rem* where the jurisdiction of a Federal court has first attached, the State court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the Federal court's jurisdiction; and the converse of the rule is equally true. *Kline v. Burke Construction Co.*, 260 U. S. 125, 67 L. ed. 226, 43 Sup. Ct. Rep. 79.

Under U. S. Rev. Stat. § 720, a Federal court is precluded from granting an injunction against enforcing claims against Indians in a State court. *United States v. Parkhurst-Davis Mercantile Co.*, 176 U. S. 317, 44 L. ed. 485, 20 Sup. Ct. Rep. 423. See, upon injunctions restraining proceedings in State courts, notes to 16 C. C. A. 90, and 27 C. C. A. 575.

No State court has authority to order execution against a national bank in the hands of a receiver for the enforcement of a lien in attachment against the bank as garnishee, even though the lien were obtained before the receiver's appointment. *Earle v. Pennsylvania*, 178 U. S. 449, 44 L. ed. 1146, 20 Sup. Ct. Rep. 915. But the State court may entertain an action in attachment against such bank and its receiver, and the receiver must report such fact and the judgment upon the action to the Comptroller of the Currency whose duty it is to hold the proceeds of the bank's assets subject to all rights acquired by the plaintiff through the attachment proceedings. *Earle v. Pennsylvania*, above; *Earle v. Conway*, 178 U. S. 456, 44 L. ed. 1149, 20 Sup. Ct. Rep. 918, aff. 189 Pa. 610, 42 Atl. 303.

A Federal court controlling receivership of bank cannot restrain a prosecution brought by State against an officer of the bank for crime committed in respect to the bank property before the civil suit was brought. *Harkrader v. Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119.

A receiver appointed by a Federal court voluntarily going into a State court cannot question the right of the State court to determine the controversy. *Grant v. Buckner*, 172 U. S. 232, 43 L. ed. 430, 19 Sup. Ct. Rep. 163, aff. 49 La. Ann. 668, 21 So. 580.

A State court cannot compel the complainants in a suit pending in a Federal court to come into the State court and there relitigate the question in controversy in the Federal court, nor can it by injunction restrain them from proceeding under the final decree of sale of the Federal court, and from enforcing the other remedies adjudged to them by that decree. *Central Nat.*

*Bk. v. Stevens*, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403.

Proceedings *in rem* for the enforcement of a lien against a vessel given by a State statute for repairs made upon her in her home port under contract with her owners or their agent are within the exclusive jurisdiction of the Federal courts, being in admiralty. *The Glide*, 167 U. S. 606, 42 L. ed. 301, 17 Sup. Ct. Rep. 930, rev. 157 Mass. 525, 33 N. E. 163, 159 Mass. 60, 34 N. E. 258. That such lien will be enforced in admiralty, see *The J. E. Rumbell*, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498.

The same act may be a crime against both a State and the United States, and each then has jurisdiction to punish it. *Crossley v. California*, 168 U. S. 640, 42 L. ed. 610, 18 Sup. Ct. Rep. 242, s. c. below; *People v. Worden*, 113 Cal. 569, 45 Pac. 844.

Where the question of the validity of a patent arises collaterally, the State court has jurisdiction to pass upon it. *Pratt v. Paris Gaslight & Coke Co.*, 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62. See also *Marsh v. Nichols, Shepard and Co.*, 140 U. S. 344, 35 L. ed. 413, 11 Sup. Ct. Rep. 798.

State courts have jurisdiction of crimes committed on Indian reservations where crime is neither by nor against Indians. *Draper v. United States*, 164 U. S. 240, 41 L. ed. 419, 17 Sup. Ct. Rep. 107.

National banks are subject to State authority in all respects except where the attempted exercise of such authority "expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were created." *Davis v. Elmira Sav. Bk.*, 161 U. S. 283, 40 L. ed. 700, 16 Sup. Ct. Rep. 502; and the power vested in a national bank by Federal law to take property "such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings" is not infringed by a State statute making such conveyances voidable in case of insolvency within a limited

period thereafter by the transferor. *McClellan v. Chipman*, 164 U. S. 347, 41 L. ed. 461, 17 Sup. Ct. Rep. 85.

Appointment of a receiver by a Federal court does not divest a State court of its previously acquired control of the assets of a corporation. *Mo. Pac. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 670.

Upon effect of judgment of State court upon United States title to lands, see *Stanley v. Schwalby*, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754.

Federal court will not revise views of State court upon principles of general law. *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

State decisions control interpretation of wills. *Roberts v. Lewis*, 153 U. S. 367, 38 L. ed. 747, 14 Sup. Ct. Rep. 945.

When a Federal court of competent jurisdiction has acquired possession of property, and is proceeding to determine a controversy concerning it, a State court cannot enjoin the plaintiffs in the Federal court from proceeding in the case. *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019, rev. 136 N. Y. 169, 32 N. E. 623, 20 L. R. A. 391.

A State court cannot adjudicate upon a maritime lien, nor can any action of such court divest property of such lien when it has once attached. *Moran v. Sturges*, above. State statutes of limitation are not binding upon the United States, but the United States may take advantage of them. *Stanley v. Schwalby*, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418.

Although the statutes of the State regulate the administration and descent of the assets of descendants, and exclusive jurisdiction of such matters may be conferred upon the State's probate courts, so far as its own citizens are concerned, the Federal courts have jurisdiction to adjudicate upon claims concerning such assets as between citizens of different States. *Hayes v. Pratt*, 147 U. S. 557, 37 L. ed. 279, 13 Sup. Ct. Rep. 503. But if the probate

court has secured possession of the assets, the Federal court cannot deprive it of such possession. *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; see the dissenting opinion of Mr. Justice *Shiras* in this case, concurred in by Chief Justice *Fuller*.

The jurisdiction of the Federal courts over suits between citizens of different States cannot be impaired by any statutory regulations of a State concerning the manner in which the validity of demands against its counties shall be established. *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. ed. 546, 13 Sup. Ct. Rep. 695.

In absence of congressional legislation Federal courts follow State statutes of limitation. *Bauserman v. Blunt*, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466.

Federal courts will not entertain suit against a receiver appointed by State court without permission of such court. *Porter v. Sabin*, 149 U. S. 473, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008.

Property in the hands of a receiver of a Federal court cannot be levied upon by a State officer to enforce the payment of taxes. *Ex parte Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785.

Assignee in bankruptcy is bound if he appears in a State court and answers. *Ludeling v. Chaffe*, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439; s. c. 40 La. Ann. 645, 4 So. 586.

Federal courts are not bound by the rules of constructive notice and summons followed in the State courts. *Tripp v. Santa Rosa St. R. Co.*, 144 U. S. 126, 36 L. ed. 372, 12 Sup. Ct. Rep. 655.

A State can neither enlarge nor restrict the jurisdiction of the Federal courts. *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; *Parker v. Ormsby*, 141 U. S. 81, 35 L. ed. 654, 11 Sup. Ct. Rep. 912. Nor can it regulate the practice thereof. *Scott v. Neely*, 140 U. S. 106, 35 L. ed. 358, 11 Sup. Ct. Rep. 712. Nor can a State court readjudicate matters determined by a Federal court. *Leadville Coal Co. v.*

*McCreery*, 141 U. S. 475, 35 L. ed. 824, 12 Sup. Ct. Rep. 28.

Where an administrator appointed under the laws of one State appears, without authority from the court appointing him, and defends upon the merits a suit brought against him in a Federal circuit court in another State, and the decree goes against him, and he later appears and files a bill of review in that court, the laws of the second State permitting administrators of other States to sue as such in its courts, the Federal court gets jurisdiction of the administrator and the decree in the suit for review is binding upon him and must be given full faith and credit in other States. *Lawrence v. Nelson*, 143 U. S. 215, 36 L. ed. 130, 12 Sup. Ct. Rep. 440.

Judgments and decrees of a circuit court of the United States are to be accorded in the State courts the same effect as would be accorded to the judgments and decrees of a State tribunal of equal authority. *Pendleton v. Russell*, 144 U. S. 640, 36 L. ed. 574, 12 Sup. Ct. Rep. 743.

Federal Supreme Court will not issue mandamus to State Supreme Court to reinstate a disbarred attorney. *Re Green*, 141 U. S. 325, 35 L. ed. 765, 11 Sup. Ct. Rep. 11.

Federal practice not subject to State control. *Fishburn v. Chicago, M. & St. P. R. Co.*, 137 U. S. 60, 34 L. ed. 585, 11 Sup. Ct. Rep. 8.

A State court will not be permitted to try a United States marshal, deputed to protect one of the Federal judges in the performance of his duties, for an alleged murder where the killing was done by the marshal in affording such protection and was necessary thereto. *Cunningham v. Neagle*, 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658.

Receivers appointed by Federal court are, by act of Congress, suable in State courts. *Gableman v. Peoria, D. & E. R. Co.*, 179 U. S. 335, 45 L. ed. 220, 21 Sup. Ct. Rep. 171. Upon administration of Federal laws in State courts, see valuable note in 48 L. R. A. 33.

Except by permission of Congress a State cannot determine the territorial

final decision upon all questions arising in regard thereto should rest with the courts of the Union;<sup>1</sup> and as such questions must frequently arise first in the State courts, [the following] provision is made by the Judiciary Act: ["A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity, may be reexamined and reversed or affirmed in the Supreme Court upon writ of error. . . .

"It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is in favor of their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is against their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against the title, right, privilege, or immunity especially set up or claimed, by

extent to which a judgment of a Federal court shall be a lien. *Blair v. Ostrander*, 109 Iowa, 204, 80 N. W. 330, 47 L. R. A. 469, 77 Am. St. 532; upon liens of judgments in Federal courts, see note to this case in L. R. A.

That a State court will set aside a judgment obtained by fraud in a Federal court, see *Wonderly v. La Fayette Co.*, 150 Mo. 635, 51 S. W. 745, 45 L. R. A. 386, 73 Am. St. 474.

That Congress cannot compel State courts to entertain and act upon applications for naturalization, see *State v. Judges of Inf. Ct. of Com. Pleas*, 58 N. J. L. 97, 32 Atl. 743, 30 L. R. A. 761.

Liens arising from Federal decrees are not subject to State recording laws. *Stewart v. W. & L. E. R. Co.*, 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438.

<sup>1</sup>*Martin v. Hunter's Lessee*, 1 Wheat. 304, 334, 4 L. ed. 97; *Cohens v. Virginia*, 6 Wheat. 264, 5 L. ed. 257; *Bank of United States v. Norton*, 3 Marsh. 423; *Braynard v. Marshall*, 8 Pick. 194, per *Parker*, Ch. J.; *Spangler's Case*, 11 Mich. 298; *Tarbles' Case*, 13 Wall. 397, 20 L. ed. 597; *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648; *Com. v. Nickerson*, 236 Mass. 281, 128 N. E. 273, 10 A. L. R. 1568.

either party, under such Constitution, treaty, statute, commission, or authority.

"In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a State applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, upon writ of error, reexamine, reverse, or affirm the final judgment of the highest court of a State in which a decision in the suit could be had, if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made."<sup>1</sup>

<sup>1</sup> Judicial Code, § 237 (5 Fed. St. Ann., 2d ed., 723; supplement 1918, p. 411; supplement 1922, p. 223).

"It is settled law, as established by well-considered decisions of this court, pronounced upon full argument, and after mature deliberation, notably in *Cohens v. Virginia*, 6 Wheat. 264; *Osborn v. Bank of United States*, 9 Wheat. 738; *Mayor v. Cooper*, 6 Wall. 247; *Gold Water & Washing Co. v. Keyes*, 96 U. S. 199; and *Tennessee v. Davis*, 100 U. S. 257:

"That while the eleventh amendment of the national Constitution excludes the judicial power of the United States from suits, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, such power is extended by the Constitution to suits commenced or prosecuted by a State against an individual, in which the latter demands nothing from the former, but only seeks the protection of the Constitution and laws of the United States against the claim or demand of the State;

"That a case in law or equity consists of the right of one party, as well as of the other, and may properly be said to arise under the Constitution, or a law of the United States, whenever its correct decision depends upon a construction of either;

"That cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right, or privilege, or claim, or protection, or defence of the party, in whole or in part, by whom they are asserted;

"That except in the cases of which this court is given by the Constitution original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct; and lastly, —

"That it is not sufficient to exclude the judicial power of the United States from a particular case that it involves questions which do not at all depend on the Constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is within the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or law may be involved in it." *Harlan, J.*, in *Railroad Co. v. Mississippi*, 102 U. S. 135, 140, 26 L. ed. 96, 98. Upon removal of causes to the Federal court, see note to 36 L. ed. U. S. 346, and another at page 528.

The Federal Supreme Court may review the decision of a State Court as to what property of a bankrupt passes to his assignee in bankruptcy. *Williams v. Heard*, 140 U. S. 529, 35 L. ed. 550, 11 Sup. Ct. Rep. 885.

The question whether a State statute violates the due process of law provision of the Constitution of the United States is, of course, a Federal question, reviewable by the Supreme Court. *Myles Salt Co. v. Iberia, etc., Drainage Dist.*, 239 U. S. 478, 60 L. ed. 392, 36 Sup. Ct. Rep. 204, L. R. A. 1918 E, 190. As is also the question whether a State statute or a municipal



ordinance impairs a contract right. *Walsh v. Columbus, etc., R. Co.*, 176 U. S. 469, 44 L. ed. 548, 20 Sup. Ct. Rep. 393; *Grand Rapids, etc., R. Co. v. Osborn*, 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. Rep. 310; *New York Electric Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, 59 L. ed. 184, 35 Sup. Ct. Rep. 72, L. R. A. 1918 E, 874, Ann. Cas. 1915 A, 906; *Detroit United Ry. v. Detroit*, 242 U. S. 238, 61 L. ed. 268, 37 Sup. Ct. Rep. 87. See also *Bellingham Bay, etc., R. Co. v. New Whatcom*, 172 U. S. 314, 43 L. ed. 463, 19 Sup. Ct. Rep. 205.

Whether an act, authorized by legislation decided by the courts of a State to be in conformity to its Constitution, amounts to a taking of property without due process is a Federal question authorizing a writ of error from the Federal Supreme Court. *Wheeler v. N. Y., N. H. & H. R. Co.*, 178 U. S. 321, 44 L. ed. 1085, 20 Sup. Ct. Rep. 949.

A claim that a State statute was enacted under the authority of a Federal statute and is, therefore, valid, even though it violates the State Constitution, is a claim of a right under an "authority exercised under the United States." *Montana ex rel. Haire v. Rice*, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281.

Where the court of last resort of a State dealt with and passed upon the question raised by plaintiff in error as to the validity of a State statute under the Federal Constitution, and held it valid, the Federal Supreme Court has jurisdiction to pass upon the question, even though the constitutionality of the statute was not considered as an issue by the trial court. *Chicago etc., R. Co. v. Perry*, 259 U. S. 548, 66 L. ed. 1056, 42 Sup. Ct. Rep. 524.

Where officers of the United States are in possession of lands and claim to hold for the United States, and are sued as trespassers, the case may be reviewed in the Federal court. *Stanley v. Schwalby*, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418.

The construction of a contract of interstate shipment is a Federal question. *Ginsberg v. Wabash R. Co.*, 219 Mich. 665, 189 N. W. 1018, 28

A. L. R. 518; *Jonesboro, L. C. & E. R. Co. v. Maddy*, 157 Ark. 484, 248 S. W. 911, 28 A. L. R. 498.

Whether a right given by act of Congress to "legal representatives" is for benefit of next of kin to the exclusion of creditors is a Federal question. *Briggs v. Walker*, 171 U. S. 466, 43 L. ed. 243, 19 Sup. Ct. Rep. 1. So is the effect of foreclosure proceedings in a Federal court. *Pittsburg C. C. & St. L. Ry. Co. v. Long Island L. & T. Co.*, 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238.

Validity of title alleged to be derived through a congressional land grant when questioned raises a Federal question. *Northern Pac. Ry. Co. v. Colburn*, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98.

It is a Federal question whether a State court has given effect to the unreversed decision of a United States Circuit Court acting within its jurisdiction. *Crescent City, &c. Co. v. Butcher's Union, &c. Co.*, 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472. So, whether a prisoner has been twice in jeopardy; *Bohanan v. Nebraska*, 118 U. S. 231, 30 L. ed. 71, 6 Sup. Ct. Rep. 1049; *Keerl v. Montana*, 213 U. S. 135, 53 L. ed. 734, 29 Sup. Ct. Rep. 469; and whether one in a country with which we have an extradition treaty can be brought back for trial except under the treaty provisions. *Ker v. Illinois*, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225.

That a State court has held valid a divorce in a foreign country raises no such question. *Roth v. Ehman*, 107 U. S. 319, 27 L. ed. 499, 2 Sup. Ct. Rep. 312.

For other examples of cases held to involve no Federal question, see *Crystal Springs Land & W. Co. v. Los Angeles*, 177 U. S. 169, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; *De Lamar's Gold Mining Co. v. Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; *McCain v. Des Moines*, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644; *Remington Paper Co. v. Watson*, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456; *Capital Nat'l Bk. v. First Nat'l Bk.*, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; *Barrington v. Missouri*,

But to authorize the removal under the Judiciary Act, it must appear by the record, either expressly or by clear and necessary intendment, that some one of the enumerated questions did arise in the State court, and was there passed upon. It is not sufficient that it might have arisen or been applicable.<sup>1</sup> [And where the deci-

205 U. S. 483, 51 L. ed. 890, 27 Sup. Ct. Rep. 582; *Stickney v. Kelsey*, 209 U. S. 419, 52 L. ed. 863, 28 Sup. Ct. Rep. 508; *Seattle, etc. R. Co. v. Washington ex rel. Linhoff*, 231 U. S. 568, 58 L. ed. 372, 34 Sup. Ct. Rep. 185; *Bowe v. Scott*, 233 U. S. 658, 58 L. ed. 1141, 34 Sup. Ct. Rep. 769.

The Federal Supreme Court, while bound by the construction of a State statute adopted by the State court of last resort, is not concluded by its reasoning, but must exercise an independent judgment, when called upon to determine the Federal question whether the act as construed and applied, is repugnant to the restrictions of the Federal Constitution. *Ward & Gow v. Krinsky*, 259 U. S. 503, 66 L. ed. 1033, 42 Sup. Ct. Rep. 529.

The decision of a State court upon a question of fact ordinarily cannot be made the subject of an inquiry by the Federal Supreme Court. But to this rule there are two exceptions: (1) where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. *Northern Pacific R. Co. v. North Dakota*, 236 U. S. 585, 59 L. ed. 735, 35 Sup. Ct. Rep. 429, L. R. A. 1917 F, 1148, Ann. Cas. 1916 A, 1; *Ætna Life Ins. Co. v. Dunken*, 266 U. S. 389, 69 L. ed. 342, 45 Sup. Ct. Rep. 129; *Truax v. Corrigan*, 257 U. S. 312, 66 L. ed. 254, 42 Sup. Ct. Rep. 124; *Jones National Bank v. Yates*, 240 U. S. 541, 60 L. ed. 788, 36 Sup. Ct. Rep. 429.

In cases brought to the Federal Supreme Court from State courts for review, on the ground that a Federal right set up in the State court has been wrongfully denied, and in which the

State court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, the Federal Supreme Court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. *Truax v. Corrigan*, 257 U. S. 312, 66 L. ed. 254, 42 Sup. Ct. Rep. 124.

<sup>1</sup> *Owings v. Norwood's Lessee*, 5 Cranch, 344, 3 L. ed. 120; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 4 L. ed. 562; *Inglee v. Coolidge*, 2 Wheat. 363, 4 L. ed. 261; *Miller v. Nicholls*, 4 Wheat. 311, 4 L. ed. 578; *Williams v. Norris*, 12 Wheat. 117, 6 L. ed. 571; *Hickie v. Starke*, 1 Pet. 94, 7 L. ed. 67; *Harris v. Dennie*, 3 Pet. 292, 7 L. ed. 683; *Fisher's Lessee v. Cockerell*, 5 Pet. 248, 8 L. ed. 114; *New Orleans v. De Armas*, 9 Pet. 223, 234, 9 L. ed. 109, 113; *Keene v. Clarke*, 10 Pet. 291, 9 L. ed. 429; *Crowell v. Randell*, 10 Pet. 368, 9 L. ed. 458; *McKinny v. Carroll*, 12 Pet. 66, 9 L. ed. 1002; *Holmes v. Jennison*, 14 Pet. 540, 10 L. ed. 579; *Scott v. Jones*, 5 How. 343, 12 L. ed. 181; *Smith v. Hunter*, 7 How. 738, 12 L. ed. 894; *Williams v. Oliver*, 12 How. 111, 13 L. ed. 915; *Calcote v. Stanton*, 18 How. 243, 15 L. ed. 348; *Maxwell v. Newbold*, 18 How. 511, 15 L. ed. 506; *Hoyt v. Shelden*, 1 Black, 518, 17 L. ed. 65; *Farney v. Towle*, 1 Black, 350, 17 L. ed. 216; *Day v. Gallup*, 2 Wall. 97, 17 L. ed. 855; *Walker v. Villavaso*, 6 Wall. 124, 18 L. ed. 853; *The Victory*, 6 Wall. 382, 18 L. ed. 848; *Hamilton Co. v. Mass.*, 6 Wall. 632, 18 L. ed. 904; *Gibson v. Chouteau*, 8 Wall. 314, 19 L. ed. 317; *Worthy v. Commissioners*, 9 Wall. 611, 19 L. ed. 565; *Messenger v. Mason*, 10 Wall. 507, 19 L. ed. 1028; *Insurance Co. v. Treasurer*, 11 Wall. 204, 20 L. ed. 112; *McManus v. O'Sullivan*, 91 U. S. 578, 23 L. ed. 390; *Bolling v. Lersner*, 91 U. S. 594, 23 L. ed. 366; *Adams Co. v. Burlington, &c.*

R. R. Co., 112 U. S. 123, 28 L. ed. 678, 5 Sup. Ct. Rep. 77; *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Detroit Ry. Co. v. Guthard*, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811; *Arrowsmith v. Harmoning*, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 30 L. ed. 461, 7 Sup. Ct. Rep. 360; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; *New Orleans Water Works v. Louisiana Sugar Co.*, 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Scudder v. Coler*, 175 U. S. 32, 44 L. ed. 62, 20 Sup. Ct. Rep. 26; *Roby v. Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47; *Brown v. Massachusetts*, 144 U. S. 573, 36 L. ed. 546, 12 Sup. Ct. Rep. 757; *Jesler v. Bd. of Harbor Com'rs*, 146 U. S. 646, 36 L. ed. 1119, 13 Sup. Ct. Rep. 190; *United States v. Lynch*, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; *American Steel, etc., Co. v. Speed*, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; *Iron Cliffs Co. v. Negaunee Iron Co.*, 197 U. S. 463, 49 L. ed. 836, 25 Sup. Ct. Rep. 474; *Barrington v. Missouri*, 205 U. S. 483, 51 L. ed. 890, 27 Sup. Ct. Rep. 582; *Smith v. Jennings*, 206 U. S. 276, 51 L. ed. 106, 27 Sup. Ct. Rep. 610; *Vandalia R. Co. v. Indiana*, 207 U. S. 359, 52 L. ed. 246, 28 Sup. Ct. Rep. 130; *Elder v. Wood*, 208 U. S. 226, 52 L. ed. 464, 28 Sup. Ct. Rep. 263; *Londoner v. Denver*, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708; *Western Union Tel. Co. v. Wilson*, 213 U. S. 52, 53 L. ed. 693, 29 Sup. Ct. Rep. 403; *Kenney v. Craven*, 215 U. S. 125, 54 L. ed. 122, 30 Sup. Ct. Rep. 64; *Fisher v. New Orleans*, 218 U. S. 438, 54 L. ed. 1099, 31 Sup. Ct. Rep. 57; *J. W. Perry Co. v. Norfolk*, 220 U. S. 472, 55 L. ed. 548, 31 Sup. Ct. Rep. 465; *Missouri, etc., R. Co. v. Olathe*, 222 U. S. 187, 56 L. ed. 156, 32 Sup. Ct. Rep. 47; *Brinkmeier v. Missouri Pac. R. Co.*, 224 U. S. 268, 56 L. ed. 758, 32 Sup. Ct. Rep. 412; *Dill v. Ebey*, 229 U. S. 199, 57 L. ed. 1148, 33 Sup. Ct. Rep. 620; *Adams v. Russell*, 229 U. S. 353, 57 L.

ed. 1224, 33 Sup. Ct. Rep. 846; *Yazoo, etc., R. Co. v. Brewer*, 231 U. S. 245, 58 L. ed. 204, 34 Sup. Ct. Rep. 90; *Bowe v. Scott*, 233 U. S. 658, 58 L. ed. 1141, 34 Sup. Ct. Rep. 769; *Minneapolis, etc., R. Co. v. Poppler*, 237 U. S. 369, 59 L. ed. 1000, 35 Sup. Ct. Rep. 609; *Union National Bank v. McBoyle*, 243 U. S. 26, 61 L. ed. 570, 37 Sup. Ct. Rep. 370; *Stodelman v. Miner*, 246 U. S. 544, 62 L. ed. 875, 38 Sup. Ct. Rep. 359; *Home for Incurables v. New York*, 187 U. S. 155, 47 L. ed. 117, 23 Sup. Ct. Rep. 84, 63 L. R. A. 329; *National Mut. Bldg. etc., Ass'n v. Brahan*, 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532; *Thomas v. Iowa*, 209 U. S. 258, 52 L. ed. 782, 28 Sup. Ct. Rep. 487; *El Paso, etc., R. Co. v. Eichel*, 226 U. S. 590, 57 L. ed. 369, 33 Sup. Ct. Rep. 179; *Chicago, etc., R. Co. v. Hackett*, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; *Cincinnati, etc., R. Co. v. Slade*, 216 U. S. 78, 54 L. ed. 390, 30 Sup. Ct. Rep. 230; *Godchaux Co. v. Estopinal*, 251 U. S. 179, 64 L. ed. 213, 40 Sup. Ct. Rep. 116; *Yazoo, etc., Valley R. Co. v. Clarksdale*, 257 U. S. 10, 66 L. ed. 104, 42 Sup. Ct. Rep. 27; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 66 L. ed. 239, 42 Sup. Ct. Rep. 106.

"We have repeatedly decided that an appeal to the jurisdiction of the court must not be a mere afterthought, and that if any right, privilege, or immunity is asserted under the Constitution or laws of the United States, it must be specially set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained." Per Mr. Justice *Brown* in *Bolln v. Nebraska*, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287. See also *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; *Eastern Building & L. Ass'n v. Welling*, 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531; *Yazoo & M. V. Ry. Co. v. Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; *Turner v. Richardson*, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; *Texas & P. Ry. Co. v.*

So. Pac. Co., 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10; *Butler v. Gage*, 138 U. S. 52, 34 L. ed. 869, 11 Sup. Ct. Rep. 235.

It is not enough that the Federal question was first presented by a petition for rehearing, unless that question was thereupon considered, and passed on by the court. *Montana ex rel. Haire v. Rice*, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281; *Barrington v. Missouri*, 205 U. S. 483, 51 L. ed. 890, 27 Sup. Ct. Rep. 582; *Bowe v. Scott*, 233 U. S. 658, 58 L. ed. 1141, 34 Sup. Ct. Rep. 769. But where it clearly and unmistakably appears from the opinion of the State court under review that a Federal question was assumed by the highest court of the State to be in issue, was actually decided against the Federal claim, and the decision of the question was essential to the judgment rendered, it is sufficient to give the Supreme Court of the United States authority to re-examine that question on writ of error. *Montana ex rel. Haire v. Rice*, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281.

It is not sufficient that the presiding judge of the State court certifies that a right claimed under the national authority was brought in question. *Railroad Co. v. Rock*, 4 Wall. 177, 18 L. ed. 381; *Parmelee v. Lawrence*, 11 Wall. 36, 20 L. ed. 48; *Felix v. Scharnweber*, 125 U. S. 54, 31 L. ed. 687, 8 Sup. Ct. Rep. 759; *Henkel v. Cincinnati*, 177 U. S. 170, 44 L. ed. 720, 20 Sup. Ct. Rep. 573. If the record does not show a Federal question raised or necessarily involved, the opinion of the court will not be examined to see if one was in fact decided. *Otis v. Oregon S. S. Co.*, 116 U. S. 548, 29 L. ed. 719, 6 Sup. Ct. Rep. 523. But where an opinion is part of the record by law, it may be examined. *New Orleans Water Works v. Louisiana Sugar Co.*, 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Kreiger v. Shelby R. R. Co.*, 125 U. S. 39, 31 L. ed. 675, 8 Sup. Ct. Rep. 752; *Gross v. U. S. Mortgage Co.*, 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; and see *Phila. Fire Ass. v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108.

The record should show that the right was claimed in the trial court. *Brooks v. Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443.

Where plaintiff's pleading alleged that a municipal ordinance was an attempt to take from him his property without due process of law, but made no reference to the Constitution of the United States, it was held that the averment was solely referable to the State Constitution, which contained a due process clause, and that no basis was afforded for invoking the appellate jurisdiction of the Federal Supreme Court. *Bowe v. Scott*, 233 U. S. 658, 58 L. ed. 1141, 34 Sup. Ct. Rep. 769.

Where the jurisdiction of a State trial court was not questioned and no statute forbade the decree that was made, a decision by the highest court of appeal of the State granting a writ of prohibition, based on the rights of the parties, over the objection that in doing so it violated a right under the Federal Constitution, may be reviewed by the Federal Supreme Court though it is stated in terms of jurisdiction. *Butlock v. Florida ex rel. Railroad Commission*, 254 U. S. 513, 65 L. ed. 380, 41 Sup. Ct. Rep. 193.

Where the Federal question is first raised in the petition to the Federal Supreme Court for a writ of error, and the accompanying assignment of errors, it is insufficient to give the court jurisdiction of the question, even though another Federal question is properly raised and brought up by the same writ of error. *Montana ex rel. Haire v. Rice*, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281.

The dispute must be real and substantial. *Re Buchanan*, 158 U. S. 31, 39 L. ed. 884, 15 Sup. Ct. Rep. 723. Where the question presented is one which requires analysis and exposition for its decision, it is not frivolous. *Louisville, etc., R. Co. v. Melton*, 218 U. S. 36, 54 L. ed. 921, 30 Sup. Ct. Rep. 676, 47 L. R. A. (N. S.) 84; *Milheim v. Moffat Tunnel Improvement Dist.*, 262 U. S. 710, 67 L. ed. 1194, 43 Sup. Ct. Rep. 694.

The right claimed must be one of the plaintiff in error, and not of a

sion of the State court may be supported upon grounds which do not involve a Federal question, the United States Supreme Court will not review the case even though a Federal question was also raised in the State court.<sup>1</sup> But the rule is otherwise if the non-Federal grounds will not support the decision.<sup>2</sup> The Supreme Court has

third person only. *Giles v. Little*, 134 U. S. 645, 33 L. ed. 1062, 10 Sup. Ct. Rep. 623; *Ludeling v. Chaffe*, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439. And his interest must be a personal, and not an official, interest. *Smith v. Indiana*, 191 U. S. 138, 48 L. ed. 125, 24 Sup. Ct. Rep. 51; *Marshall v. Dye*, 231 U. S. 250, 58 L. ed. 206, 34 Sup. Ct. Rep. 92.

The right must be set up by him who would avail himself of it in the Federal Supreme Court. He cannot avail himself of the fact that somebody else raised the question in the State court, even though it were in the same suit. *Sully v. American National Bank*, 178 U. S. 239, 44 L. ed. 1072, 20 Sup. Ct. Rep. 935; *Missouri v. Andriano*, 138 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385.

Where by Federal statute an assignee in bankruptcy is immune from citation in certain proceedings such immunity can only be set up by the assignee himself, or by a person claiming under him. *Ludeling v. Chaffe*, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439.

We take no notice here of the statutes for the removal of causes from the State to the Federal courts for the purposes of original trial, as they are not important to any discussion we shall have occasion to enter upon in this work. See Rev. Stat. of U. S. 1878, title 13, ch. 7; Cooley, Constitutional Principles, 122-128. Judge Dillon has published a convenient manual on the removal of causes.

<sup>1</sup> *Harrison v. Morton*, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; *Chappell Chemical & F. Co. v. Sulphur Mines Co.*, 172 U. S. 465, 43 L. ed. 517, 19 Sup. Ct. Rep. 265; *Allen v. Southern Pac. R. Co.*, 173 U. S. 479, 43 L. ed. 775, 19 Sup. Ct. Rep. 265; *Allen v. Arguimbau*, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct.

Rep. 622; *Leathe v. Thomas*, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 112, 53 L. ed. 417, 431, 29 Sup. Ct. Rep. 220, 227; *Cincinnati, etc., R. Co. v. Stode*, 216 U. S. 78, 54 L. ed. 390, 30 Sup. Ct. Rep. 230; *Wood v. Chesborough*, 228 U. S. 672, 57 L. ed. 1018, 33 Sup. Ct. Rep. 706; *Holland Land, etc., Co. v. Interstate Trading Co.*, 233 U. S. 536, 58 L. ed. 1083, 34 Sup. Ct. Rep. 661; *Manhattan L. Ins. Co. v. Cohen*, 234 U. S. 123, 58 L. ed. 1245, 34 Sup. Ct. Rep. 874; *Mellon Co. v. McCafferty*, 239 U. S. 134, 60 L. ed. 181, 36 Sup. Ct. Rep. 94; *Enterprise Irrigation Dist. v. Farmers' Mut. Canal Co.*, 243 U. S. 157, 61 L. ed. 644, 37 Sup. Ct. Rep. 318; *Hardin-Wyandot Lighting Co. v. Upper Sandusky*, 251 U. S. 173, 64 L. ed. 210, 40 Sup. Ct. Rep. 104; *Ward v. Love County*, 253 U. S. 17, 64 L. ed. 751, 40 Sup. Ct. Rep. 419; *Broadwell v. Carter County*, 253 U. S. 25, 64 L. ed. 759, 40 Sup. Ct. Rep. 422; *Minneapolis, etc., R. Co. v. Washburn Lignite Coal Co.*, 254 U. S. 370, 65 L. ed. 310, 41 Sup. Ct. Rep. 140; *Nickel v. Cole*, 256 U. S. 222, 65 L. ed. 900, 41 Sup. Ct. Rep. 467; *Howat v. Kansas*, 258 U. S. 181, 66 L. ed. 550, 42 Sup. Ct. Rep. 277; *New York ex rel. Doyle v. Atwell*, 261 U. S. 590, 67 L. ed. 814, 43 Sup. Ct. Rep. 410.

For a judgment of a State court held not to rest upon an independent non-Federal ground, so as to defeat the appellate jurisdiction of the Federal Supreme Court, see *Bowe v. Scott*, 233 U. S. 658, 58 L. ed. 1141, 34 Sup. Ct. Rep. 769.

<sup>2</sup> *Klinger v. Missouri*, 13 Wall. 257, 20 L. ed. 635; *Johnson v. Risk*, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; *Ward v. Love County*, 253 U. S. 17, 64 L. ed. 751, 40 Sup. Ct. Rep. 419.

jurisdiction under the statute only where the judgment or decree was rendered by the highest court of the State in which a decision in the suit could be had,<sup>1</sup> and where such judgment or decree was final.<sup>2</sup>

The same reasons which require that the final decision upon all questions of national jurisdiction should be left to the national courts will also hold the national courts bound to respect the decisions of the State courts upon all questions arising under the State constitutions and laws, where nothing is involved of national authority, or of right under the Constitution, laws, or treaties of the United States; and to accept the State decisions as correct, and to follow them whenever the same questions arise in the national courts.<sup>3</sup> With the power to revise the decisions of the State courts

<sup>1</sup> *Atherton v. Fowler*, 91 U. S. 143, 23 L. ed. 265; *Newman v. Gates*, 204 U. S. 89, 51 L. ed. 385, 27 Sup. Ct. Rep. 220; *Norfolk, etc., Turnpike Co. v. Virginia*, 225 U. S. 264, 56 L. ed. 1082, 32 Sup. Ct. Rep. 828; *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 59 L. ed. 1027, 35 Sup. Ct. Rep. 625; *Mergenthaler Linotype Co. v. Davis*, 251 U. S. 256, 64 L. ed. 255, 40 Sup. Ct. Rep. 133.

The Supreme Court may review a final judgment of a court which, under the State law, is the highest court of the State in which a decision in the suit could be had, although it is not the highest appellate court in the State. *Kentucky v. Powers*, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387, 5 Ann. Cas. 692; *Western Union Tel. Co. v. Hughes*, 203 U. S. 505, 51 L. ed. 294, 27 Sup. Ct. Rep. 162; *Sullivan v. Texas*, 207 U. S. 416, 52 L. ed. 274, 28 Sup. Ct. Rep. 215; *Western Union Tel. Co. v. Crow*, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399; *Pacific Gas, etc., Co. v. Police Ct.*, 251 U. S. 22, 64 L. ed. 112, 40 Sup. Ct. Rep. 79; *Mergenthaler Linotype Co. v. Davis*, 251 U. S. 256, 64 L. ed. 255, 40 Sup. Ct. Rep. 133; *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 66 L. ed. 1044, 42 Sup. Ct. Rep. 516.

<sup>2</sup> *Schlosser v. Hemphill*, 198 U. S. 173, 49 L. ed. 1001, 25 Sup. Ct. Rep. 654; *Missouri, etc., R. Co. v. Olathe*, 222 U. S. 185, 56 L. ed. 155, 32 Sup. Ct. Rep. 46; *Louisiana Nav. Co. v. Oyster Commission*, 226 U. S. 99, 57 L. ed.

138, 33 Sup. Ct. Rep. 78; *Bruce v. Tobin*, 245 U. S. 18, 62 L. ed. 123, 38 Sup. Ct. Rep. 7.

In order to give the United States Supreme Court jurisdiction the judgment or decree must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance, the court below would have nothing to do but to execute the judgment or decree it had rendered. *Bostwick v. Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; *Georgia Ry. & Power Co. v. Decatur*, 262 U. S. 432, 67 L. ed. 1065, 43 Sup. Ct. Rep. 613.

As to what constitutes "a final judgment or decree," see also *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 48; *St. Clair County v. Livingston*, 18 Wall. 628, 21 L. ed. 813; *Hartman v. Greenhow*, 102 U. S. 672, 26 L. ed. 271; *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132; 16 Sup. Ct. Rep. 1023; *Schlosser v. Hemphill*, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654; *Louisiana Nav. Co. v. Oyster Commission*, 226 U. S. 99, 57 L. ed. 138, 33 Sup. Ct. Rep. 78; *Missouri, etc., R. Co. v. Olathe*, 222 U. S. 185, 56 L. ed. 155, 32 Sup. Ct. Rep. 46.

<sup>3</sup> In *Beauregard v. New Orleans*, 18 How. 497, 502, 15 L. ed. 469, 472, Mr. Justice *Campbell* says: "The constitution of this court requires it to follow the laws of the several States as rules of decision wherever they apply. And the habit of the court has been to defer to the decisions of their judicial tribu-

nals upon questions arising out of the common law of the State, especially when applied to the title of lands."

In *Bank of Hamilton v. Dudley's Lessee*, 2 Pet. 492, 524, 7 L. ed. 496, 507, it was urged that the exclusive power of State courts to construe legislative acts did not extend to the paramount law, so as to enable them to give efficacy to an act which was contrary to the State constitution; but *Marshall*, Ch. J., said: "We cannot admit this distinction. The judicial department of every government is the rightful expositor of its laws, and emphatically of its supreme law."

Again, in *Elmendorf v. Taylor*, 10 Wheat. 152, 159, 6 L. ed. 289, 292, the same eminent judge says: "The judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe which proposed to be governed by principle would, we presume, undertake to say that the courts of Great Britain or France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle the construction given by the courts of the several States to the legislative acts of those States is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States."

In *Green v. Neal's Lessee*, 6 Pet. 291, 298, 8 L. ed. 402, 405, it is said by *McLean*, J.: "The decision of the highest judicial tribunal of a State should be considered as final by this court, not because the State tribunal in such a case has any power to bind this court, but because, in the language of the court in *Shelby v. Guy*, 11 Wheat. 361, a fixed and received con-

struction by a State in its own courts makes a part of the statute law." And see *Jackson v. Chew*, 12 Wheat. 153, 162, 6 L. ed. 583, per *Thompson*, J.; also the following cases: *Sims v. Irvine*, 3 Dall. 425, 1 L. ed. 665; *McKeen v. Delancy*, 5 Cranch, 22, 3 L. ed. 25; *Polk's Lessee v. Wendal*, 9 Cranch, 87, 3 L. ed. 665; *Preston v. Browder*, 1 Wheat. 115, 4 L. ed. 50; *Mutual Assurance Co. v. Watts*, 1 Wheat. 279, 4 L. ed. 91; *Shipp v. Miller*, 2 Wheat. 316, 4 L. ed. 248; *Thatcher v. Powell*, 6 Wheat. 119, 5 L. ed. 221; *Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174; *Waring v. Jackson*, 1 Pet. 570, 7 L. ed. 266; *De Wolf v. Raband*, 1 Pet. 476, 7 L. ed. 227; *Fullerton v. Bank of United States*, 1 Pet. 604, 7 L. ed. 280; *Gardner v. Collins*, 2 Pet. 58, 7 L. ed. 347; *Beach v. Viles*, 2 Pet. 675, 7 L. ed. 559; *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99, 7 L. ed. 617; *United States v. Morrison*, 4 Pet. 124, 7 L. ed. 804; *Henderson v. Griffin*, 5 Pet. 151, 8 L. ed. 79; *Hinde v. Vattier*, 5 Pet. 398, 8 L. ed. 168; *Ross v. McLung*, 6 Pet. 283, 8 L. ed. 400; *Marlatt v. Silk*, 11 Pet. 1, 9 L. ed. 609; *Bank of United States v. Daniel*, 12 Pet. 32, 9 L. ed. 989; *Clarke v. Smith*, 13 Pet. 195, 10 L. ed. 123; *Ross v. Duval*, 13 Pet. 45, 10 L. ed. 51; *Wilcox v. Jackson*, 13 Pet. 498, 10 L. ed. 264; *Harpending v. Reformed Church*, 16 Pet. 455, 10 L. ed. 1029; *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997; *Amis v. Smith*, 16 Pet. 303, 10 L. ed. 973; *Kinney v. Clark*, 2 How. 76, 11 L. ed. 185; *Lane v. Vick*, 3 How. 464, 11 L. ed. 681; *Foxcroft v. Mallett*, 4 How. 353, 11 L. ed. 1008; *Barry v. Mercein*, 5 How. 103, 12 L. ed. 70; *Rowan v. Runnells*, 5 How. 134, 12 L. ed. 85; *Van Rensselaer v. Kearney*, 11 How. 297, 13 L. ed. 703; *Pease v. Peck*, 18 How. 595, 15 L. ed. 518; *Fisher v. Haldeman*, 20 How. 15 L. ed. 879, 186; *Parker v. Kane*, 22 How. 1, 16 L. ed. 286; *Suydam v. Williamson*, 24 How. 427, 16 L. ed. 742; *Sumner v. Hicks*, 2 Black, 532, 17 L. ed. 355; *Chicago v. Robbins*, 2 Black, 418, 17 L. ed. 298; *Miles v. Caldwell*, 2 Wall. 35, 17 L. ed. 755; *Williams v. Kirkland*, 13 Wall. 306, 20 L. ed. 683; *Walker v. Harbor Com'rs*, 17 Wall. 648, 21 L. ed. 744; *Supervisors v.*

United States, 18 Wall. 71, 21 L. ed. 771; *Fairfield v. Gallatin*, 100 U. S. 47, 25 L. ed. 544; *Wade v. Walnut*, 105 U. S. 1, 26 L. ed. 1027; *Post v. Supervisors*, *id.* 667, 26 L. ed. 1204; *Taylor v. Ypsilanti*, *id.* 60, 26 L. ed. 1008; *Equator Co. v. Hall*, 106 U. S. 86, 27 L. ed. 114, 1 Sup. Ct. Rep. 198; *Bendey v. Townsend*, 109 U. S. 665, 27 L. ed. 1065, 3 Sup. Ct. Rep. 482; *Norton v. Shelby Co.*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; *Stryker v. Goodnow*, 123 U. S. 527, 31 L. ed. 194, 8 Sup. Ct. Rep. 203; *Williams v. Conger*, 125 U. S. 397, 31 L. ed. 778, 8 Sup. Ct. Rep. 933; *Bucher v. Cheshire R. R. Co.*, *id.* 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 32 L. ed. 519, 9 Sup. Ct. Rep. 159; *Springer v. Foster*, 2 Story C. C. 383; *Neal v. Green*, 1 McLean, 18; *Paine v. Wright*, 6 McLean, 395; *Boyle v. Arledge*, Hemp. 620; *Griffing v. Gibb*, McAll. 212; *Bayerque v. Cohen*, McAll. 113; *Wick v. The Samuel Strong*, Newb. 187; *N. F. Screw Co. v. Bliven*, 3 Blatch. 240; *Bronson v. Wallace*, 4 Blatch. 465; *Van Bokelen v. Brooklyn City R. R. Co.*, 5 Blatch. 379; *United States v. Mann*, 1 Gall. 3; *Society, &c. v. Wheeler*, 2 Gall. 105; *Coates v. Muse*, Brock. 529; *Meade v. Beale*, Taney, 339; *Loring v. Marsh*, 2 Cliff. 311; *Parker v. Phetteplace*, 2 Cliff. 70; *King v. Wilson*, 1 Dill. 555; *New York Life Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; *Clarke v. Clarke*, 178 U. S. 186, 44 L. ed. 1029, 20 Sup. Ct. Rep. 873; *Warburton v. White*, 176 U. S. 484, 44 L. ed. 555, 20 Sup. Ct. Rep. 404; *Hartford F. Ins. Co. v. Chicago M. & St. P. Ry. Co.*, 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33; *Sioux City Tr. & W. Co. v. Trust Co. of N. A.*, 173 U. S. 99, 43 L. ed. 628, 19 Sup. Ct. Rep. 381; *First Nat'l Bank v. Chehalis Co.*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; *Walker v. New Mexico & S. P. Ry. Co.*, 165 U. S. 593, 41 L. ed. 760, 17 Sup. Ct. Rep. 421; *Bamberger & Co. v. Schoolfield*, 160 U. S. 149, 40 L. ed. 374, 16 Sup. Ct. Rep. 225; *First Nat'l Bk. v. Ayers*, 160 U. S. 660, 40 L.

ed. 573, 16 Sup. Ct. Rep. 412; *Berge-man v. Backer*, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727; *Baltimore Tr. Co. v. Baltimore B. R. Co.*, 151 U. S. 137, 38 L. ed. 102, 14 Sup. Ct. Rep. 294; *Ex parte Lockwood*, 154 U. S. 116, 38 L. ed. 929, 14 Sup. Ct. Rep. 1082; *Morley v. L. S. & M. S. Ry. Co.*, 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *Hancock v. Louisville & N. Ry. Co.*, 145 U. S. 409, 36 L. ed. 755, 12 Sup. Ct. Rep. 969; *Kaukauna W. P. Co. v. Green Bay & M. Canal Co.*, 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Duncan v. McCall*, 139 U. S. 449, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; *Pullman Pal. Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 11 Sup. Ct. Rep. 876; *Cross v. Allen*, 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. Rep. 67; *Randolph's Executor v. Quidnick Co.*, 135 U. S. 457, 34 L. ed. 200, 10 Sup. Ct. Rep. 655; *Abraham v. Casey*, 179 U. S. 210, 45 L. ed. 156, 21 Sup. Ct. Rep. 88; *Mason v. Missouri*, 179 U. S. 328, 45 L. ed. 214, 21 Sup. Ct. Rep. 125; *Loeb v. Columbia Tp. Trustees*, 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *Smiley v. Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; *Mead v. Portland*, 200 U. S. 148, 50 L. ed. 413, 26 Sup. Ct. Rep. 171; *Northwestern National Life Ins. Co. v. Riggs*, 203 U. S. 243, 51 L. ed. 168, 27 Sup. Ct. Rep. 126, 7 Ann. Cas. 1104; *Gatewood v. North Carolina*, 203 U. S. 531, 51 L. ed. 305, 27 Sup. Ct. Rep. 167; *Sauer v. New York*, 206 U. S. 536, 51 L. ed. 1176, 27 Sup. Ct. Rep. 686; *Seaboard Air Line Ry. v. Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 57 L. ed. 1410, 33 Sup. Ct. Rep. 967; *Carlesi v. New York*, 233 U. S. 51, 58 L. ed. 843, 34 Sup. Ct. Rep. 576; *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 59 L. ed. 265, 35 Sup. Ct. Rep. 99; *Wadley Southern R. Co. v. Georgia*, 235 U. S. 651, 59 L. ed. 405, 35 Sup. Ct. Rep. 214; *Collins v. Johnston*, 237 U. S. 502, 59 L. ed. 1071, 35 Sup. Ct. Rep. 649; *Price v. Illinois*, 238 U. S. 446, 59 L. ed. 1400,



35 Sup. Ct. Rep. 892; *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440, 60 L. ed. 1084, 36 Sup. Ct. Rep. 637; *Hendrickson v. Apperson*, 245 U. S. 105, 62 L. ed. 178, 38 Sup. Ct. Rep. 44; *International Paper Co. v. Massachusetts*, 246 U. S. 135, 62 L. ed. 624, 38 Sup. Ct. Rep. 292, Ann. Cas. 1918 C, 617; *Mackay Tel. etc., Co. v. Little Rock*, 250 U. S. 94, 63 L. ed. 863, 39 Sup. Ct. Rep. 428; *American Mfg. Co. v. St. Louis*, 250 U. S. 459, 63 L. ed. 1084, 39 Sup. Ct. Rep. 522; *Vigliotti v. Pennsylvania*, 258 U. S. 403, 66 L. ed. 686, 42 Sup. Ct. Rep. 330; *Ward & Gow v. Krinsky*, 259 U. S. 503, 66 L. ed. 1033, 42 Sup. Ct. Rep. 529; *Cudahy Packing Co. v. Parramore*, 263 U. S. 418, 68 L. ed. 336, 44 Sup. Ct. Rep. 153; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954; 5 Ann. Cas. 314; *Fleischman Const. Co. v. Burns*, 284 Fed. 358; *Greene County v. Lydy*, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917 C, 274; *Barber v. Hartford Life Ins. Co.*, 279 Mo. 316, 214 S. W. 207, 12 A. L. R. 758; *Kulp v. Fleming*, 65 Ohio St. 321, 62 N. E. 334, 87 A. S. R. 611; *Savings Bank of Richmond v. National Bank of Goldsboro*, 3 Fed. (2d) 970, 39 A. L. R. 1374. See also notes in 12 L. ed. 169, and 5 L. R. A. 508.

The latest settled adjudications are usually followed. *Wade v. Travis Co.*, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715; *Backus v. Fort St. Union Depot Co.*, 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; *Nobles v. Georgia*, 168 U. S. 398, 42 L. ed. 515, 18 Sup. Ct. Rep. 87; *Barber v. Pittsburg Ft. W. & C. Ry. Co.*, 166 U. S. 83, 41 L. ed. 925, 17 Sup. Ct. Rep. 488; *Bauserman v. Blunt*, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466; *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. Rep. 406; *Miller's Exrs. v. Swann*, 150 U. S. 132, 37 L. ed. 1028, 14 Sup. Ct. Rep. 52; *New York L. E. & W. Ry. Co. v. Estill*, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444; *Wood v. Brady*, 150 U. S. 18, 37 L. ed. 981, 14 Sup. Ct. Rep. 6; *May v. Tenney*, 148 U. S. 60, 37 L. ed. 368, 13 Sup. Ct. Rep. 491; *Stutsman Co. v. Wallace*, 142 U. S. 293, 35 L. ed. 1018, 12 Sup. Ct. Rep.

227; *Yazoo & M. V. Ry. Co. v. Adams*, 181 U. S. 580, 45 L. ed. 1011, 21 Sup. Ct. Rep. 729.

Upon when Federal courts do not follow State decisions, see note to 19 L. ed. U. S. 490. See also *Missouri, K. & T. Ry. Co. v. McCann*, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755.

But though the Federal Supreme Court is bound by the *construction* of a State statute adopted by the State court of last resort, it is not concluded by its *reasoning*, but must exercise an independent judgment, when called upon to determine the Federal question whether the act, as construed and applied, is repugnant to the restrictions of the Federal Constitution. *Ward & Gow v. Krinsky*, 259 U. S. 503, 66 L. ed. 1033, 42 Sup. Ct. Rep. 529, 28 A. L. R. 1207. It may determine whether the application made of the statute was so arbitrary as to contravene the fundamental principles of justice which the constitutional guaranty of due process of law is intended to preserve. *Southwestern Tel. etc., Co. v. Danaher*, 238 U. S. 482, 59 L. ed. 1419, 35 Sup. Ct. Rep. 886, L. R. A. 1916 A, 1208.

The decision of the State court, that a State statute has been enacted in accordance with the State constitution, is binding on the Federal courts. *Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. ed. 185; *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Tullis v. Lake Erie & W. Ry. Co.*, 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Missouri, K. & T. Ry. Co. v. McCann*, 174 U. S. 580, 586, 43 L. ed. 1093, 1096, 19 Sup. Ct. Rep. 755; *M. & M. Nat'l Bk. v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Green v. Frazier*, 253 U. S. 233, 64 L. ed. 878, 40 Sup. Ct. Rep. 499.

Rules of real property settled by course of State decisions are followed by Federal courts. *Lowndes v. Town of Huntington*, 153 U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 758; *Halstead v. Buster*, 140 U. S. 273, 35 L. ed. 484, 11 Sup. Ct. Rep. 782; *Francis v. Francis*, 203 U. S. 233, 51 L. ed. 165, 27 Sup. Ct. Rep. 129, affirming 136

Mich. 288, 99 N. W. 14; *East Central Eureka Min. Co. v. Central Eureka Min. Co.*, 204 U. S. 266, 51 L. ed. 476, 27 Sup. Ct. Rep. 258; *Messinger v. Anderson*, 225 U. S. 436, 56 L. ed. 1152, 32 Sup. Ct. Rep. 739; *Guffey v. Smith*, 237 U. S. 101, 120, 59 L. ed. 856, 866, 35 Sup. Ct. Rep. 526, 532; *Downey v. Gooch*, 240 Fed. 527; *Rowe v. Kidd*, 249 Fed. 882; *Fensky v. Campbell*, 290 Fed. 83; *Edward Hines Yellow Pine Trustees v. Martin*, 296 Fed. 442. And so as to chattel mortgages. *Etheridge v. Sperry W. & G.*, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 565; *Scandinavian-American Bank v. Sabin*, 142 C. C. A. 211, 227 Fed. 579; *In re Dagwell*, 263 Fed. 406. And assignments for benefit of creditors. *South Branch L. Co. v. Ott*, 142 U. S. 622, 35 L. ed. 1136, 12 Sup. Ct. Rep. 318.

State decisions upon what is correct practice in criminal cases are followed unless due process is denied. *Graham v. Weeks*, 138 U. S. 461, 34 L. ed. 1051, 11 Sup. Ct. Rep. 363.

The decisions of the State courts in construing their own statutes in relation to the rights of creditors of insolvent corporations are controlling on the Federal courts. *Ryerson & Son v. Peden*, 303 Ill. 171, 135 N. E. 423, 24 A. L. R. 1273.

Whether the provision of a State Constitution relating to the condemnation of private property for a public use permits or prevents the condemnation of a right of way through a private ditch for water to be used by individuals on their private lands, is a question for decision by the State courts. *Smith v. Cameron*, 106 Oreg. 1, 210 Pac. 716, 27 A. L. R. 510. In *Green v. Neal's Lessee*, 6 Pet. 291, 8 L. ed. 402, an important question was presented as to the proper course to be pursued by the Supreme Court of the United States, under somewhat embarrassing circumstances. That court had been called upon to put a construction upon a State statute of limitations, and had done so. Afterwards the same question had been before the Supreme Court of the State, and in repeated cases had been decided otherwise. The question now was whether

the Supreme Court would follow its own decision, or reverse that, in order to put itself in harmony with the State decisions. The subject is considered at length by *McLean*, J., who justly concludes that "adherence by the Federal to the exposition of the local law, as given by the courts of the State, will greatly tend to preserve harmony in the exercise of the judicial power in the State and Federal tribunals. This rule is not only recommended by strong considerations of propriety, growing out of our system of jurisprudence, but it is sustained by principle and authority." The court, accordingly, reversed its rulings to make them conform to those of the State court. See also *Suydam v. Williamson*, 24 How. 427, 16 L. ed. 742; *Leffingwell v. Warren*, 2 Black, 599, 17 L. ed. 261; *Blossburg, &c. R. R. Co. v. Tioga R. R. Co.*, 5 Blatch. 387; *Smith v. Shriver*, 3 Wall. Jr. 219; *Sanford v. Poe*, 69 Fed. 546, 16 C. C. A. 305, 37 U. S. App. 378, 60 L. R. A. 641; *Fleischman Const. Co. v. Burns*, 284 Fed. 358; *Indianapolis v. Navin*, 151 Ind. 139, 47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337.

It is, of course, immaterial that the court may still be of opinion that the State court has erred, or that the decisions elsewhere are different. *Bell v. Morrison*, 1 Pet. 351, 7 L. ed. 174. But where the Supreme Court had held that certain contracts for the price of slaves were not made void by the State constitution, and afterwards the State court held otherwise, the Supreme Court, regarding this decision wrong, declined to reverse their own ruling. *Rowan v. Runnels*, 5 How. 134, 12 L. ed. 85.

Compare this with *Nesmith v. Sheldon*, 7 How. 812, 12 L. ed. 925, in which the court followed, without examination or question, the State decision that a State general banking law was in violation of the constitution of the State. The United States Circuit Court had held otherwise previous to the State decision. *Falconer v. Campbell*, 2 McLean, 195. Under like circumstances the State Supreme Court's ruling on a statute of limitations was followed, overruling the

Federal circuit decision which followed that of a lower State court. *Moore v. Nat. Bank*, 104 U. S. 625, 26 L. ed. 870. But the State court's construction of its constitution or laws after the controversy arose, and in a suit between different parties as to the same subject-matter, is not binding on the Federal court. *Carroll Co. v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539; *Enfield v. Jordan*, 119 U. S. 680, 30 L. ed. 523, 7 Sup. Ct. Rep. 358. So, where after a ruling in the United States Circuit Court the State Supreme Court for the first time decides against such ruling, its decision will not be followed of necessity in the Federal Supreme Court. *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10. See *Gibson v. Lyon*, 115 U. S. 439, 29 L. ed. 440, 6 Sup. Ct. Rep. 129. And it has been held that where at the time of a decision of the United States Circuit Court of appeals, construing the constitution and statutes of a State, no decision upon the question had been made by the Supreme Court of the State, and in this status of affairs property rights were acquired, the former court will adhere to its decision notwithstanding a contrary decision by the latter court. *United States ex rel. Pierce v. Cargill*, 263 Fed. 856. See also *State v. St. Louis-San Francisco R. Co.*, 162 Ark. 443, 258 S. W. 609.

Where the constitutionality of a provision in a State statute depends upon whether it is severable from other provisions which are unconstitutional, the decision of the State court as to such severability is conclusive on the Federal Supreme Court. But in the absence of a decision by the State court the Supreme Court may itself decide the question, or it may leave it for decision by the State court. *Dorchy v. Kansas*, 264 U. S. 286, 68 L. ed. 686, 44 Sup. Ct. Rep. 323.

The doctrine stated in the text does not usually apply to questions not at all dependent upon local statutes or usages; as, for instance, to contracts and other instruments of a commercial and general nature, like bills of exchange: *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865; *Oates v. National Bank*,

100 U. S. 239, 25 L. ed. 580; *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61; *Clark v. Bever*, 139 U. S. 96, 35 L. ed. 88, 11 Sup. Ct. Rep. 468; *Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67, 34 L. ed. 864, 11 Sup. Ct. Rep. 215.

In the interpretation of negotiable contracts the Supreme Court of the United States will follow the general principles of commercial law, and will not follow the particular construction of any State court. This is true, though such contracts be issued by municipalities of the State. *Woodruff v. Mississippi*, 162 U. S. 291, 40 L. ed. 973, 16 Sup. Ct. Rep. 820. So with regard to the master's liability to servants for damage caused by negligence of a fellow-servant. *Baltimore & Ohio Ry. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Gardner v. Michigan C. Ry. Co.*, 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; *Nelson Land & Cattle Co. v. Smith*, 235 U. S. 699, 59 L. ed. 431, 35 Sup. Ct. Rep. 200.

The doctrine does not apply to cases involving the validity of alleged contracts. *Turner v. Com'rs of Wilkes Co.*, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464. And see also the dissenting opinion of *Peckham, J.*, in *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134. Also *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023.

It does not apply to cases involving the question of impairment of obligation of contracts. *McGahey v. Virginia*, 135 U. S. 662, 34 L. ed. 304, 10 Sup. Ct. Rep. 972; *Knox Co. v. Ninth National Bank*, 147 U. S. 91, 37 L. ed. 93, 13 Sup. Ct. Rep. 267; *Barnum v. Okolona*, 148 U. S. 393, 37 L. ed. 495, 13 Sup. Ct. Rep. 638; *Mobile, etc. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Folsom v. Township Ninety-Six*, 159 U. S. 611, 40 L. ed. 278, 16 Sup. Ct. Rep. 174; *Shelby Co. v. Union & Planter's Bank*, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558; *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; *Walsh v. Columbus, etc., R. Co.*, 176 U. S. 469, 44 L. ed. 548, 20 Sup. Ct. Rep. 393;

Houston, etc., *R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545; *Stearns v. Minnesota*, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73; *Yazoo, etc., R. Co. v. Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Wilson v. Standefer*, 184 U. S. 399, 46 L. ed. 612, 22 Sup. Ct. Rep. 384; *Northern Cent. R. Co. v. Maryland*, 187 U. S. 258, 47 L. ed. 167, 23 Sup. Ct. Rep. 62; *Waggoner v. Flack*, 188 U. S. 595, 47 L. ed. 609, 23 Sup. Ct. Rep. 345; *Rogers v. Alabama*, 192 U. S. 226, 48 L. ed. 417, 24 Sup. Ct. Rep. 257; *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576; *Powers v. Detroit, etc., R. Co.*, 201 U. S. 543, 50 L. ed. 860, 26 Sup. Ct. Rep. 556; *Blair v. Chicago*, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253; *Sullivan v. Texas*, 207 U. S. 416, 53 L. ed. 274, 28 Sup. Ct. Rep. 215; *Northern Pacific R. Co. v. Minnesota*, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; *New York Electric Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, 59 L. ed. 184, 35 Sup. Ct. Rep. 72, L. R. A. 1918 E, 874, Ann. Cas. 1915 A, 906; *Seton Hall College v. South Orange*, 242 U. S. 100, 61 L. ed. 170, 37 Sup. Ct. Rep. 54; *Milwaukee Electric Ry. etc., Co. v. Wisconsin*, 252 U. S. 100, 64 L. ed. 476, 40 Sup. Ct. Rep. 306, 10 A. L. R. 892; *Omaha Water Co. v. Omaha*, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614.

It does not apply to insurance contracts. *Robinson v. Commonwealth Ins. Co.*, 3 Sum. 220. And see *Reimsdyke v. Kane*, 1 Gall. 376; *Austen v. Miller*, 5 McLean, 153; *Gloucester Ins. Co. v. Younger*, 2 Curt. C. C. 322; *Bragg v. Meyer*, McAll. 408; *Alexander v. Lane*, 85 C. C. A. 677, 157 Fed. 1002, certiorari denied, 208 U. S. 617, 52 L. ed. 647, 28 Sup. Ct. Rep. 569. Whether a lunatic's contract is void or voidable is a question of general jurisprudence. *Edwards v. Davenport*, 20 Fed. Rep. 756.

The Federal court must decide for itself whether there exists a contract within the constitutional protection. *Louisville & N. R. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265; *Milwaukee Electric Ry. etc., Co. v. Wisconsin*, 252 U. S. 100, 64 L. ed. 476, 40 Sup. Ct. Rep. 306, 10 A. L. R. 892. So in determining the validity of municipal ordinances, *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064. And where a contract had been made under a settled construction of the State constitution by its highest court, the Supreme Court sustained it, notwithstanding the State court had since overruled its former decision. *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520. See *Olcott v. Supervisors*, 16 Wall. 678, 21 L. ed. 382; *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968. See upon "rule of decision" in Federal courts, article in 60 Alb. L. Jour. 297.

But even in relation to the doctrines of commercial law and general jurisprudence, the Federal courts, for the sake of harmony and to avoid confusion, will lean towards an agreement of views with the State courts, if the question seems to them balanced with doubt. *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Wilson v. Standefer*, 184 U. S. 399, 46 L. ed. 612, 22 Sup. Ct. Rep. 384; *Stanly County v. Coler*, 190 U. S. 437, 47 L. ed. 1126, 23 Sup. Ct. Rep. 811; *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 532, 48 L. ed. 778, 24 Sup. Ct. Rep. 576; *Tampa Waterworks Co. v. Tampa*, 199 U. S. 241, 50 L. ed. 172, 26 Sup. Ct. Rep. 23; *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 54 L. ed. 228, 30 Sup. Ct. Rep. 140; *Ennis Waterworks v. Ennis*, 233 U. S. 652, 58 L. ed. 1139, 34 Sup. Ct. Rep. 767; *Moore-Mansfield Constr. Co. v. Electrical Installation Co.*, 234 U. S. 619, 58 L. ed. 1503, 34 Sup. Ct. Rep. 941; *Lankford v. Platte Iron Works Co.*, 235 U. S. 461, 59 L. ed. 316, 35 Sup. Ct. Rep. 173; *Sim v. Edenborn*, 242 U. S. 131, 61 L. ed. 199, 37 Sup. Ct. Rep. 36.

in the cases already pointed out, the due observance of this rule will prevent those collisions of judicial authority which would otherwise be inevitable, and which, besides being unseemly, would be dangerous to the peace, harmony, and stability of the Union. [The legislative construction of a provision in a State constitution will be followed by the Federal courts in the absence of an authoritative decision of the highest court of appeal of the State to the contrary.<sup>1</sup>]

Besides conferring specified powers upon the national government, the Constitution contains also certain restrictions upon the action of the States, a portion of them designed to prevent encroachments upon the national authority, and another portion to protect individual rights against possible abuse of State power. Of the first class are the following: No State shall enter into any treaty, alliance, or confederation, grant letters of marque or reprisal, coin money, emit bills of credit,<sup>2</sup> or make anything but gold and silver coin a tender in payment of debts. No State shall, without the consent of Congress, lay any imposts or duties upon imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of Congress. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact<sup>3</sup> with another

<sup>1</sup> *Van Dyke v. Geary*, 244 U. S. 39, 61 L. ed. 973, 37 Sup. Ct. Rep. 483.

<sup>2</sup> To constitute a bill of credit within the meaning of the Constitution, it must be issued by a State, involve the faith of the State, and be designed to circulate as money on the credit of the State, in the ordinary uses of business. *Briscoe v. Bank of Kentucky*, 11 Pet. 257, 9 L. ed. 418; *Woodruff v. Trapnall*, 10 How. 190, 13 L. ed. 358. Treasury warrants designed so to circulate are bills of credit. *Braggs v. Tuffts*, 49 Ark. 554, 6 S. W. 158. But if they are to be retired, as soon as presented for payment at the State treasury, and paid, they are not bills of credit, even though the creditor to whom they are issued may demand at the time of receiving them that they be issued in denominations of one dollar each to the extent of the debt, the remainder being issued in denominations of not less than five dollars, and even though they may pass from

hand to hand and are receivable from any person in payment of taxes. *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545, rev. 41 S. W. 157.

The facts that a State owns the entire capital stock of a bank, elects the directors, makes its bills receivable for the public dues, and pledges its faith for their redemption, do not make the bills of such bank "bills of credit" in the constitutional sense. *Darrington v. State Bank of Alabama*, 13 How. 12, 14 L. ed. 30. See, further, *Craig v. Missouri*, 4 Pet. 410, 7 L. ed. 903; *Byrne v. Missouri*, 8 Pet. 40, 8 L. ed. 859; *Curran v. Arkansas*, 15 How. 304, 14 L. ed. 705; *Moreau v. Detchamendy*, 41 Mo. 431; *Bailey v. Milner*, 35 Ga. 330; *City National Bank v. Mahan*, 21 La. Ann. 751.

<sup>3</sup> Agreement between two States to appoint commissioners to trace and mark their common boundary line is not prohibited. *Virginia v. Tennessee*,

State or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. Of the second class are the following: No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts,<sup>1</sup> or make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,<sup>2</sup> nor base discriminations in suffrage on race, color, or previous condition of servitude.<sup>3</sup>

Other provisions have for their object to prevent discriminations by the several States against the citizens and public authority and proceedings of other States. Of this class are the provisions that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;<sup>4</sup> that fugitives from

148 U. S. 503, 37 L. ed. 537, 13 Sup. Ct. Rep. 728. Upon judicial settlement of State boundaries, see *Nebraska v. Iowa*, 145 U. S. 519, 36 L. ed. 798, 12 Sup. Ct. Rep. 976, and note to 36 L. ed. U. S. 798.

<sup>1</sup> Const. of U. S. art. 1, § 10; Story on Const. c. 33, 34.

But this provision of the Constitution does not extend to the case where a State court overrules its prior decisions, even though they have become rules of property and contracts have been entered into whose obligation is seriously impaired by such overruling. *Bacon v. Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *State v. O'Neil*, 147 Iowa, 513, 126 N. W. 454, 33 L. R. A. (n. s.) 788, Ann. Cas. 1912 B, 691; and see also *Turner v. Com'rs of Wilkes Co.*, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464, and dissenting opinion of *Peckham, J.*, in *McCullough v. Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134.

That impairing remedy impairs the obligation of a contract, see note to 26 L. ed. U. S. 132.

This provision does not cover the case of an alleged impairment of a contract by State action other than legislative. *Hanford v. Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051; *Turner v. Com'rs of Wilkes Co.*, 173 U. S. 461, 43 L. ed. 768, 19 Sup. Ct. Rep. 464; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91,

16 Sup. Ct. Rep. 80; *Wood v. Brady*, 150 U. S. 18, 37 L. ed. 981, 14 Sup. Ct. Rep. 6. See also *Ford v. Delta & Pine Land Co.*, 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. Rep. 230.

"The prohibition is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals." *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Ross v. Oregon*, 227 U. S. 150, 57 L. ed. 458, 33 Sup. Ct. Rep. 220, Ann. Cas. 1914 C, 224; *Crigler v. Shapler*, 79 Kan. 834, 101 Pac. 619, 23 L. R. A. (n. s.) 500; *King v. Phoenix Ins. Co.*, 195 Mo. 290, 92 S. W. 892, 6 Ann. Cas. 618, 113 A. S. R. 678.

Whether a State statute impairs the obligation of a contract is a Federal question. *Pierce v. Somerset Ry.*, 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64. See *ante*, p. 38, note 3.

<sup>2</sup> Const. of U. S. 14th Amendment; see Story on the Constitution (4th ed.), c. 47.

<sup>3</sup> Const. of U. S. 15th Amendment; Story on Const. (4th ed.) c. 48.

<sup>4</sup> Const. of U. S. art. 4. "What are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these ex-

pressions to those privileges and immunities which are in their nature *fundamental*; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What those fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of *habeas corpus*; to institute and maintain actions of every kind in the courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the citizens of the other State, — may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added the elective franchise as regulated and established by the laws or constitution of the State in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities; and the enjoyment of them by the citizens of each State in every other State was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old Articles of Confederation) 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union.' " *Washington, J.*, in *Corfield v. Coryell*, 4 Wash. C. C. 380.

The constitutional guaranty is in-

tended to protect the privileges and immunities against State action and not against the action of individuals. *United States v. Wheeler*, 254 U. S. 281, 65 L. ed. 270, 41 Sup. Ct. Rep. 133. It was not designed to interfere with the police power of a State. *De Grazier v. Stephens*, 101 Tex. 194, 105 S. W. 992, 16 L. R. A. (N. S.) 1033, 16 Ann. Cas. 1059. It does not profess to control the power of the State government over the rights of its own citizens. It merely guarantees privileges and immunities to citizens of other States. *State v. Swanson*, 182 Ind. 582, 107 N. E. 275.

It does not give a citizen the right to enjoy within his own State the privileges which citizens of other States enjoy under the laws of those States. *McKane v. Durston*, 153 U. S. 684, 38 L. ed. 867, 14 Sup. Ct. Rep. 913; *McCarter v. Hudson County Water Co.*, 70 N. J. Eq. 695, 65 Atl. 489, 118 Am. St. Rep. 754, 14 L. R. A. (N. S.) 197, 10 Ann. Cas. 116, affirmed 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529. Nor to carry with him, when he goes into other States, the privileges which he enjoys in his home State. *Detroit v. Osborne*, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012. Foreigners who have never been residents of any one of the States are not within its protection. *In re Colbert's Estate*, 44 Mont. 259, 119 Pac. 791.

The Supreme Court will not describe and define the privileges and immunities in a general classification; preferring to decide each case as it may come up. *Conner v. Elliott*, 18 How. 591, 15 L. ed. 497; *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248. The question in this last case was whether the State of Virginia could prohibit citizens of other States from planting oysters in Ware River, a stream in that State where the tide ebbs and flows, and the right be granted by the State to its own citizens exclusively. *Waite, Ch. J.*, in answering the question in the affirmative, said: "The right thus granted is not a privilege or immunity of general, but of special citizenship. It does not belong

of right to the citizens of all free governments, but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed; they, and they alone, owned the property to be sold or used; and they alone had the power to dispose of it as they saw fit. They owned it, not by virtue of citizenship merely, but of citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality." See also *Paul v. Hazelton*, 37 N. J. 106; *Com. v. Hilton*, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475; *Silver v. State*, 147 Ga. 162, 93 S. E. 145; *People v. Setunsky*, 161 Mich. 624, 126 N. W. 844; *State v. Kofines*, 33 R. I. 211, 80 Atl. 432, Ann. Cas. 1913 C, 1120; *State v. Ashman*, 123 Tenn. 654, 135 S. W. 325.

For other discussions upon this subject, see *Murray v. McCarty*, 2 Munf. 393; *Lemmon v. People*, 26 Barb. 270, and 20 N. Y. 562; *Campbell v. Morris*, 3 Har. & M'H. 554; *Amy v. Smith*, 1 Lit. 326; *Crandall v. State*, 10 Conn. 340; *Butler v. Farnsworth*, 4 Wash. C. C. 101; *Commonwealth v. Towles*, 5 Leigh, 743; *Haney v. Marshall*, 9 Md. 194; *Slaughter v. Commonwealth*, 13 Gratt. 767; *State v. Medbury*, 3 R. I. 138; *People v. Imlay*, 20 Barb. 68; *People v. Coleman*, 4 Cal. 46; *People v. Thurber*, 13 Ill. 544; *Phoenix Insurance Co. v. Commonwealth*, 5 Bush, 68; *Ducat v. Chicago*, 48 Ill. 172; *Fire Department v. Noble*, 3 E. D. Smith, 441; *Same v. Wright*, 3 E. D. Smith, 453; *Robinson v. Oceanic S. N. Co.*, 112 N. Y. 315, 19 N. E. 625; *Bliss's Petition*, 63 N. H. 135; *State v. Lancaster*, *id.* 267; *People v. Phippin*, 70 Mich. 6, 37 N. W. Rep. 88; *State v. Gilman*, 33 W. Va. 146, 10 S. E. Rep. 283; *Fire Dep't v. Helfenstein*, 16 Wis. 136; *Sears v. Commissioners of Warren Co.*, 36 Ind. 267; *Jeffersonville, &c. R. R. Co. v. Hendricks*, 41 Ind. 48; *Cincinnati Health Association v. Rosenthal*, 55 Ill. 85; *State v. Fosdick*, 21 La. Ann. 434; *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 394; *Bradwell v. State*, 16 Wall. 130, 21 L. ed. 442; *Bartmeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *United States v. Cruikshank*, 92 U. S.

542, 23 L. ed. 588; *Kimmish v. Ball*, 129 U. S. 217, 32 L. ed. 695, 9 Sup. Ct. Rep. 277; *Maxwell v. Dow*, 176 U. S. 581, 588-593, 44 L. ed. 597, 600, 20 Sup. Ct. Rep. 448, 494; *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; *Maxwell v. Bugbee*, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2; *Quong Ham Wah Co. v. Industrial Acc. Commission*, 184 Cal. 26, 192 Pac. 1021; *Hammer v. State*, 173 Ind. 199, 89 N. E. 850, 24 L. R. A. (N. S.) 795, 21 Ann. Cas. 1034, 140 A. S. R. 248; *Robinson v. Fishback*, 175 Ind. 132, 93 N. E. 666, Ann. Cas. 1913 B, 1271; *Shaw v. Marshalltown*, 131 Iowa, 128, 104 N. W. 1121, 10 L. R. A. (N. S.) 825, 9 Ann. Cas. 1039; *Olander v. Hallowell*, 193 Iowa, 979, 188 N. W. 667; *La Tourette v. McMaster*, 104 S. C. 501, 89 S. E. 398; *De Grazier v. Stephens*, 101 Tex. 194, 105 S. W. 992, 16 L. R. A. (N. S.) 1033, 16 Ann. Cas. 1059.

Upon privileges of citizens of States, see note to 1 L. R. A. 56; political rights of, note to 8 L. R. A. 337.

The right to engage in commerce between the States is impliedly guaranteed by this provision of the Constitution as a privilege inherent in American citizenship. *Hoxie v. New York, etc., R. Co.*, 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 432.

The constitutional requirement protects the citizen of another State against discriminatory taxation, but not to an entire immunity therefrom, nor to any preferential treatment as compared with resident citizens. *Shaffer v. Carter*, 252 U. S. 37, 64 L. ed. 445, 40 Sup. Ct. Rep. 221; *People ex rel. Stafford v. Travis*, 231 N. Y. 339, 132 N. E. 109. It gives the citizen of one State the right to remove to and carry on business in another without being subjected in property or person to taxes more onerous than the citizens of the latter State are subjected to. *Maxwell v. Bugbee*, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2; *Shaffer v. Carter*, 252 U. S. 37, 64 L. ed. 445, 40 Sup. Ct. Rep. 221; *People ex rel. Stafford v. Travis*, 231 N. Y. 339, 132 N. E. 109.

Exemptions from taxation must be granted to non-residents upon same



terms as to residents. *Sprague v. Fletcher*, 69 Vt. 69, 37 Atl. 239, 37 L. R. A. 840; *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 228.

A statute imposing privilege taxes on construction companies which lays a higher tax on companies having their chief office outside the State than on those having it within the State, is repugnant to the constitutional requirement. *Chalker v. Birmingham, etc., R. Co.*, 249 U. S. 522, 63 L. ed. 748, 39 Sup. Ct. Rep. 366.

The right to sue and defend in the courts is one of the highest and most essential privileges of citizenship and must be allowed by each State to the citizens of all other States. *Chambers v. Baltimore, etc., R. Co.*, 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34, affirming 73 Ohio St. 16, 76 N. E. 91; *Canadian Northern Ry. Co. v. Eggen*, 252 U. S. 553, 64 L. ed. 713, 40 Sup. Ct. Rep. 402; *Missouri Pac. R. Co. v. Clarendon Boat Oar Co.*, 257 U. S. 533, 66 L. ed. 354, 42 Sup. Ct. Rep. 210; *State ex rel. Prall v. District Court of Waseca County*, 126 Minn. 501, 148 N. W. 463, Ann. Cas. 1915 D, 198; *Davis v. Minneapolis, etc., R. Co.*, 134 Minn. 455, 159 N. W. 1084; *Deitrick's Admin. v. State Life Ins. Co.*, 107 Va. 602, 59 S. E. 489. But the constitutional requirement is satisfied if the non-resident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens. The power is in the courts, ultimately in the Federal Supreme Court, to determine the adequacy and reasonableness of such terms. *Canadian Northern Ry. Co. v. Eggen*, 252 U. S. 553, 64 L. ed. 713, 40 Sup. Ct. Rep. 402.

Subject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The State policy decides whether and to what extent the State will entertain in its courts transitory

actions, where the causes of action have arisen in other jurisdictions. *Chambers v. Baltimore, etc., R. Co.*, 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34, affirming 73 Ohio St. 16, 76 N. E. 91. See also *Daugherty v. American McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619, L. R. A. 1915 F, 955, Ann. Cas. 1913 D, 568; *State v. District Court of Waseca County*, 126 Minn. 501, 148 N. W. 463, Ann. Cas. 1915 D, 198.

A State statute which provides that when a cause of action has arisen outside the State, and by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintained in the State unless the plaintiff be a citizen of the State who has owned the cause of action ever since it accrued, is not repugnant to the constitutional requirement. *Canadian Northern Ry. Co. v. Eggen*, 252 U. S. 553, 64 L. ed. 713, 40 Sup. Ct. Rep. 402. See also *Loftus v. Pennsylvania R. Co.*, 107 Ohio St. 352, 140 N. E. 94.

Citizen of sister State may sue defendant resident of his home State in any State where he can get service upon him, even though cause of action arose in home State, provided it be transitory. *Eingartner v. Illinois Steel Company*, 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503; *Cofrode v. Gartner*, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511. Insurance laws cannot place greater restrictions upon citizens of other States than upon those of home State. *State v. Board of Ins. Com'rs*, 37 Fla. 564, 20 So. 772, 33 L. R. A. 288.

Agents of non-resident insurers may be required to secure a certificate of authority from the insurance commissioner before insuring property within the State. *People v. Gay*, 107 Mich. 422, 65 N. W. 292, 30 L. R. A. 464.

Citizens of other States cannot be denied right to become trustees by appointment through deeds, mortgages, &c. *Roby v. Smith*, 131 Ind. 342, 30 N. E. 1093, 15 L. R. A. 792.

Dower interests may be restricted to widows of residents. *Buffington v. Grosvenor*, 46 Kan. 730, 27 Pac. 137, 13 L. R. A. 282; *Bennett v. Harms*, 51

Wis. 251, 8 N. W. 222; *Ferry v. Spokane, etc., R. Co.*, 258 U. S. 314, 66 L. ed. 635, 42 Sup. Ct. Rep. 358.

Privilege of selling liquors may be restricted to male inhabitants of State. *Welsh v. State*, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664.

A prohibition amendment to a State Constitution is not violative of the constitutional provision, although it may deprive persons of the right to pursue a business which was previously lawful and diminish the value of property devoted to such business. *Ghera v. State*, 16 Ariz. 344, 146 Pac. 494, Ann. Cas. 1916 D, 94. See also *Saddler v. State*, 148 Ga. 462, 97 S. E. 79; *Gordon v. Corning*, 174 Ind. 337, 92 N. E. 59.

Discrimination in inheritance tax law between nephews and nieces resident within the State and those resident without is void. *Re Mahoney's Estate*, 133 Cal. 180, 65 Pac. 389.

The constitutional provision does not apply to corporations. *Warren Manuf. Co. v. Aetna Ins. Co.*, 2 Paine, 501; *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 8 Sup. Ct. Rep. 737; *Woodward v. Com.*, 7 S. W. Rep. 613 (Ky.); *Phenix Ins. Co. v. Burdett*, 112 Ind. 204, 13 N. E. 705; *Blake v. McClung*, 176 U. S. 59, 44 L. ed. 371, 20 Sup. Ct. Rep. 307; s. c. 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Cumberland Gaslight Co. v. West Virginia & Maryland Gas Co.*, 110 C. C. A. 383, 188 Fed. 585; *Bracey v. Durst*, 218 Fed. 482; *Chicago, etc., R. Co. v. State*, 86 Ark. 412, 111 S. W. 456, affirmed 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275; *Adams v. American Agricultural Chemical Co.*, 78 Fla. 362, 82 So. 850; *People v. Woman's Home Missionary Soc.*, 304 Ill. 418, 135 N. E. 749; *Schmidt v. City of Indianapolis*, 168 Ind. 631, 80 N. E. 632, 14 L. R. A. (N. S.) 787, 120 Am. St. Rep. 385; *Hunter v. Colfax Consol. Coal Co.*, 175 Iowa, 245, 154 N. W. 1037, L. R. A. 1917 D, 15; *Arizona Commercial Mining Co. v.*

*Iron Cap Copper Co.*, 236 Mass. 185, 128 N. E. 4; *State v. Louisville, etc., R. Co.*, 97 Miss. 35, 51 So. 918, Ann. Cas. 1912 C, 1150; *Bethlehem Motors Corporation v. Flynt*, 178 N. C. 399, 100 S. E. 693; *Independent Tug Line v. Lake Superior Lumber & Box Co.*, 146 Wis. 121, 131 N. W. 408.

A discrimination between local freight on railroads and that which is extra-territorial is not personal, and therefore not forbidden by this clause of the Constitution. *Shipper v. Pennsylvania R. R. Co.*, 47 Pa. St. 338.

This clause does not forbid requiring security for costs from non-resident plaintiffs. *Cummings v. Wingo*, 30 S. C. 611, 10 S. E. 107.

See, for taxes which are forbidden by it, *post*, 1006, note 3.

A statute allowing pauper citizens of the State and pauper aliens who have been domiciled in the State for three years to prosecute law suits without paying the court costs in advance or as they accrue and without giving bond for costs, does not violate the constitutional provision. *White v. Walker*, 136 La. 464, 67 So. 332.

A State cannot give priority to creditors residing within its boundaries over those of the same class residing without. *Blake v. McClung*, 176 U. S. 59, 44 L. ed. 371, 20 Sup. Ct. Rep. 307; s. c. 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Sully v. American Nat'l Bk.*, 178 U. S. 289, 44 L. ed. 1072, 20 Sup. Ct. Rep. 935; *American & British Mfg. Co. v. International Power Co.*, 173 App. Div. 319, 159 N. Y. Supp. 582; see also *Bertram v. Jones*, 205 Ky. 691, 266 S. W. 385.

A conveyance, which the courts of the State wherein it was made held void as against the citizens of that State, the Federal courts will hold void as against the citizens of other States. *Smith M. P. Co. v. McGroarty*, 136 U. S. 237, 34 L. ed. 346, 10 Sup. Ct. Rep. 1017.

The mere fact that a partnership was organized under the laws of another State is not sufficient to justify the imposition of conditions upon its doing business within the State not required of local partnerships. *State*

*v. Cadigan*, 73 Vt. 245, 50 Atl. 1079, 57 L. R. A. 666, 87 Am. St. 714.

The constitutional provision is not violated by requiring plaintiff to have been a bona fide resident of the State for not less than six months preceding the filing of a petition for attachment. *Tanner v. De Vinney*, 101 Neb. 46, 161 N. W. 1052.

A State statute under which a riparian owner may be prevented from diverting the waters of a stream of the State into any other State, for use therein, does not violate the constitutional provision. *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, affirming 70 N. J. Eq. 695, 65 Atl. 489, 118 Am. St. Rep. 754, 14 L. R. A. (N. S.) 197, 10 Ann. Cas. 116. Nor is it violated by a State statute which provides that in the employment of persons for the construction of public works citizens of the State must be given preference. *Heim v. McCall*, 239 U. S. 175, 60 L. ed. 206, 36 Sup. Ct. Rep. 78, Ann. Cas. 1917 B, 287, affirming 214 N. Y. 629, 108 N. E. 1095.

Further as to what particular rights are given by this constitutional provision, see *Chambers v. Baltimore*, etc. R. Co., 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34, affirming 73 Ohio St. 16, 76 N. E. 91; *Armour & Co. v. Virginia*, 246 U. S. 1, 62 L. ed. 547, 38 Sup. Ct. Rep. 267, affirming 118 Va. 242, 87 S. E. 610; *La Tourette v. McMaster*, 248 U. S. 465, 63 L. ed. 362, 39 Sup. Ct. Rep. 160; *Maxwell v. Bugbee*, 250 U. S. 525, 63 L. ed. 1124, 40 Sup. Ct. Rep. 2; *Shaffer v. Carter*, 252 U. S. 37, 64 L. ed. 445, 40 Sup. Ct. Rep. 221; *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 228; *United States v. Wheeler*, 254 U. S. 281, 65 L. ed. 270, 41 Sup. Ct. Rep. 133; *Ownbey v. Morgan*, 256 U. S. 94, 65 L. ed. 837, 41 Sup. Ct. Rep. 433; *Haavik v. Alaska Packers' Ass'n*, 263 U. S. 510, 68 L. ed. 414, 44 Sup. Ct. Rep. 177; *William R. Compton Co. v. Allen*, 216 Fed. 537; *Cottrell v. Sperry & Hutchinson Co.*, 227 Fed. 256; *Adams v. Thomas*, 246 Fed. 175; *Keeley v. Evans*, 271 Fed. 520; *In re Soderberg*,

26 Ariz. 404, 226 Pac. 210; *Quong Ham Wah Co. v. Industrial Acc. Commission*, 184 Cal. 26, 192 Pac. 1021; *People v. Batkin*, 9 Cal. App. 244, 98 Pac. 861; *Smith v. Farr*, 46 Colo. 364, 104 Pac. 401; *Leonard v. Reed*, 46 Colo. 307, 104 Pac. 410, 133 Am. St. Rep. 77; *South Georgia Mercantile Co. v. Lance*, 143 Ga. 530, 85 S. E. 749; *Lehon v. City of Atlanta*, 16 Ga. App. 64, 84 S. E. 608, affirmed 242 U. S. 53, 61 L. ed. 145, 37 Sup. Ct. Rep. 70; *State v. Butterfield Live Stock Co.*, 17 Idaho, 441, 106 Pac. 455, 26 L. R. A. (N. S.) 1224, 134 Am. St. Rep. 263; *In re McWhirter's Estate*, 235 Ill. 607, 85 N. E. 918; *Daugherty v. American McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619, L. R. A. 1915 F, 955, Ann. Cas. 1913 D, 568; *Pratt v. Hawley*, 297 Ill. 244, 130 N. E. 793; *Gordon v. Corning*, 174 Ind. 337, 92 N. E. 59; *Brown & Bennett v. Powers*, 146 Iowa, 729, 125 N. W. 833; *Bracken v. Dinning*, 140 Ky. 348, 131 S. W. 19; *State v. Nolan*, 108 Minn. 170, 122 N. W. 255; *State v. District Court of Waseca County*, 126 Minn. 501, 148 N. W. 463, Ann. Cas. 1915 D, 198; *State v. Senatobia Book & Stationery Co.*, 115 Miss. 254, 76 So. 258; *Ex parte Goddard*, 44 Nev. 128, 190 Pac. 916; *State v. Stevens*, 78 N. H. 268, 99 Atl. 723; *People v. Griswold*, 213 N. Y. 92, 106 N. E. 929, L. R. A. 1915 D, 538, affirming 151 App. Div. 933, 135 N. Y. Supp. 1132; *Klatz v. Angle*, 220 N. Y. 347, 116 N. E. 24, affirming 166 App. Div. 963, 151 N. Y. Supp. 1125; *Wierse v. Thomas*, 145 N. C. 261, 59 S. E. 58, 15 L. R. A. (N. S.) 1008, 122 Am. St. Rep. 446; *Com. v. Shaleen*, 215 Pa. St. 595, 64 Atl. 797; *State v. Rosenkrans*, 30 R. I. 374, 75 Atl. 491, 19 Ann. Cas. 824, affirmed 225 U. S. 698, 56 L. ed. 1263, 32 Sup. Ct. Rep. 840; *Santee Mills v. Query*, 122 S. C. 158, 115 S. E. 202; *State v. Ashman*, 123 Tenn. 654, 135 S. W. 325; *Wright v. Jackson*, 138 Tenn. 145, 196 S. W. 488; *De Grazier v. Stephens*, 101 Tex. 194, 105 S. W. 992, 16 L. R. A. (N. S.) 1033, 16 Ann. Cas. 1059; *Barfield v. State*, 62 Tex. Cr. Rep. 400, 137 S. W. 920; *Pistole v. State*, 68 Tex. Cr. Rep. 127, 150 S. W. 618; *State v. Frear*, 148 Wis. 456, 134 N.

justice shall be delivered up,<sup>1</sup> and that full faith and credit shall be given in each State to the public acts, records, and judicial proceed-

W. 673, L. R. A. 1915 B, 569, Ann. Cas. 1913 A, 1147; *In re Bolens*, 148 Wis. 456, 135 N. W. 164, L. R. A. 1915 B, 606, Ann. Cas. 1913 A, 1147; *Konkel v. State*, 168 Wis. 335, 170 N. W. 715.

An unconstitutional discrimination by a State against the citizens of other States will not be cured if those States establish a like discrimination against the citizens of the State in question. *Travis v. Yale & Towne Mfg. Co.*, 252 U. S. 60, 64 L. ed. 460, 40 Sup. Ct. Rep. 228.

For an instructive discussion of the doctrine of the "Privileges and Immunities of Citizens in the Several States", see article by Wm. J. Meyers in 1 Mich. Law Rev. 286, 364.

<sup>1</sup> *Extradition as between the States.* — The return by one State of fugitives from justice which have fled to it from another State is only made a matter of rightful demand by the provisions of the Federal Constitution. In the absence of such provisions, it might be provided for by State law; but the Constitution makes that obligatory which otherwise would rest in the imperfect and uncertain requirements of interstate comity. The subject has received much attention from the courts when having occasion to consider the nature and extent of the constitutional obligation. It has also been the subject of many executive papers; and several controversies between the executives of New York and those of more southern States, are referred to in the recent *Life of William H. Seward*, by his son. See also *Hyatt v. People*, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 63 L. R. A. 471, affirming 172 N. Y. 176, 64 N. E. 825, 60 L. R. A. 774, 92 A. S. R. 706.

Upon extradition between States, see note to 36 L. ed. U. S. 934; upon extradition interstate and international, see note to 41 L. ed. U. S. 1064. See also *Whitten v. Tomlinson*, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297, and note to 40 L. ed. U. S. 406.

The following are among the judicial decisions: The constitutional pro-

vision and the Federal statutes enacted in pursuance thereof deal merely with the conditions under which one State may demand rendition from another. They do not limit the power of a State to arrest, within its borders, a citizen of another State for a crime committed elsewhere; nor do they prescribe the manner in which such arrests may be made. These are matters left wholly to the individual States. *Burton v. New York, etc., R. Co.*, 245 U. S. 315, 62 L. ed. 314, 38 Sup. Ct. Rep. 108.

All the provisions of the Federal law relating to requisitions must be strictly observed and respected. *Ex parte Owen*, 10 Okla. Crim. Rep. 284, 136 Pac. 197, Ann. Cas. 1916 A, 522.

The offense for which extradition may be ordered need not have been an offense either at the common law or at the time the Constitution was adopted; it is sufficient that it was so at the time the act was committed, and when demand is made. *Matter of Clark*, 9 Wend. 212; *People v. Donohue*, 84 N. Y. 438; *Johnston v. Riley*, 13 Ga. 97; *Matter of Fetter*, 23 N. J. L. 311; *Matter of Voorhees*, 32 N. J. L. 141; *Morton v. Skinner*, 48 Ind. 123; *Matter of Hughes*, Phill. (N. C.) 57; *Kentucky v. Dennison*, 24 How. 66, 16 L. ed. 717; *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 748; *In re Hooper*, 52 Wis. 699, 58 N. W. 741.

The words "treason, felony, or other crime", in the Constitution, include every offense, from the highest to the lowest, known to the law of the State from which the accused had fled, including misdemeanors. *Kentucky v. Dennison*, 24 How. 66, 16 L. ed. 717; *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; *Ross v. Crofutt*, 84 Conn. 370, 80 Atl. 90, Ann. Cas. 1912 C, 1295; *State v. Stewart*, 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388.

U. S. Rev. Stat. § 5278, Comp. Stat. 1913, § 10, 126, expressly or by necessary implication prohibits the surrender of a person in one State for

removal as a fugitive to another where it clearly appears that the person was not and could not have been a fugitive from the justice of the demanding State. *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148, 5 Am. Crim. Rep. 218; *Hyatt v. New York*, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456, 12 Am. Crim. Rep. 311; *Bassing v. Cady*, 208 U. S. 386, 52 L. ed. 584, 28 Sup. Ct. Rep. 392, 13 Ann. Cas. 905; *Innes v. Tobin*, 240 U. S. 127, 60 L. ed. 562, 36 Sup. Ct. Rep. 290, affirming 77 Tex. Crim. 351, 173 S. W. 291, L. R. A. 1916 C, 1251. The offense must have been actually committed within the State making the demand, and the accused must have fled therefrom. *Ex parte Smith*, 3 McLean, 121; *Jones v. Leonard*, 50 Iowa, 106, 32 Am. Rep. 116; *Hartman v. Aveline*, 63 Ind. 344; *Wilcox v. Nolze*, 34 Ohio St. 520; *Hogan v. O'Neill*, 255 U. S. 52, 56, 65 L. ed. 497, 500, 41 Sup. Ct. Rep. 222, 223; *In re Roberson*, 38 Nev. 326, 149 Pac. 182, L. R. A. 1915 E, 691; *Gottschalk v. Brown*, 237 N. Y. 483, 143 N. E. 653, 32 A. L. R. 1164; *Ex parte Coleman*, 53 Tex. Co. Rep. 99, 113 S. W. 17; *Ex parte McDaniel*, 76 Tex. Cr. Rep. 184, 173 S. W. 1018, Ann. Cas. 1917 B, 335. "Presence of the accused in the State at the time that the crime was, if ever, committed, is sufficient proof to justify the arrest and delivery of the accused as a fugitive from justice." *People ex rel. Gottschalk v. Brown*, 237 N. Y. 483, 143 N. E. 653, 32 A. L. R. 1164.

To be a fugitive it is not necessary that one should have left the State after indictment found, or to avoid prosecution; but simply that, having committed a crime within it, he is when sought found in another State. *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; *State v. Richter*, 37 Minn. 436, 35 N. W. 9; *Hyatt v. People*, 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456; *Appleyard v. Massachusetts*, 203 U. S. 222, 27 Sup. Ct. Rep. 122, 51 L. ed. 161, 7 Ann. Cas. 1073; *Drew v. Thaw*, 235 U. S. 432, 59 L. ed. 302, 35 Sup. Ct. Rep. 137; *Hogan v. O'Neill*, 255 U. S. 52, 65 L. ed. 497, 41 Sup. Ct. Rep. 222;

*Farrell v. Hawley*, 78 Conn. 150, 61 Atl. 502, 112 Am. St. Rep. 98, 70 L. R. A. 686, 3 Ann. Cas. 874; *Taft v. Lord*, 92 Conn. 539, 103 Atl. 644, L. R. A. 1918 E, 545; *State v. Wellman*, 102 Kan. 503, 170 Pac. 1052, L. R. A. 1918 D, 949, Ann. Cas. 1918 D, 1006; *Ex parte Williams*, 10 Okla. Crim. Rep. 344, 136 Pac. 597, 51 L. R. A. (N. S.) 668; *Ex parte McDaniel*, 76 Tex. Crim. Rep. 184, 173 S. W. 1018, Ann. Cas. 1917 B, 335; *In re Henke*, 172 Wis. 36, 177 N. W. 880, 13 A. L. R. 409. An escaped prisoner is a fugitive. *Drinkall v. Spiegel*, 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486.

The criminal need not do within the State every act necessary to complete the crime. If he does there an overt act which is and is intended to be a material step toward accomplishing the crime, and then absents himself from the State and does the rest elsewhere, he becomes a fugitive from justice when the crime is complete, if not before. *Strassheim v. Daily*, 221 U. S. 280, 55 L. ed. 735, 31 Sup. Ct. Rep. 558; *In re Sultan*, 115 N. C. 57, 20 S. E. 375, 44 Am. St. Rep. 433, 28 L. R. A. 294. But a person standing in one State and shooting across the boundary line and injuring one in another State is not a fugitive from justice in the first State. *State v. Hall*, 115 N. C. 811, 20 S. E. 729, 44 Am. St. 501.

A person is "charged" with a crime, within the meaning of the Constitution, when a complaint for a felony has been filed against him before a committing magistrate who can only discharge or hold for trial before another tribunal. *Matter of Strauss*, 197 U. S. 324, 49 L. ed. 774, 25 Sup. Ct. Rep. 535.

The accused may be arrested to await demand. *State v. Buzine*, 4 Harr. 572; *Ex parte Cubreth*, 49 Cal. 436; *Ex parte Rosenblat*, 51 Cal. 285. See *Tullis v. Fleming*, 69 Ind. 15. But one cannot lawfully be arrested on a telegram from officers in another State and without warrant. *Malcolmson v. Scott*, 56 Mich. 459, 23 N. W. 166. Nor can he be surrendered before formal demand is made, and parties who seize and deliver him up without demand

will be liable for doing so. *Botts v. Williams*, 17 B. Monr. 677. Still if he is returned without proper papers to the State from whence he fled, or if his presence therein is secured by illegal methods, this will be no sufficient ground for his discharge from custody. *Dow's Case*, 18 Pa. St. 37; *Pettibone v. Nichols*, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111; *Mayer v. Nichols*, 203 U. S. 221, 51 L. ed. 160, 27 Sup. Ct. Rep. 121; see also *ex parte Wilson*, 63 Tex. Crim. Rep. 281, 140 S. W. 98, 36 L. R. A. (N. S.) 243. Even forceable and unlawful abduction of a citizen gives a State no right to demand his release. *Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204; *Cook v. Hart*, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40. The question whether after such abduction in another country a State court will try a person, is not a Federal question. *Ker v. Illinois*, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225.

Where one who has violated the criminal laws of a State without having been present therein is surrendered to such State by another State, although such surrender is without authority, the fact that the accused was not in the demanding State at the time of the offense, or since then, does not deprive its courts of jurisdiction to try him therefor, nor does it show such an abuse of process as to warrant the dismissal of the case against him. *State v. Wellman*, 102 Kan. 503, 170 Pac. 1052, L. R. A. 1918 D, 949, Ann. Cas. 1918 D, 1006.

The charge must be made before a magistrate of the State where the offense was committed. *Smith v. State*, 21 Neb. 552, 32 N. W. 594.

The demand is to be made by the executive of the State, by which is meant the governor: *Com. v. Hall*, 9 Gray, 262, and it is the duty of the executive of the State to which the offender has fled to comply: *Johnston v. Riley*, 13 Ga. 97; *Ex parte Swearingen*, 13 S. C. 74; *People v. Pinkerton*, 77 N. Y. 245; *Work v. Corrington*, 34 Ohio St. 64, 32 Am. Rep. 345; *In re Opinion of Justices*, 201 Mass. 609, 89 N. E. 174, 24 L. R. A. (N. S.) 799, but

if he refuses to do so, the courts have no power to compel him: *Kentucky v. Dennison*, 24 How. 66, 16 L. ed. 717; *Matter of Manchester*, 5 Cal. 237; *Ex parte Ray*, 215 Mich. 156, 183 N. W. 774.

He must determine for himself, in the first place, as to whether or not the demand made is in compliance with the law, and as to whether or not the person whose return is sought is in fact a fugitive from justice; but his decision is subject to review by the courts in *habeas corpus* proceedings. *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; *Pettibone v. Nichols*, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111, 7 Ann. Cas. 1047; *Bassing v. Cady*, 208 U. S. 386, 52 L. ed. 540, 28 Sup. Ct. Rep. 392, 13 Ann. Cas. 905; *Hogan v. O'Neill*, 255 U. S. 52, 65 L. ed. 497, 41 Sup. Ct. Rep. 222; *Farrell v. Hawley*, 78 Conn. 150, 61 Atl. 502, 112 Am. St. Rep. 98, 70 L. R. A. 686, 3 Ann. Cas. 874; *State v. Clough*, 72 N. H. 178, 55 Atl. 554, 67 L. R. A. 946, affirmed 196 U. S. 364, 25 Sup. Ct. Rep. 282, 49 L. ed. 515; *Ex parte Owen*, 10 Okla. Crim. Rep. 284, 136 Pac. 197, Ann. Cas. 1916 A, 522. See also *Dennison v. Christian*, 72 Neb. 703, 101 N. W. 1045, 117 Am. St. Rep. 817; *In re Tod*, 12 S. D. 386, 81 N. W. 637, 47 L. R. A. 566.

He is not obliged to demand proof, independent of the requisition papers, that the person whose surrender is demanded is a fugitive from justice. His failure to require such proof cannot be regarded as an infringement of any constitutional right of such person. *Pettibone v. Nichols*, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111; *Mayer v. Nichols*, 203 U. S. 221, 51 L. ed. 160, 27 Sup. Ct. Rep. 121.

After the requisition is issued and complied with, it is competent for the courts of either State on *habeas corpus* to look into the papers, and if they show no sufficient legal cause, to order the prisoner's discharge. *Ex parte Smith*, 3 McLean, 121; *Matter of Clark*, 9 Wend. 212; *Matter of Manchester*, 5 Cal. 237; *Matter of Hey-*

ward, 1 Sandf. 701; *Ex parte White*, 49 Cal. 484; *State v. Hufford*, 28 Iowa, 391; *People v. Brady*, 56 N. Y. 182; *Kingsbury's Case*, 106 Mass. 223; *Ex parte McKean*, 3 Hughes, 23; *Jones v. Leonard*, 50 Iowa, 106, 32 Am. Rep. 116; *Ex parte Powell*, 20 Fla. 806; *State v. Richardson*, 34 Minn. 115, 24 N. W. 354; *In re Mohr*, 73 Ala. 503. As to the showing required, see *State v. Swope*, 72 Mo. 399; *Ex parte Sheldon*, 34 Ohio St. 319; *Ham v. State*, 4 Tex. App. 645.

But it has been held that the courts of a State will not review the decision of the Governor in extradition proceedings upon a question of fact made before him, which the law makes it his duty to decide, and upon which there was evidence pro and con. *Dennison v. Christian*, 72 Neb. 703, 101 N. W. 1045, 117 Am. St. Rep. 817.

The prisoner should not be discharged merely because, in the judgment of the court, the evidence as to his being a fugitive from justice was not so full as might properly have been required, or because it was so meager as perhaps to admit of a conclusion different from that reached by the Governor. *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148. The Governor's conclusion that the prisoner was a fugitive from justice must stand unless clearly overthrown. *Hogan v. O'Neill*, 255 U. S. 52, 65 L. ed. 497, 41 Sup. Ct. Rep. 222.

A novel question was raised in *In re Maney*, 20 Wash. 509, 55 Pac. 930, 72 Am. St. 130. A sheriff while conducting a prisoner from one part of Idaho to another part of the same State, passed through a portion of the State of Washington. His prisoner in this latter State invoked the aid of the writ of *habeas corpus* on the theory that he was unlawfully detained. Writ denied.

If one is brought under extradition proceedings into the State where the crime was committed, he will not be discharged by it for defects in proceedings, except on application of officers of the State from which he has been taken. *Ex parte Barker*, 87 Ala. 4, 6 So. 7.

In *habeas corpus* to prevent removal to another jurisdiction of one in custody in an extradition proceeding, the court will not inquire into the question of the invalidity of a statute, or the sufficiency of the indictment, since these are questions primarily for the trial court in the jurisdiction where the indictment was found. *Whitaker v. Hitt*, 52 App. D. C. 149, 285 Fed. 797, 27 A. L. R. 951.

The Federal courts have no power to compel the State authorities to fulfill their duties under this clause of the Constitution. *Kentucky v. Dennison*, 24 How. 66, 16 L. ed. 717.

The executive may revoke his warrant, if satisfied it ought not to have issued. *Work v. Corrington*, 34 Ohio St. 64, 32 Am. Rep. 345. A governor may revoke his warrant at any time before the alleged fugitive has been removed from the State. *State v. Toole*, 69 Minn. 104, 72 N. W. 53, 38 L. R. A. 224; *State ex rel. Falconer v. Eberstein*, 105 Neb. 833, 182 N. W. 500.

When once within the custody of the demanding State, the prisoner may be tried for any crime there charged against him. *Lascelles v. Georgia*, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687; *State v. McNaspy*, 58 Kan. 691, 817, 38 L. R. A. 756, 50 Pac. 895; *Re Little*, 129 Mich. 454, 89 N. W. 38, 57 L. R. A. 295; *Innes v. Tobin*, 240 U. S. 127, 60 L. ed. 562, 36 Sup. Ct. Rep. 290, affirming 77 Tex. Crim. Rep. 351, 173 S. W. 291, L. R. A. 1916 C, 1251; *People v. Martin*, 188 Cal. 281, 205 Pac. 121, 21 A. L. R. 1399; *Knox v. State*, 164 Ind. 226, 73 N. E. 255, 3 Ann. Cas. 539, 108 A. S. R. 291; *In re Flack*, 88 Kan. 616, 129 Pac. 541, 47 L. R. A. (n. s.) 807, Ann. Cas. 1914 B, 789, overruling *State v. Hall*, 40 Kan. 338, 19 Pac. 918, 10 A. S. R. 200; *Taylor v. Commonwealth*, 29 Ky. L. Rep. 714, 96 S. W. 440; *Rutledge v. Krauss*, 73 N. J. L. 397, 63 Atl. 988; *In re Thaw*, 167 App. Div. 104, 152 N. Y. Supp. 771; *State ex rel. Brown v. Stewart*, 60 Wis. 587, 19 N. W. 429. And may be sued in civil suit. *Reid v. Ham*, 54 Minn. 305, 56 N. W. 35, 21 L. R. A. 232, 40 Am. St. 333. But a State into which is brought a citizen

and resident of another State upon criminal process to answer for an offense alleged to have been committed while in the State of his residence, will not upon his discharge, and before he has an opportunity to return, forcibly retain him to answer for an act of omission since he was brought into the State, unless such omission was conscious and willful on his part. *In re Fowles*, 89 Kan. 430, 131 Pac. 598, 47 L. R. A. (N. S.) 227.

A person who has been extradited, tried and acquitted, may be surrendered to another State upon an extradition warrant, without returning him to the State from which he was originally extradited. *Innes v. Tobin*, 240 U. S. 127, 60 L. ed. 562, 36 Sup. Ct. Rep. 290, affirming 77 Tex. Crim. Rep. 351, 173 S. W. 291, L. R. A. 1916 C, 1251.

The constitutional requirement does not create a preference in the enforcement of the laws in favor of the demanding State. It has no application to a case where the offender is, at the time, held to answer for an offense against the laws of the State in which he has taken refuge. *In re Opinion of Justices*, 201 Mass. 609, 89 N. E. 174, 24 L. R. A. (N. S.) 799. See also *Carpenter v. Lord*, 88 Oreg. 128, 171 Pac. 577, L. R. A. 1918 D, 674.

Where a person is charged in two States with the commission of a separate offense in each, and has been arrested in one of them, such State has exclusive jurisdiction of the alleged offender until the demands of its laws are satisfied. Nevertheless the Governor of such State may honor the requisition of the Governor of a demanding State and such surrender of the prisoner will operate as a waiver of the jurisdiction of the asylum State. *State ex rel. Falconer v. Eberstein*, 105 Neb. 833, 182 N. W. 500. See also *Ex parte McDaniel*, 76 Tex. Crim. Rep. 184, 173 S. W. 1018, Ann. Cas. 1917 B, 335.

Where an offense was committed in a territory which subsequently became a State the State may exercise the right to extradite the offender. *Ex parte McCarthy*, 56 Tex. Crim. Rep.

209, 119 S. W. 682, 133 A. S. R. 964.

For other questions relating to extradition between the States, see *Pettibone v. Nichols*, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111, 7 Ann. Cas. 1047; *Moyer v. Nichols*, 203 U. S. 221, 51 L. ed. 160, 27 Sup. Ct. Rep. 121, affirming 12 Idaho, 250, 85 Pac. 897, 12 L. R. A. (N. S.) 227, 118 A. S. R. 214; *Bassing v. Cady*, 208 U. S. 386, 52 L. ed. 540, 28 Sup. Ct. Rep. 392; *Burton v. New York, etc., R. Co.*, 245 U. S. 315, 62 L. ed. 314, 38 Sup. Ct. Rep. 108; *Ex parte Hart*, 63 Fed. 249, 28 L. R. A. 801; *Farrell v. Hawley*, 78 Conn. 150, 61 Atl. 502, 70 L. R. A. 686, 3 Ann. Cas. 874, 112 A. S. R. 98; *Ex parte Ray*, 215 Mich. 156, 183, N. W. 774; *In re Thaw*, 167 App. Div. 104, 152 N. Y. Supp. 771; *In re Sultan*, 115 N. C. 57, 20 S. E. 375, 28 L. R. A. 294, 44 Am. St. Rep. 433; *State v. Knowles*, 94 Wash. 351, 162 Pac. 518.

*Extradition to foreign countries* is purely a national power, to be exercised under treaties. *Holmes v. Jennison*, 14 Pet. 540, 10 L. ed. 579; *Ex parte Holmes*, 12 Vt. 631; *People v. Curtis*, 50 N. Y. 321.

Upon interstate and international extradition, see note to 41 L. ed. U. S. 1046. See also *Whitten v. Tomlinson*, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297, and note to 40 L. ed. U. S. 406.

In *Neeley v. Henkel*, 180 U. S. 109, 126, 45 L. ed. 448, 457, 21 Sup. Ct. Rep. 308, the question of the validity of an act providing for extradition to foreign countries or to countries occupied by the United States was before the court and the act sustained as applicable to Cuba before that island was turned over to the home government after the Spanish war.

In the absence of a treaty there is no obligation to deliver a fugitive: *U. S. v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234; but by virtue of such a treaty an American criminal resident in a foreign country gets no right of asylum there so that he may not be removed therefrom by a State except under the provisions of the treaty. *Ker v. Illinois*, 119 U. S.



ings of every other State.<sup>1</sup> Many cases have been decided under these several provisions, the most important of which are collected in the marginal notes. The last provisions that we shall here notice

436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225. Foreign governments must make the application, not individuals. *In re Ferrelle*, 28 Fed. Rep. 878.

That where a person is extradited from another country on one charge, he should be discharged if not held upon that, see *Commonwealth v. Hawes*, 13 Bush, 697; *State v. Vanderpool*, 39 Ohio St. 272; *Blandford v. State*, 10 Tex. App. 627; *U. S. v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234; *Johnson v. Browne*, 205 U. S. 309, 51 L. ed. 816, 27 Sup. Ct. Rep. 539, 10 Ann. Cas. 636; *Greene v. United States*, 85 C. C. A. 251, 154 Fed. 401, certiorari denied 207 U. S. 596, 52 L. ed. 357, 28 Sup. Ct. Rep. 261; *Dominguez v. State*, 90 Tex. Crim. Rep. 92, 234 S. W. 79, 18 A. L. R. 503. But see *In re Miller*, 23 Fed. 32. But when he is surrendered as a matter of comity and not under treaty stipulations, and the indictment is set aside as being defective, he is liable to arrest upon a subsequent complaint for same offense. *Re Foss*, 102 Cal. 347, 36 Pac. 669, 25 L. R. A. 593, and note.

<sup>1</sup>Const. of U. S. art. 4. This covers territorial judgments. *Suesenbach v. Wagner*, 41 Minn. 108, 42 N. W. Rep. 925.

This clause of the Constitution has been the subject of a good deal of discussion in the courts. See notes to 3 L. ed. U. S. 411, 12 L. R. A. 574, 7 L. R. A. 578, 4 L. R. A. 131, 1 L. R. A. 79. See also *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269, aff. 142 Mass. 47, 6 N. E. 782. See note on this case, 4 Har. L. Rev. 93.

The clause "is not to be confused with the rule relating to construction of statutes by comity so as to conform to the ruling of the highest court of the State which enacted the statute. In the former, a State court is bound to recognize a judgment of another

State; in the latter, where a judgment is not directly involved, the courts of a sister State will, by comity, under similar facts and where the course of decisions has been uniform, adopt the decision of the highest tribunal of the State enacting the statute, as to the construction to be given the act." *Nesbitt v. Clark*, 272 Pa. St. 161, 116 Atl. 404, 25 A. L. R. 1406. "The requirement of the Constitution is not that same, but that full faith and credit shall be given by States to the judicial decrees of other States. That is to say, where a decree rendered in one State is embraced by the full faith and credit clause that constitutional provision commands that the other States shall give to the decree the force and effect to which it was entitled in the State where rendered." *Haddock v. Haddock*, 201 U. S. 562, 567, 50 L. ed. 867, 26 Sup. Ct. Rep. 525.

The courts of one State are not required to regard as conclusive any judgment of the court of another State which had no jurisdiction of the subject or of the parties. *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648; *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; *Bigelow v. Old Dominion Copper Min. etc., Co.*, 225 U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641, Ann. Cas. 1913 E, 875, affirming 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (n. s.) 314; *Baker v. Baker*, 242 U. S. 394, 61 L. ed. 386, 37 Sup. Ct. Rep. 152; *Marin v. Augedahl*, 247 U. S. 142, 62 L. ed. 1038, 38 Sup. Ct. Rep. 452; *Hancock's Estate*, 156 Cal. 804, 106 Pac. 58, 134 Am. St. Rep. 177; *Gordon v. Hillman*, 47 Cal. App. 571, 191 Pac. 62; *Gildersleeve v. Gildersleeve*, 88 Conn. 689, 92 Atl. 684, Ann. Cas. 1916 B, 920; *Forsyth v. Barnes*, 228 Ill. 326, 81 N. E. 1028, 10 Ann. Cas. 710; *Tootle v. McClellan*, 7 Indian Terr. 64, 103 S. W. 766, 12 L. R. A. (n. s.) 941; *Cohn, Baer & Berman v. Bromberg*, 185 Iowa, 298, 170 N. W. 478; *Cuy-*

*kendall v. Doe*, 129 Iowa, 453, 105 N. W. 698, 113 Am. St. Rep. 472, 3 L. R. A. (N. S.) 449; *Ashby v. Manley*, 191 Iowa, 113, 181 N. W. 869; *Walker v. Walker*, 125 Md. 649, 94 Atl. 346, Ann. Cas. 1916 B, 934; *Chicago Title, etc., Co. v. Smith*, 185 Mass. 363, 70 N. E. 426, 102 Am. St. Rep. 350; *Boyle v. Musser-Sauntry Land, etc., Co.*, 88 Minn. 456, 93 N. W. 520, 97 Am. St. Rep. 538; *Moe v. Shaffer*, 150 Minn. 114, 184 N. W. 785, 18 A. L. R. 1194; *Olmsted v. Olmsted*, 190 N. Y. 458, 83 N. E. 569, 123 Am. St. Rep. 585; *In re Crawford*, 68 Ohio St. 58, 67 N. E. 156, 96 Am. St. Rep. 648; *Roller v. Murray*, 71 W. Va. 161, 76 S. E. 172, L. R. A. 1915 F, 984, Ann. Cas. 1914 B, 1139. See also *In re Estate of Coppack*, 72 Mont. 431, 234 Pac. 258, 39 A. L. R. 1152.

The constitutional provision establishes a rule of evidence. It does not affect questions of jurisdiction. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269, affirming 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657; *Douglas v. Gyulai*, 144 La. 213, 80 So. 258; *Gasquet's Interdiction*, 147 La. 722, 85 So. 884; *Beilman v. Poe*, 138 Md. 486, 114 Atl. 568; *Old Dominion Copper Min., etc., Co. v. Bigelow*, 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314; *Marshall v. Owen*, 171 Mich. 232, 137 N. W. 204; *Clark v. Morehouse*, 74 N. J. Eq. 658, 70 Atl. 307; *Anglo-American Provision Co. v. Davis Provision Co.*, 169 N. Y. 506, 62 N. E. 587, 88 Am. St. Rep. 608, affirmed 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92; *De Vall v. De Vall*, 57 Ore. 128, 109 Pac. 755, 110 Pac. 705. Nor does it give to a judgment any extraterritorial effect. *Gasquet v. Fenner*, 247 U. S. 16, 62 L. ed. 956, 38 Sup. Ct. Rep. 416, affirming 235 Fed. 997; *National Circle Daughters of Isabella v. National Order of the Daughters of Isabella*, 232 Fed. 907; *Anthony v. Tarpley*, 45 Cal. App. 72, 187 Pac. 779; *Beilman v. Poe*, 139 Md. 486, 114 Atl. 568; *Levine v. Levine*, 95 Ore. 94, 187 Pac. 609. The jurisdiction of the court is always

open to inquiry. *Guaranty Tr. & S. Dep. Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 35 L. ed. 116, 11 Sup. Ct. Rep. 512; *Streitwolf v. Streitwolf*, 181 U. S. 179, 45 L. ed. 807, 21 Sup. Ct. Rep. 553, aff. 58 N. J. Eq. 563, 41 Atl. 876, 43 Atl. 683, 78 Am. St. 630; *Bell v. Bell*, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551, aff. 157 N. Y. 719, 53 N. E. 1123. "Where the full faith and credit clause of the Constitution is invoked to compel the enforcement in one State of a decree rendered in another, the question of the jurisdiction of the court by which the decree was rendered is open to inquiry. And if there was no jurisdiction either of the subject matter or of the person of the defendant, the courts of another State are not required by virtue of the full faith and credit clause of the Constitution to enforce such decree." *Haddock v. Haddock*, 201 U. S. 562, 573, 26 Sup. Ct. Rep. 525, 50 L. ed. 867.

A Federal court may inquire into the jurisdiction of a State court of another State to render a decree sued upon in the Federal court. *Hekking v. Pfaff*, 91 Fed. 60, 43 L. R. A. 618.

It is well settled that if the record of a judgment shows that it was rendered without service of process or appearance of the defendant, or if that fact can be shown without contradicting the recitals of the record, it will be treated as void in any other State, notwithstanding this constitutional provision. *Kibbe v. Kibbe*, Kirby, 119; *Aldrich v. Kinney*, 4 Conn. 380; *Middlebrooks v. Ins. Co.*, 14 Conn. 301; *Wood v. Watkinson*, 17 Conn. 500; *Bartlett v. Knight*, 1 Mass. 401; *Bissell v. Briggs*, 9 Mass. 462; *Hall v. Williams*, 6 Pick. 232; *Woodworth v. Tremere*, 6 Pick. 354; *Gleason v. Dodd*, 4 Met. 333; *Commonwealth v. Blood*, 97 Mass. 538; *Edson v. Edson*, 108 Mass. 590, 11 Am. Rep. 393; *Kilburn v. Woodworth*, 5 Johns. 37; *Robinson v. Ward's Executors*, 8 Johns. 86; *Fenton v. Garlick*, 8 Johns. 194; *Pawling v. Bird's Executors*, 13 Johns. 192; *Holbrook v. Murray*, 5 Wend. 161; *Bradshaw v. Heath*, 13 Wend. 407; *Noyes v. Butler*, 6 Barb. 613; *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am.

Rep. 299; *Thurber v. Blackbourne*, 1 N. H. 242; *Whittier v. Wendell*, 7 N. H. 257; *Rangely v. Webster*, 11 N. H. 299; *Adams v. Adams*, 51 N. H. 388, 12 Am. Rep. 134; *Wilson v. Jackson*, 10 Mo. 334. See *McLaurine v. Monroe*, 30 Mo. 462; *Bimeler v. Dawson*, 5 Ill. 536; *Warren v. McCarthy*, 25 Ill. 95; *Curtiss v. Gibbs*, 1 Pa. 406; *Rogers v. Coleman*, Hard. 416; *Armstrong v. Harshaw*, 1 Dev. 187; *Norwood v. Cobb*, 24 Texas, 551; *Rape v. Heaton*, 9 Wis. 328; *McCauley v. Hargroves*, 48 Ga. 50, 15 Am. Rep. 660; *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260; *Hood v. State*, 56 Ind. 263; *Lincoln v. Tower*, 2 McLean, 473; *Westervelt v. Lewis*, 2 McLean, 511; *Railroad Co. v. Trimble*, 10 Wall. 367, 19 L. ed. 948; *Board of Public Works v. Columbia College*, 17 Wall. 521, 21 L. ed. 687; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 350; *Van Fossen v. State*, 37 Ohio St. 317; *Cross v. Armstrong*, 44 Ohio St. 613. See *Drake v. Granger*, 22 Fla. 348; *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; *Guaranty Tr. & S. Dep. Co. v. Green Cove Spr. & M. R. Co.*, 139 U. S. 137, 35 L. ed. 116, 11 Sup. Ct. Rep. 92; *Grover & B. S. M. Co. v. Radcliffe*, 137 U. S. 287, 34 L. ed. 670, 11 Sup. Ct. Rep. 92; *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369; *Wabash R. Co. v. Tourville*, 179 U. S. 322, 45 L. ed. 210, 21 Sup. Ct. Rep. 113, aff. 148 Mo. 614, 50 S. W. 300; *Ward v. Boyce*, 152 N. Y. 191, 46 N. E. 180, 36 L. R. A. 549; *Crumlish's Adm'r v. Central Imp. Co.*, 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120; *Baker v. Baker, Eccles & Co.*, 242 U. S. 394, 61 L. ed. 386, 37 Sup. Ct. Rep. 152: "Where a personal judgment has been rendered in the courts of a State against a non-resident merely upon constructive service and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another state in virtue of the full faith and credit clause." But where a husband who has acquired a domicile in a State other than that of the marriage procures a divorce therein,

such decree is not entitled under the full faith and credit clause to obligatory enforcement in the State of the marriage and the domicile of the wife, where she was not personally served with process in the State where the decree was rendered and did not voluntarily submit to the jurisdiction of the court, although there was constructive service of process by publication. *Haddock v. Haddock*, 201 U. S. 562, 50 L. ed. 867, 26 Sup. Ct. Rep. 525. But where the plaintiff is duly domiciled in the State in which he sues for divorce, and such State is the duly established matrimonial domicile of the parties, if the defendant is without the State, reasonable constructive service of notice if authorized by the laws of the State will give the court such jurisdiction that its decree of divorce will be valid throughout the United States. *Atherton v. Atherton*, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544, rev. 155 N. Y. 129, 49 N. E. 933, 40 L. R. A. 291, 63 Am. St. 650; *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. Rep. 525, 50 L. ed. 867.

Whether it would be competent to show, in opposition to the recitals of the record, that a judgment of another State was rendered without jurisdiction having been obtained of the person of the defendant, the authorities are not agreed. Some cases, more particularly the earlier ones, hold not. *Field v. Gibbs*, 1 Pet. C. C. 155; *Green v. Sarmiento*, 1 Pet. C. C. 74; *Lincoln v. Tower*, 2 McLean, 473; *Westervelt v. Lewis*, 2 McLean, 511; *Roberts v. Caldwell*, 5 Dana, 512; *Hensley v. Force*, 7 Eng. 756; *Pearce v. Olney*, 20 Conn. 544; *Hoxie v. Wright*, 2 Vt. 263; *Newcomb v. Peck*, 17 Vt. 302; *Willcox v. Kassick*, 2 Mich. 165; *Bimeler v. Dawson*, 5 Ill. 536; *Welch v. Sykes*, 8 Ill. 197; *Wetherell v. Stillman*, 65 Pa. St. 105; *Lance v. Dugan*, 13 Atl. Rep. 942 (Pa.); *Lockhart v. Locke*, 42 Ark. 17; *Caughran v. Gilman*, 72 Iowa, 570, 34 N. W. 423; *Citizens National Bank v. Consolidated Glass Co.*, 83 W. Va. 1, 97 S. E. 689. But the greater weight of authority holds such evidence admissible. *Starbuck v. Murray*, 5 Wend. 148, 21 Am. Dec. 172; *Holbrook v. Murray*, 5

Wend. 161; *Shumway v. Stillman*, 6 Wend. 447; *Borden v. Fitch*, 15 Johns. 121; *Bartlet v. Knight*, 1 Mass. 401, 2 Am. Dec. 36; *Hall v. Williams*, 6 Pick. 232; *Aldrich v. Kinney*, 4 Conn. 380; *Bradshaw v. Heath*, 13 Wend. 407; *Hoffman v. Hoffman*, 46 N. Y. 30; *Gleason v. Dodd*, 4 Met. 333; *Kane v. Cook*, 8 Cal. 449; *Norwood v. Cobb*, 24 Texas, 551; *Russell v. Perry*, 14 N. H. 152; *Rape v. Heaton*, 9 Wis. 328; *Carleton v. Bickford*, 13 Gray, 591; *McKay v. Gordon*, 34 N. J. L. 286; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Stewart v. Stewart*, 27 W. Va. 167; *Chunn v. Gray*, 51 Texas, 112; *Old Wayne Mutual Life Ass'n v. McDonough*, 204 U. S. 8, 51 L. ed. 345, 27 Sup. Ct. Rep. 236; *Bigelow v. Old Dominion Copper Min., etc., Co.*, 225 U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641, Ann. Cas. 1913 E, 875; *Cooper v. Brazelton*, 68 C. C. A. 188, 135 Fed. 476; *Cohen v. Portland Lodge No. 142 B. P. O. E.*, 140 Fed. 774; *Davis v. Davis*, 164 Fed. 281; *Burt, etc., Lumber Co. v. Bailey*, 175 Fed. 131; *Parker v. Parker*, 137 C. C. A. 627, 222 Fed. 186, certiorari denied 239 U. S. 643, 60 L. ed. 483, 36 Sup. Ct. Rep. 164; *Blue Goose Min. Co. v. Northern Light Min. Co.*, 158 C. C. A. 129, 245 Fed. 727; *Banco de Senora v. Morales*, 23 Ariz. 248, 203 Pac. 328; *Matter of Hancock*, 156 Cal. 804, 106 Pac. 58, 134 Am. St. Rep. 177; *In re Pusey*, 180 Cal. 368, 181 Pac. 648; *In re Culp*, 2 Cal. App. 70, 83 Pac. 89; *Anthony v. Tarpley*, 45 Cal. App. 72, 187 Pac. 779; *Underwood v. Underwood*, 142 Ga. 441, 83 S. E. 208, L. R. A. 1915 B, 674; *Forsyth v. Barnes*, 228 Ill. 326, 81 N. E. 1028, 10 Ann. Cas. 710; *Tootle v. McClellan*, 7 Indian Terr. 64, 103 S. W. 766, 12 L. R. A. (N. s.) 941; *Old Wayne Mut. Life Assoc. v. Flynn*, 31 Ind. App. 473, 68 N. E. 327; *Robinson v. Chicago, etc., R. Co.*, 96 Kan. 137, 150 Pac. 636; *Bryant v. Shute*, 147 Ky. 268, 144 S. W. 28; *Spiker v. American Relief Soc.*, 140 Mich. 225, 103 N. W. 611, 104 N. W. 670; *Marshall v. Owen*, 171 Mich. 232, 137 N. W. 204; *Farrow v. Railway Conductors' Co-op. Protective Assoc.*, 178 Mich. 639, 146 N. W. 147; *Smithman v. Gray*, 203 Mich. 317,

168 N. W. 998; *Moore v. Williams*, 111 Neb. 342, 196 N. W. 695; *Thompson v. Thompson*, 89 N. J. Eq. 70, 103 Atl. 856; *Woodward v. Mutual Reserve Life Ins. Co.*, 178 N. Y. 485, 71 N. E. 10, 102 Am. St. Rep. 519; *White v. Glover*, 138 App. Div. 797, 123 N. Y. Supp. 482; *Gustavus v. Dahlmer*, 98 Misc. 462, 163 N. Y. Supp. 132; *Osborne v. Val O'Farrell Detective Agency*, 175 N. Y. Supp. 860; *Levin v. Gladstein*, 142 N. C. 482, 55 S. E. 371, 115 Am. St. Rep. 747, 32 L. R. A. (N. s.) 905; *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969; *State v. Westmoreland*, 76 S. C. 145, 56 S. E. 673, 8 L. R. A. (N. s.) 842; *Rice v. Bennett*, 29 S. D. 341, 137 N. W. 357.

In *People v. Dawell*, 25 Mich. 247, on an indictment for bigamy, in which the defendant relied on a foreign divorce from his first wife, it was held competent to show, in opposition to the recitals of the record, that the parties never resided in the foreign State, and that the proceedings were a fraud. To the same effect are *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 23; *Pennywit v. Foote*, 27 Ohio St. 600; *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *O'Dea v. O'Dea*, 101 N. Y. 23, 4 N. E. 110; *Reed v. Reed*, 52 Mich. 117, 17 N. W. 720; *Smith v. Smith*, 19 Neb. 706, 28 N. W. 296; and see further as to divorce cases, *post*, p. 848, *et seq.* Mr. Freeman discusses this general subject in his treatise on judgments, c. 26.

"Judgments recovered in one State in the Union, when proved in the courts of another, . . . (are not) re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties." Per Mr. Justice *Gray* in *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; *Buckner v. Finley*, 2 Pet. 592, 7 L. ed. 218; *M'Elmoyle v. Cohen*, 13 Pet. 312, 10 L. ed. 177; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. ed. 648; *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369; *Bigelow v. Old Dominion Copper Min.,*

etc., Co., 225 U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641, Ann. Cas. 1913 E, 875, affirming 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314; Alabama Great Southern R. Co. v. Hill, 139 Ga. 224, 76 S. E. 1001, 43 L. R. A. (N. S.) 236, Ann. Cas. 1914 D, 996; Hambleton v. Glenn, 72 Md. 331, 20 Atl. 115; Sewall v. Sewall, 122 Mass. 156, 23 Am. Rep. 299. But in some of the State courts it has been held that a judgment recovered in one State may be impeached in the courts of another State for fraud in obtaining it. Cohn, Baer & Berman v. Bromberg, 185 Iowa, 298, 170 N. W. 478; Ashley v. Manley, 191 Iowa, 113, 181 N. W. 869; Moe v. Shaffer, 150 Minn. 114, 184 N. W. 785, 18 A. L. R. 1194; Roberts v. Pratt, 152 N. C. 731, 68 S. E. 240. Upon the question of fraud as a defense to a judgment of another State, see note to 18 U. S. L. ed. 475.

The judgment of a court of one State, when sued upon, or pleaded in estoppel, in the courts of another State, is put upon the plane of a domestic judgment in respect of conclusiveness as to the facts adjudged. Bigelow v. Old Dominion Copper Min., etc., Co., 225 U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641, Ann. Cas. 1913 E, 875, affirming 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314; Bates v. Bodie, 245 U. S. 520, 62 L. ed. 444, 38 Sup. Ct. Rep. 182, L. R. A. 1918 C, 355; Marin v. Augedahl, 247 U. S. 142, 62 L. ed. 1038, 38 Sup. Ct. Rep. 452; Beauchamp v. Bertig, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659; Forrest v. Fey, 218 Ill. 165, 75 N. E. 789, 109 Am. St. Rep. 249, 1 L. R. A. (N. S.) 740; Mahoney v. State Ins. Co., 133 Iowa, 570, 110 N. W. 1041, 9 L. R. A. (N. S.) 490; Brand v. Brand, 116 Ky. 785, 76 S. W. 868, 63 L. R. A. 206; Francis v. Hazlett, 192 Mass. 137, 78 N. E. 405, 116 Am. St. Rep. 230; Moe v. Shaffer, 150 Minn. 114, 184 N. W. 785, 18 A. L. R. 1194; Clark v. Eltinge, 38 Wash. 376, 80 Pac. 556, 107 Am. St. Rep. 858.

As has been said by the Federal Supreme Court: "The general effect of a judgment of a court of one State, when relied upon as an estoppel in the courts of another State, is that which

it has, by law or usage, in the courts of the State from which it comes." Bigelow v. Old Dominion Copper Min., etc., Co., 225 U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641, Ann. Cas. 1913 E, 875, affirming 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314.

The same defenses may be made to it, which could have been made to it in the State where rendered: Hampton v. McConnel, 3 Wheat. 234, 4 L. ed. 378; Mills v. Duryea, 7 Cranch, 481, 3 L. ed. 411; Steele v. Smith, 7 W. & S. 447; Bank of the State v. Dalton, 9 How. 522, 13 L. ed. 242; Scott v. Coleman, 5 Litt. 349, 15 Am. Dec. 71; but no others: Green v. Van Buskirk, 7 Wall. 139, 19 L. ed. 109; Christmas v. Russell, 5 Wall. 290, 18 L. ed. 475; Cheever v. Wilson, 9 Wall. 108, 19 L. ed. 604; Wernwag v. Pawling, 5 Gill & J. 500, 25 Am. Dec. 317; Fletcher v. Ferrel, 9 Dana, 372, 35 Am. Dec. 143; People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260; Dodge v. Coffin, 15 Kan. 277; Hancock National Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506, rev. 20 R. I. 466, 40 Atl. 341; Thompson v. Taylor, 65 N. J. L. 107, 46 Atl. 567, 54 L. R. A. 585; Owsley v. New York Cent. Trust Co., 196 Fed. 412; Canton-Hughes Pump Co. v. Llera, 123 C. C. A. 397, 205 Fed. 209; Davis v. Davis, 70 Colo. 37, 197 Pac. 241; Bruce v. Ackroyd, 95 Conn. 167, 110 Atl. 835; Flexner v. Farson, 268 Ill. 435, 109 N. E. 327, Ann. Cas. 1916 D, 810; Cohn, Baer & Berman v. Bromberg, 185 Iowa, 298, 170 N. W. 478; Ashby v. Manley, 191 Iowa, 113, 181 N. W. 869; Robinson v. Chicago, etc., R. Co., 96 Kan. 137, 150 Pac. 636; Geary v. Geary, 102 Neb. 511, 167 N. W. 778, 20 A. L. R. 809; Olmsted v. Olmsted, 190 N. Y. 458, 83 N. E. 569, 123 Am. St. Rep. 585; Gleason v. Northwestern Mut. L. Ins. Co., 203 N. Y. 507, 97 N. E. 35; Geduld v. Baltimore, etc., R. Co., 55 Misc. 239, 105 N. Y. Supp. 110; Werner v. Pelletier, 148 App. Div. 137, 131 N. Y. Supp. 1010; Mottu v. Davis, 151 N. C. 237, 65 S. E. 969; Sharg v. Eszlinger, 45 N. D. 133, 176 N. W. 938; Levine v. Levine, 95 Ore. 94, 187 Pac. 609.

The constitutional provision does

not make it mandatory upon the courts of a State to entertain an action for the enforcement of a judgment of another State. *Anglo-American Provision Co. v. Davis Provision Co.*, 169 N. Y. 506, 62 N. E. 587, 88 Am. St. Rep. 608.

A bill will not lie to enforce specific performance of a decree for alimony rendered in a court of a sister State. *Bullock v. Bullock*, 51 N. J. Eq. 444, 27 Atl. 435, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. 528.

Execution cannot issue in one State upon a judgment rendered in another. The foreign judgment must first be reduced to a domestic judgment. *Bennett v. Bennett*, 63 N. J. Eq. 306, 49 Atl. 501.

The judgment of the court of the State in which a corporation was created as to validity of its by-laws is entitled to full faith and credit in the courts of other States. *Modern Woodman v. Mixer*, 267 U. S. 550, 69 L. ed. 785, 45 Sup. Ct. Rep. 389.

The courts of a State cannot so apply its laws as to control contracts made under the laws of other States by citizens thereof. *Ætna Life Ins. Co. v. Dunken*, 266 U. S. 389, 69 L. ed. 342, 45 Sup. Ct. Rep. 129.

This provision of the Constitution does not require that disabilities imposed upon a person convicted of crime in one State should follow him and be enforced in other States. *Sims v. Sims*, 75 N. Y. 466, approving *Commonwealth v. Green*, 17 Mass. 515, and disapproving *Chase v. Blodgett*, 10 N. H. 22, and *State v. Chandler*, 3 Hawks, 393.

The courts of the United States cannot enforce the penal laws of a State, and where an action was brought in such court by a State upon a judgment recovered in its own courts, the Federal court looked back of the judgment to the original demand, and refused to enforce the judgment. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370. But in order that the law may be penal it must inflict the penalty as punishment for some offense against the State. It is not within the rule if the penalty is mere liquidated damages for a private

wrong, still less if it is damages ascertained from the contract relations between the parties. *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224, rev. 70 Md. 191, 16 Atl. 651, 2 L. R. A. 779, 14 Am. St. 344. See also upon "full faith and credit", note to this case in 36 L. ed. U. S. 1123.

Where a discontinuance of the suit is entered by consent of the parties, the entry reciting that it is upon a settlement of the suit, it may be shown in an action in another State upon the original cause that the settlement was by an executory agreement which has not been fulfilled. *Jacobs v. Marks*, 182 U. S. 583, 45 L. ed. 1241, 21 Sup. Ct. Rep. 865, aff. 183 Ill. 533, 56 N. E. 154.

The situs of a debt is with the debtor, so far at least as attachment and garnishment are concerned, and a judgment against a garnishee is not invalidated by the fact that his creditor, the principal defendant, resides outside the State and has been served only constructively by publication. If otherwise sufficient, the judgment must be given "full faith and credit" in every State. *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797, followed in *King v. Cross*, 175 U. S. 396, 44 L. ed. 211, 20 Sup. Ct. Rep. 139, aff. 19 R. I. 220, 33 Atl. 147.

A judgment *in rem* upon lands in another State is not binding in that State. *Watts v. Waddle*, 6 Pet. 389, 8 L. ed. 437; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; *Clarke v. Clarke*, 178 U. S. 186, 44 L. ed. 1028, 20 Sup. Ct. Rep. 873; *Smith v. Smith*, 174 Ill. 52, 50 N. E. 1083, 43 L. R. A. 403; *MacDonald v. Dexter*, 234 Ill. 517, 85 N. E. 209; *Morris v. Loyd*, 183 Iowa, 1056, 168 N. W. 557; *Youngs v. Youngs*, 197 Iowa, 101, 196 N. W. 795; *Gordon v. Munn*, 87 Kan. 624, 125 Pac. 1, Ann. Cas. 1914 A, 783; *Campbell v. W. M. Ritter Lumber Co.*, 140 Ky. 312, 131 S. W. 20, 140 Am. St. Rep. 385; *Putnam v. Conner*, 144 La. 231, 80 So. 265; *Bullock v. Bullock*, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. Rep. 528; *Thorburn v. Gates*,

177 App. Div. 474, 164 N. Y. Supp. 307; *Sharp v. Sharp*, 65 Okla. 76, 166 Pac. 175, L. R. A. 1917 F, 562; *Robinson v. Scott*, 81 Oreg. 20, 158 Pac. 268.

The judgment of the court of one State that a certain will works an equitable conversion into personalty of realty situated in another State is not binding upon the courts of that other State. *Clarke v. Clarke*, 178 U. S. 186, 44 L. ed. 1028, 20 Sup. Ct. Rep. 873, aff. 70 Conn. 195, 483, 39 Atl. 155, 40 Atl. 111.

Upon effect of probate of will in another State, see *Martin v. Stovell*, 103 Tenn. 1, 52 S. W. 296, 48 L. R. A. 130, and note; upon equitable conversion of real property into personalty, see *Cottman v. Grace*, 112 N. Y. 299, 19 N. E. 839, 3 L. R. A. 145, and note; also *Bullard v. Chandler*, 149 Mass. 532, 21 N. E. 951, 5 L. R. A. 104, and note.

An *ex parte* adjudication upon the domicile of decedent, made in grant of letters of administration, has no probative force outside the State. *Overby v. Gordon*, 177 U. S. 214, 44 L. ed. 741, 20 Sup. Ct. Rep. 603; *Tilt v. Kelsey*, 207 U. S. 43, 28 L. ed. 95, 28 Sup. Ct. Rep. 1.

A guardian appointed in one State cannot exercise any authority in another except so far as permitted by the laws of that other. He cannot even sue in a Federal court held in that other. *Morgan v. Potter*, 157 U. S. 195, 39 L. ed. 670, 15 Sup. Ct. Rep. 590.

A voluntary assignment of his property made by an insolvent debtor for the payment of his debts and valid by the law of his residence covers his property in another State in which none of his creditors reside, provided the assignee takes possession before the levy of judicial process, even though the assignment contains provisions for the preferment of creditors which are prohibited by the law of the State where such property is situated. *Burnett v. Kinney*, 147 U. S. 476, 37 L. ed. 247, 13 Sup. Ct. Rep. 403. But where the insolvency proceedings are involuntary and the assignee has not yet reduced the goods in the sister State to possession, the title does not

pass to him. *Reynolds v. Adden*, 136 U. S. 348, 34 L. ed. 360, 10 Sup. Ct. Rep. 843.

A decree of a State court having jurisdiction of the parties that a conveyance of land outside the State was in fraud of the rights of the plaintiff, but not directing defendant to reconvey, is of no force outside the State in which the decree is rendered. But a decree that defendant is indebted to plaintiff and shall pay certain sums of money is binding upon the courts of other States. *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960.

An appointment of an administrator has no extra-territorial force, and a judgment in one State against the administrator of the estate of X. is a personal judgment, and therefore cannot be pleaded by the same plaintiff against the administrator of the estate of X. in another State, because the defendants are neither the same person, nor are they in privity, and the matter is not therefore *res judicata* with respect to the defendant in the second action. *Johnson v. Powers*, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525.

In a suit to quiet title to land outside the State, service of process outside the State upon a non-resident of the State gives no jurisdiction of him. *Dull v. Blackman*, 169 U. S. 243, 42 L. ed. 733, 18 Sup. Ct. Rep. 333.

An order of a court of a sister State is subject to the statute of limitations of the State in which it is sought to be enforced. *Great W. Tel. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810, aff. 83 Iowa, 430, 50 N. W. 45.

A mistake in understanding the true meaning of the statute of a sister State as interpreted by the courts thereof, is not a refusal to give full faith and credit to such statute, and does not give jurisdiction to the Supreme Court of the United States on writ of error. *Banholzer v. N. Y. Life Ins. Co.*, 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972; *Glenn v. Garth*, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350. And such statute is a matter of fact and must be proved as such. *Lloyd v. Matthews*, 155 U. S.

are that the United States shall guarantee to every State a republican form of government,<sup>1</sup> and that no State shall grant any title of nobility.<sup>2</sup> The purpose of these is to protect a Union founded on republican principles, and composed entirely of republican members, against aristocratic and monarchical innovations.<sup>3</sup>

So far as a particular consideration of the foregoing provisions falls within the plan of our present work, it will be more convenient to treat of them in another place, especially as all of them which have for their object the protection of person or property are usually repeated in the bills of rights contained in the State constitutions, and will require some notice at our hands as a part of State constitutional law.

Where powers are conferred upon the general government, the exercise of the same powers by the States is impliedly prohibited,

222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70.

A judgment cannot receive credit if it is not responsive to the issue presented by the pleadings. *Reynolds v. Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773, affirming 43 N. J. Eq. 211.

A decree of divorce granting alimony, the decree having been rendered by a court having jurisdiction, must be given full faith and credit in a sister State so far as the divorce and the alimony due at the date of the decree are concerned, but is of no force outside the State in which it is granted so far as it relates to alimony subsequently to become due. *Lynde v. Lynde*, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. 332, affd. in 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555. See also in this connection, *Laing v. Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366; *Arrington v. Arrington*, 127 N. C. 190, 37 S. E. 212, 52 L. R. A. 201, 80 Am. St. 791; *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204, 83 Am. St. 806.

The same faith and credit must be given to a judgment by confession or upon default as is given to a judgment rendered after a trial upon the merits. *Forsyth v. Barnes*, 228 Ill. 326, 81 N. E. 1028, 10 Ann. Cas. 710; *Cuykendall v. Doe*, 129 Iowa, 453, 105 N. W. 698, 113 Am. St. Rep. 472, L. R. A. (N. S.) 449; *Cohn v. Bromberg*, 185 Iowa,

298, 170 N. W. 478; *Ashby v. Manley*, 191 Iowa, 113, 181 N. W. 869; *Venum v. Mertens*, 119 Mo. App. 461, 95 S. W. 292; *Barbour Asphalt Pav. Co. v. Griffin Roofing Co.*, 88 Misc. 79, 150 N. Y. Supp. 1075; *Hastings v. Bushong*, (Tex. Civ. App.) 252 S. W. 246; *Walker v. Garland*, (Tex. Comm'n App.) 235 S. W. 1078; *Miller v. Miller*, 90 Wash. 333, 156 Pac. 8; *Cowen v. Culp*, 97 Wash. 480, 166 Pac. 789.

Judgment by confession entered by an attorney acting upon a warrant contained in a promissory note made in the State and conformably to its laws must be granted full faith and credit in sister State. *Van Norman v. Gordon*, 172 Mass. 576, 53 N. E. 267, 44 L. R. A. 840, 70 Am. St. 304; *Crim v. Crim*, 162 Mo. 544, 63 S. W. 489, 54 L. R. A. 502, 85 Am. St. 521; *Cohn, Baer & Berman v. Bromberg*, 185 Iowa, 298, 170 N. W. 478; *Ashby v. Manley*, 191 Iowa, 113, 181 N. W. 869.

<sup>1</sup> Const. of U. S. art. 4, § 4.

<sup>2</sup> Const. of U. S. art. 1, § 10.

<sup>3</sup> *Federalist*, Nos. 43 and 44.

It does not fall within our province to discuss these provisions. They have been much discussed in Congress within a few years, but in a party rather than a judicial spirit. See *Story on Const.* (4th ed.) c. 41; *Luther v. Borden*, 7 How. 1, 12 L. ed. 581; *Texas v. White*, 7 Wall. 700, 19 L. ed. 227; *Cooley, Constitutional Principles*, ch. xi.



wherever the intent of the grant to the national government would be defeated by such exercise. On this ground it is held that the States cannot tax the agencies or loans of the general government; since the power to tax, if possessed by the States in regard to these objects, might be so exercised as altogether to destroy such agencies, and impair or even destroy the national credit.<sup>1</sup> And where by the national Constitution jurisdiction is given to the national courts with a view to the more efficient and harmonious working of the system organized under it, it is competent for Congress in its wisdom to make that jurisdiction exclusive of the State courts.<sup>2</sup> On some other subjects State laws may be valid until the power of Congress is exercised, when they become superseded, either wholly, or so far as they are found inconsistent. The States may legislate on the subject of bankruptcy if there be no national bankrupt law.<sup>3</sup> [The contracts and dealings of national banks are subject to the operation of general and undiscriminating State laws which do not conflict with the letter or the general object and purposes of congressional legislation.<sup>4</sup>] State laws for organizing and disciplining the militia are valid, except as they may conflict with national legislation;<sup>5</sup> and the States may constitutionally provide for punishing the counterfeiting of coin<sup>6</sup> and the passing of counterfeit money,<sup>7</sup> since these acts are offenses against the State, notwithstanding they may be offenses against the nation also; [and since the enactment of the Eighteenth Amendment to the Constitution of the United States, a State may provide for the punishment of an offense against

<sup>1</sup> *McCulloch v. Maryland*, 4 Wheat. 316, 427, 4 L. ed. 415, 606; *Weston v. Charleston*, 2 Pet. 449, 7 L. ed. 481; *City of Laurel v. Weems*, 100 Miss. 335, 56 So. 451, Ann. Cas. 1914 A, 159. See cases collected, *post*, pp. 990 *et seq.*

<sup>2</sup> *Martin v. Hunter's Lessee*, 1 Wheat. 304, 4 L. ed. 97; *The Moses Taylor v. Hammons*, 4 Wall. 411, 18 L. ed. 397; *The Hine v. Trevor*, 4 Wall. 555, 18 L. ed. 451.

<sup>3</sup> *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529; *McMillan v. McNeill*, 4 Wheat. 209, 4 L. ed. 552. And see *post*, pp. 599 *et seq.*

<sup>4</sup> *First National Bank v. California*, 262 U. S. 366, 67 L. ed. 1030, 43 Sup. Ct. Rep. 602; see also *Columbia National Bank v. Powell*, 265 Pa. St. 85, 108 Atl. 445.

But any attempt by a State to define the duties or control the con-

duct of the affairs of national banks is void if it conflicts with the laws of the United States or frustrates the purposes of the national legislation, or impairs the efficiency of the bank to discharge the duties for which it was created. *First National Bank v. California*, 262 U. S. 366, 67 L. ed. 1030, 43 Sup. Ct. Rep. 602.

<sup>5</sup> *Houston v. Moore*, 5 Wheat. 1, 51, 5 L. ed. 19, 31. As to jurisdiction over military camps within a State, for military purposes, see *United States v. Tierney*, 1 Bond, 571.

<sup>6</sup> *Harlan v. People*, 1 Doug. (Mich.) 207.

<sup>7</sup> *Fox v. Ohio*, 5 How. 410, 12 L. ed. 213; *United States v. Marigold*, 9 How. 560, 13 L. ed. 257. And see *Hendrick's Case*, 5 Leigh, 707; *Jett v. Commonwealth*, 18 Gratt. 933; *State v. Rankin*, 4 Cold. 145; *Moore v. People*, 14 How. 13, 14 L. ed. 306.

its prohibition law, although the act is an offense for which a punishment is prescribed by the Federal prohibition law.<sup>1</sup>

A State, in some instances, can possess and enforce prerogative rights which are not possessed by the national government in the absence of a Federal statute.<sup>2]</sup>

The tenth amendment to the Constitution provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. And it is to be observed of this instrument, that being framed for the establishment of a national government, it is a settled rule of construction that the limitations it imposes upon the powers of government are in all cases to be understood as limitations upon the government of the Union only, except where the States are expressly mentioned.<sup>3</sup> As illustrations, the sixth and seventh

<sup>1</sup> *United States v. Lanza*, 260 U. S. 377, 67 L. ed. 314, 43 Sup. Ct. Rep. 141.

<sup>2</sup> *United States Fidelity & Guaranty Co. v. Bramwell*, 108 Ore. 261, 217 Pac. 332, 32 A. L. R. 829.

<sup>3</sup> *Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Livingston's Lessee v. Moore*, 7 Pet. 469, 8 L. ed. 751; *Fox v. Ohio*, 5 How. 410, 12 L. ed. 447; *Smith v. Maryland*, 18 How. 71, 15 L. ed. 269; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580; *Spies v. Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Buonaparte v. Camden & Amboy R. R. Co.*, *Baldw.* 220; *James v. Commonwealth*, 12 S. & R. 220; *Barker v. People*, 3 Cow. 686; *Colt v. Eves*, 12 Conn. 243; *Jane v. Commonwealth*, 3 Met. (Ky.) 18; *Lincoln v. Smith*, 27 Vt. 328; *Matter of Smith*, 10 Wend. 449; *State v. Barnett*, 3 Kan. 250; *Reed v. Rice*, 2 J. J. Marsh. 45, 19 Am. Dec. 122; *North Mo. R. R. Co. v. Maguire*, 49 Mo. 490; *Lake Erie, &c. R. R. Co. v. Heath*, 9 Ind. 558; *Prescott v. State*, 19 Ohio St. 184; *State v. Shumpert*, 1 S. C. 85; *Commonwealth v. Hitchings*, 5 Gray, 482; *Bigelow v. Bigelow*, 120 Mass. 320; *Boyd v. Ellis*, 11 Iowa, 97; *Campbell v. State*, 11 Ga. 353; *State v. Carro*, 26 La. Ann. 377; *Purvear v. Commonwealth*, 5 Wall. 475, 18 L. ed. 608; *Twitchell v. Com.*, 7 Wall. 321, 19 L. ed. 223; *United States v. Lanza*, 260 U. S. 377,

67 L. ed. 314, 43 Sup. Ct. Rep. 141; *Ex parte Rameriz*, 193 Cal. 633, 226 Pac. 914, 34 A. L. R. 51.

Under the tenth amendment to the Constitution every State of the Union possesses every power of civil government the exercise of which is not in conflict with the powers delegated to the United States or prohibited to the States. *United States Fidelity & Guaranty Co. v. Bramwell*, 108 Ore. 261, 217 Pac. 332, 32 A. L. R. 829. Second and fourth amendments do not operate on States. *Miller v. Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; *Weeks v. United States*, 232 U. S. 383, 58 L. ed. 652, 34 Sup. Ct. Rep. 341, L. R. A. 1915 B, 834, Ann. Cas. 1915 C, 1177; *People v. Mayen*, 188 Cal. 237, 205 Pac. 435, 24 A. L. R. 1383; *Tucker v. State*, 128 Miss. 211, 90 So. 845, 24 A. L. R. 1377; *State v. Peterson*, 27 Wyo. 185, 194 Pac. 342, 13 A. L. R. 1284; *Ex parte Rameriz*, 193 Cal. 633, 226 Pac. 914, 34 A. L. R. 51; *Hoyer v. State*, 180 Wis. 407, 193 N. W. 89, 27 A. L. R. 673.

Nor does fifth. *Thorington v. City Council of Montgomery*, 147 U. S. 490, 37 L. ed. 252, 13 Sup. Ct. Rep. 394; *Brown v. New Jersey*, 175 U. S. 172, 174, 44 L. ed. 119, 20 Sup. Ct. Rep. 77, 22 Sup. Ct. Rep. 120; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 245, 46 L. ed. 171, 175, 22 Sup. Ct. Rep. 120; *Davis v. Texas*, 139 U. S. 651, 35 L. ed. 300, 11 Sup. Ct. Rep.

amendments to the Constitution may be mentioned. These constitute a guaranty of the right of trial by jury; but, as they do not mention the States, they are not to be understood as restricting their powers; and the States may, if they choose, provide for the trial of all offenses against the States, as well as for the trial of civil cases in the State courts, without the intervention of a jury, or by some different jury from that known to the common law.<sup>1</sup>

675; *United States v. Lanza*, 260 U. S. 377, 67 L. ed. 314, 43 Sup. Ct. Rep. 141; *Tucker v. State*, 128 Miss. 211, 90 So. 845, 24 A. L. R. 1377; *Smith v. Cameron*, 106 Oreg. 1, 210 Pac. 716, 27 A. L. R. 510; *Hoyer v. State*, 180 Wis. 407, 193 N. W. 89, 27 A. L. R. 673; *Withers v. Buckley*, 20 How. 84, 15 L. ed. 816; *Palmer v. Ohio*, 248 U. S. 32, 63 L. ed. 108, 39 Sup. Ct. Rep. 16; *Bemis v. Guirl Drain Co.*, 182 Ind. 36, 105 N. E. 496; *McGrew v. Missouri Pac. R. Co.*, 230 Mo. 496, 132 S. W. 1076; *Livingston v. New York*, 8 Wend. 85, 22 Am. Dec. 622; *Phillips v. Postal Tel. Cable Co.*, 130 N. C. 513, 41 S. E. 1022, 89 Am. St. Rep. 868, 131 N. C. 225, 42 S. E. 587; *Jackson v. Breeland*, 103 S. C. 184, 88 S. E. 128.

Nor the sixth. *Davis v. Texas*, 139 U. S. 651, 35 L. ed. 300, 11 Sup. Ct. Rep. 675.

Nor the eighth. *O'Neil v. Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693.

The fifth amendment does not apply to trials in the consular courts of the U. S. held in non-Christian countries. *Ross v. McIntyre*, 140 U. S. 453, 35 L. ed. 581, 11 Sup. Ct. Rep. 897.

The adoption of the fourteenth amendment has not extended to the several States of the Union the restrictions imposed by the first ten amendments to the Constitution of the United States upon the Federal Government. See *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448; *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Caldwell v. Texas*, 137 U. S. 692, 11 Sup. Ct. Rep. 224; *Re Converse*, 137 U. S. 624, 34 L. ed. 796, 11

Sup. Ct. Rep. 191; *Missouri v. Lewis*, 101 U. S. 22; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Slaughter House Cases*, 16 Wall. 36, 21 L. ed. 394. "State legislation is, however, subject to the due process of law clause of the 14th Amendment." *Smith v. Cameron*, 106 Oreg. 1, 210 Pac. 716, 27 A. L. R. 510.

<sup>1</sup> *Twitchell v. Commonwealth*, 7 Wall. 321, 19 L. ed. 223; *Justices v. Murray*, 9 Wall. 274, 19 L. ed. 658; *Edwards v. Elliott*, 21 Wall. 532, 22 L. ed. 487; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Huston v. Wadsworth*, 5 Col. 213; *Davis v. Texas*, 139 U. S. 651, 35 L. ed. 300, 11 Sup. Ct. Rep. 675; *Chicago, etc., R. Co. v. Cole*, 251 U. S. 54, 64 L. ed. 133, 40 Sup. Ct. Rep. 68; *State ex rel. Cartmel v. Aetna Casualty & S. Co.*, 84 Fla. 123, 92 So. 871, 24 A. L. R. 1262. See *Butler v. State*, 97 Ind. 378; *People v. Williams*, 35 Hun, 516.

A State may give a court of equity jurisdiction of a suit to establish an equitable interest in land. *Church v. Kelsey*, 121 U. S. 282, 30 L. ed. 960, 7 Sup. Ct. Rep. 897.

The seventh amendment has no application to demands against the government, or to counter-claims. *McElrath v. United States*, 102 U. S. 426, 26 L. ed. 189.

A jury of eight may be provided for criminal cases not capital. *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494. See also *State v. Bates*, 14 Utah, 293, 47 Pac. 78, 43 L. R. A. 33, and note.

The federal jury is the common-law jury of twelve men. It does not include statutory juries before justices of the peace, and facts examined before such statutory juries may be re-examined otherwise than according

[Another illustration is the Eighth Amendment to the Constitution which declares that cruel and unusual punishments shall not be inflicted. It does not mention the States and, therefore, it is not a restraint upon, and does not apply to the Legislature of any State, but only to the national Legislature.<sup>1</sup>

So far as the Federal Constitution is concerned, it is within the acknowledged power of the legislature of a State to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government.<sup>2]</sup>

With other rules for the construction of the national Constitution we shall have little occasion to deal. They have been the subject of elaborate treatises, judicial opinions, and legislative debates, which are familiar alike to the legal profession and to the public at large.<sup>3</sup> So far as that instrument apportions powers to the national judiciary, it must be understood, for the most part, as simply authorizing Congress to pass the necessary legislation for the exercise of those powers by the Federal courts, and not as directly, of its own force, vesting them with that authority. The Constitution does not, of its own force, give to national courts jurisdiction of the several cases which it enumerates, but an act of Congress is essential, first, to create courts, and afterwards to apportion the jurisdiction among them. The exceptions are of those few cases of which the Constitution confers jurisdiction upon the Supreme Court by name. And although the courts of the United States administer the common law in many cases,<sup>4</sup> they can recognize as offenses against the nation only those acts which are made criminal, and their punishment provided for, by acts of Congress.<sup>5</sup> It is otherwise in the

to the course of the common law. *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

<sup>1</sup> *Pervear v. Com.*, 5 Wall. 479, 18 L. ed. 608; *O'Neil v. Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693; *Dalton v. State*, 123 Md. 373, 91 Atl. 417, Ann. Cas. 1916 C, 89.

<sup>2</sup> *State v. Lapointe*, 81 N. H. 227, 123 Atl. 692, 2 A. L. R. 1212.

<sup>3</sup> While the declaration of principles contained in the Declaration of Independence may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and

the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. *Gulf, etc., R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *McKinster v. Sager*, 163 Ind. 671, 72 N. E. 854, 68 L. R. A. 273. See also *Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co.*, 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *American Federation of Labor v. Buck's Stove & Range Co.*, 33 App. Cas. (D. C.) 83, 32 L. R. A. (N. S.) 748.

<sup>4</sup> *Townsend v. Todd*, 91 U. S. 452, 23 L. ed. 413; *Elmwood v. Marcy*, 92 U. S. 289, 23 L. ed. 710; *Railroad Co. v. Georgia*, 98 U. S. 359, 25 L. ed. 185.

<sup>5</sup> *Demurrer to an indictment for a libel upon the President and Congress.*

By the court: "The only question which this case presents is whether the circuit courts can exercise a common-law jurisdiction in criminal cases. . . . The general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition. The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several States: whatever is not expressly given to former, the latter expressly reserve. The judicial power of the United States is a constitutional part of these concessions: that power is to be exercised by courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union. Of all the courts which the United States may, under their general powers, constitute, one only, the Supreme Court, possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power that created them, and can be vested with none but what the power ceded to the general government will authorize it to confer. It is not necessary to inquire whether the general government, in any and what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation." *United States v. Hudson*, 7 Cranch, 32, 3 L. ed. 259. See *United States v. Coolidge*, 1 Wheat. 415, 4 L. ed. 124.

"It is clear there can be no common law of the United States. The Federal government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be

made a part of our Federal system only by legislative adoption." Per *McLean J.*, *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055. See also *Kendall v. United States*, 12 Pet. 524, 9 L. ed. 1181; *Lorman v. Clarke*, 2 McLean, 568; *United States v. Lancaster*, 2 McLean, 431; *United States v. New Bedford Bridge*, 1 Wood. & M. 403; *United States v. Wilson*, 3 Blatch. 435; *United States v. Barney*, 5 Blatch. 294; *United States v. Eaton*, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; *United States v. Cardish*, 143 Fed. 640.

Upon this ground it was held in *Gatton v. Chicago, R. I. & P. R. Co.*, 95 Iowa, 112, 63 N. W. 589, 28 L. R. A. 556, that in the absence of congressional action, common carriers engaged in interstate commerce were not limited to reasonable charges. See also *Forepaugh v. Delaware, L. & W. R. Co.*, 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, and note, 15 Am. St. 672. These cases however are overruled in *W. U. Tel. Co. v. Call Pub. Co.*, 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561, aff. 58 Neb. 192, 78 N. W. 519, holding that in the absence of congressional action, interstate telegraph companies are subject to the common-law rule of reasonable charges, and no unreasonable discrimination between patrons. Mr. Justice *Brewer*, who delivered the opinion of the court, said: "There is no body of Federal common law separate and distinct from the common law existing in the several States, in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress. The principles of the common law are operative upon all interstate commercial transactions, except so far as they are modified by congressional enactment." See also *Bank of Kentucky v. Adams Express Co.*, 93 U. S.

States; for the State courts take notice of, and punish as crimes, those acts which were crimes at the common law, except in a few States where it is otherwise expressly provided by statute or Constitution.<sup>1</sup>

*How Constitution is Amended.*

[The framers of the Constitution realized that it might, in the progress of time and the development of new conditions, require changes, and they intended to provide an orderly manner in which these could be accomplished; to that end they adopted the Fifth Article<sup>2</sup> which provides: "The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Congress." The adoption by both houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment, sufficiently shows that the proposal was deemed "necessary" by all who voted for it. An express declaration that they regarded it as necessary is not essential.<sup>3</sup>

The two-thirds vote in each house which is required in proposing an amendment is a vote of two-thirds of the members present — assuming the presence of a quorum — and not a vote of two-thirds of the entire membership, present and absent.<sup>4</sup> The submission of an amendment does not require the action of the President.<sup>5</sup>

A proposed amendment can only become effective by the ratification of the legislatures of three-fourths of the States, or by conventions in a like number of States, the choice of method being left

174, 23 L. ed. 872; *Interstate Commerce Commission v. Baltimore, etc., R. Co.*, 145 U. S. 263, 36 L. ed. 699, 12 Sup. Ct. Rep. 844, 4 Inters. Com. Rep. 92; *Murray v. Chicago, etc., R. Co.*, 62 Fed. 24.

<sup>1</sup> As to the adoption of the common law by the States, see *Van Ness v. Pacard*, 2 Pet. 137, 144, 7 L. ed. 374, 377, per *Story*, J.; and *post*, p. 74, and cases cited in notes.

<sup>2</sup> *Hawke v. Smith*, No. 1, 253 U. S. 221, 64 L. ed. 871, 40 Sup. Ct. Rep. 495, reversing 100 Ohio St. 385, 126 N. E. 400.

<sup>3</sup> *National Prohibition Cases*, 253 U. S. 350, 64 L. ed. 946, 40 Sup. Ct. Rep. 486.

<sup>4</sup> *Missouri Pacific R. Co. v. Kansas*, 248 U. S. 276, 63 L. ed. 239, 39 Sup. Ct. Rep. 93; *National Prohibition Cases*, 253 U. S. 350, 64 L. ed. 946, 40 Sup. Ct. Rep. 486.

<sup>5</sup> *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L. ed. 644; *Hawke v. Smith*, No. 1, 253 U. S. 221, 64 L. ed. 871, 40 Sup. Ct. Rep. 495, reversing 100 Ohio St. 385, 126 N. E. 400.

to Congress.<sup>1</sup> Therefore the referendum provisions of State constitutions and statutes cannot be applied in ratification or rejection of amendments.<sup>2</sup>]

<sup>1</sup> *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *Hawke v. Smith*, No. 1, 253 U. S. 221, 64 L. ed. 871, 40 Sup. Ct. Rep. 495, reversing 100 Ohio St. 385, 126 N. E. 400.

<sup>2</sup> *Hawke v. Smith*, No. 1, 253 U. S. 221, 64 L. ed. 871, 40 Sup. Ct. Rep. 495, reversing 100 Ohio St. 385, 126 N. E. 400, and distinguishing *Davis v. Hildebrant*, 241 U. S. 565, 60 L. ed. 1172, 36 Sup. Ct. Rep. 708; *Hawke v. Smith*, 253 U. S. 231, 64 L. ed. 877,

40 Sup. Ct. Rep. 498, reversing 100 Ohio St. 540, 127 N. E. 924; *National Prohibition Cases*, 253 U. S. 350, 64 L. ed. 946, 40 Sup. Ct. Rep. 486. As to whether a State's ratification of an amendment to the Federal Constitution is irrevocable, see article by Mr. F. W. Grinnell, *Am. Bar Assoc. Journ.* vol. 11, p. 192. For other interesting articles relating to amendments to the Federal Constitution, see *Am. Law Rev.* vol. 57, pp. 481, 694.

## CHAPTER III

### THE FORMATION AND AMENDMENT OF STATE CONSTITUTIONS

THE Constitution of the United States assumes the existence of thirteen distinct State governments, over whose people its authority was to be extended if ratified by conventions chosen for the purpose. Each of these States was then exercising the powers of government under some form of written constitution, and that instrument would remain unaffected by the adoption of the national Constitution, except in those particulars in which the two would come in conflict; and as to those, the latter would modify and control the former.<sup>1</sup> But besides this fundamental law, every State had also a body of laws, prescribing the rights, duties, and obligations of persons within its jurisdiction, and establishing those minute rules for the various relations of life which cannot be properly incorporated in a constitution, but must be left to the regulation of the ordinary law-making power.

By far the larger and more valuable portion of that body of laws consisted of the *common law of England*, which had been transplanted in the American wilderness, and which the colonists, now become an independent nation, had found a shelter of protection during all the long contest with the mother country, brought at last to so fortunate a conclusion.

The common law of England consisted of those maxims of freedom, order, enterprise, and thrift which had prevailed in the conduct of public affairs, the management of private business, the regulation of the domestic institutions, and the acquisition, control, and transfer of property from time immemorial. It was the outgrowth of the habits of thought and action of the people, and was modified gradually and insensibly from time to time as those habits became modified, and as civilization advanced, and new inventions introduced new wants and conveniences, and new modes of business.

<sup>1</sup> *Livingston v. Van Ingen*, 9 Johns. 507; *State v. Cape Girardeau, &c.* R. Co., 48 Mo. 468; *Mayor, &c. of Mobile v. Dargan*, 45 Ala. 310; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Louisville, etc., R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; *Atkinson v. Woodmansee*, 68 Kan. 71, 74 Pac. 640, 64 L. R. A. 325.



Springing from the very nature of the people themselves, and developed in their own experience, it was obviously the body of laws best adapted to their needs, and as they took with them their nature, so also they would take with them these laws whenever they should transfer their domicile from one country to another.

To eulogize the common law is no part of our present purpose. Many of its features were exceedingly harsh and repulsive, and gave unmistakable proofs that they had their origin in times of profound ignorance, superstition, and barbarism. The feudal system, which was essentially a system of violence, disorder, and rapine,<sup>1</sup> gave birth to many of the maxims of the common law; and some of these, long after that system has passed away, may still be traced in our law, especially in the rules which govern the acquisition, control, and enjoyment of real estate. The criminal code was also marked by cruel and absurd features, some of which have clung to it with wonderful tenacity, even after the most stupid could perceive their inconsistency with justice and civilization. But, on the whole, the system was the best foundation on which to erect an enduring structure of civil liberty which the world has ever known. It was the peculiar excellence of the common law of England that it recognized the worth, and sought especially to protect the rights and privileges, of the individual man. Its maxims were those of a sturdy and independent race, accustomed in an unusual degree to freedom of thought and action, and to a share in the administration of public affairs; and arbitrary power and uncontrolled authority were not recognized in its principles. Awe surrounded and majesty clothed the king, but the humblest subject might shut the door of his cottage against him, and defend from intrusion that privacy which was as sacred as the kingly prerogatives.<sup>2</sup> The system was the opposite of servile; its features implied boldness and independent self-reliance on the part of the people; and if the criminal code was harsh, it at least escaped the inquisitorial features which were apparent in criminal procedure of other civilized countries, and which have ever been fruitful of injustice, oppression, and terror.

For several hundred years, however, changes had from time to time been made in the common law by means of statutes. Originally the purpose of general statutes was mainly to declare and

<sup>1</sup> "A feudal kingdom was a confederacy of a numerous body, who lived in a state of war against each other, and of rapine towards all mankind; in which the king, according to his ability

and vigor, was either a cipher or a tyrant, and a great portion of the people were reduced to personal slavery." Mackintosh, *History of England*, c. 3.

<sup>2</sup> See *post*, pp. 610 *et seq.*

reaffirm such common-law principles as, by reason of usurpations and abuses, had come to be of doubtful force, and which, therefore, needed to be authoritatively announced, that king and subject alike might understand and observe them. Such was the purpose of the first great statute, promulgated at a time when the legislative power was exercised by the king alone, and which is still known as the Magna Charta of King John.<sup>1</sup> Such also was the purpose of the several confirmations of that charter, as well as of the Petition of Right,<sup>2</sup> and the Bill of Rights,<sup>3</sup> each of which became necessary by reason of usurpations. But further statutes also became needful because old customs and modes of business were unsuited to new conditions of things when property had become more valuable, wealth greater, commerce more extended, and when all these changes had brought with them new desires and necessities, and also new dangers against which society as well as the individual subject needed protection. For this reason the Statute of Wills<sup>4</sup> and the Statute of Frauds and Perjuries<sup>5</sup> became important; and the Habeas Corpus Act<sup>6</sup> was also found necessary, not so much to change the law,<sup>7</sup> as to secure existing principles of the common law against being habitually set aside and violated by those in power.

From the first the colonists in America claimed the benefit and protection of the common law. In some particulars, however, the common law as then existing in England was not suited to their condition and circumstances in the new country, and those particulars they omitted as it was put in practice by them.<sup>8</sup> They also

<sup>1</sup> It is justly observed by Sidney that "Magna Charta was not made to restrain the absolute authority, for no such thing was in being or pretended (the folly of such visions seeming to have been reserved to complete the misfortunes and ignominy of our age), but it was to assert the native and original liberties of our nation by the confession of the king then being, that neither he nor his successors should any way encroach upon them." Sidney on Government, c. 3, sec. 27.

<sup>2</sup> 1 Charles I. c. 1.

<sup>3</sup> 1 William and Mary, sess. 2, c. 2.

<sup>4</sup> 32 Henry VIII. c. 7, and 34 & 35 Henry VIII. c. 5.

<sup>5</sup> 29 Charles II. c. 3.

<sup>6</sup> 31 Charles II. c. 2.

<sup>7</sup> "I dare not advise to cast the laws into a new mould. The work which I propound tendeth to the pruning and grafting of the law, and not the plowing

up and planting it again, for such a remove I should hold for a perilous innovation." Bacon's Works, Vol. II. p. 231, Phil. ed. 1852.

<sup>8</sup> "The common law of England is not to be taken, in all respects, to that of America. Our ancestors brought with them its general principles, and claimed it as their birth-right; but they brought with them and adopted only that portion which was applicable to their condition." Story, J., in *Van Ness v. Pacard*, 2 Pet. 137, 7 L. ed. 374.

"The settlers of colonies in America did not carry with them the laws of the land as being bound by them wherever they should settle. They left the realm to avoid the inconveniences and hardships they were under, where some of these laws were in force; particularly ecclesiastical laws, those for payment of tithes, and others. Had it

been understood that they were to carry these laws with them, they had better have stayed at home among their friends, unexposed to the risks and toils of a new settlement. They carried with them a right to such parts of laws of the land as they should judge advantageous or useful to them; a right to be free from those they thought hurtful, and a right to make such others as they should think necessary, not infringing the general rights of Englishmen; and such new laws they were to form as agreeable as might be to the laws of England." Franklin Works, by Sparks Vol. IV. p. 271. See also *Chisholm v. Georgia*, 2 Dall. 419, 1 L. ed. 440; *Doe v. Winn*, 5 Pet. 233, 8 L. ed. 108; *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055; *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Commonwealth v. Leach*, 1 Mass. 59; *Commonwealth v. Knowlton*, 2 Mass. 530; *Commonwealth v. Hunt*, 4 Met. 111; *Pearce v. Atwood*, 13 Mass. 324; *Sackett v. Sackett*, 8 Pick. 309; *Marks v. Morris*, 4 Hen. & M. 463; *Mayo v. Wilson*, 1 N. H. 53; *Houghton v. Page*, 2 N. H. 42; *State v. Rollins*, 8 N. H. 550; *State v. Buchanan*, 5 H. & J. 356; *Sibley v. Williams*, 3 G. & J. 62; *State v. Cummings*, 33 Conn. 260; *Martin v. Bigelow*, 2 Aiken, 187; *Lindsley v. Coats*, 1 Ohio, 243; *Bloom v. Richards*, 2 Ohio St. 287; *Lyle v. Richards*, 9 S. & R. 322; *State v. Campbell*, T. U. P. Charlt. 166; *Craft v. State Bank*, 7 Ind. 219; *Dawson v. Coffman*, 28 Ind. 220; *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633; *Morgan v. King*, 30 Barb. 9; *Lansing v. Stone*, 37 Barb. 15; *Simpson v. State*, 5 Yerg. 356; *Crouch v. Hall*, 15 Ill. 263; *Brown v. Pratt*, 3 Jones (N. C.) Eq. 202; *Stout v. Keyes*, 2 Doug. (Mich.) 184; *Lorman v. Benson*, 8 Mich. 18; *Pierson v. State*, 12 Cal. 149; *Norris v. Harris*, 15 Cal. 226; *Powell v. Sims*, 5 W. Va. 1; *Colley v. Merrill*, 6 Me. 55; *State v. Cawood*, 2 Stew. 360; *Carter v. Balfour*, 19 Ala. 814; *Barlow v. Lambert*, 28 Ala. 704; *Goodwin v. Thompson*, 2 Greene (Iowa), 329; *Wagner v. Bissell*, 3 Iowa, 396; *Noonan v. State*, 9 Miss. 562; *Powell v. Brandon*, 24 Miss. 343; *Coburn v. Harvey*, 18 Wis. 147;

*Reaume v. Chambers*, 22 Mo. 36; *Hamilton v. Kneeland*, 1 Nev. 10; *People v. Green*, 1 Utah, 11; *Thomas v. Railroad Co.*, 1 Utah, 232; *Reno Smelting Works v. Stevenson*, 20 Nev. 269, 21 Pac. 317; *Hageman v. Vanderdoes*, 15 Ariz. 312, 138 Pac. 1053, L. R. A. 1915 A, 491, Ann. Cas. 1915 D, 1197; *Katz v. Walkinshaw*, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; *San Joaquin, etc., Canal & Irrigation Co. v. Fresno Flume & Irrigation Co.*, 158 Cal. 626, 112 Pac. 182, 35 L. R. A. (N. S.) 832; *Clark v. Allaman*, 71 Kan. 206, 80 Pac. 571, 70 L. R. A. 971; *Cooper v. Seaverns*, 81 Kan. 267, 105 Pac. 509, 135 Am. St. Rep. 359, 25 L. R. A. (N. S.) 517; *Friend v. Childs Dining Hall Co.*, 231 Mass. 65, 120 N. E. 407, 5 A. L. R. 1100; *Brookhaven v. Smith*, 188 N. Y. 74, 80 N. E. 665, 9 L. R. A. (N. S.) 326, 11 Ann. Cas. 1; *Horace Waters & Co. v. Gerard*, 189 N. Y. 302, 82 N. E. 143, 121 Am. St. Rep. 886, 24 L. R. A. (N. S.) 958, 12 Ann. Cas. 397; *State v. Cleveland, etc., R. Co.*, 94 Ohio St. 61, 113 N. E. 677, L. R. A. 1917 A, 1007; *Fowler v. Cleveland*, 100 Ohio St. 158, 126 N. E. 72, 9 A. L. R. 131; *United States Fidelity & Guaranty Co. v. Bramwell*, 108 Oreg. 261, 217 Pac. 332; *Moss v. State*, 131 Tenn. 94, 173 S. W. 859, L. R. A. 1915 D, 361, Ann. Cas. 1916 B, 1; *Swayne v. Lone Acre Oil Co.*, 98 Tex. 597, 86 S. W. 740, 69 L. R. A. 986, 8 Ann. Cas. 1117; *Grigsby v. Reib*, 105 Tex. 597, 153 S. W. 1124, L. R. A. 1915 E, 1, Ann. Cas. 1915 C, 1011; *Johnson v. Union Pac. Coal Co.*, 28 Utah, 46, 76 Pac. 1089, 67 L. R. A. 506.

The common law is in force in this country only so far as it is compatible with our views of liberty and sovereignty. *State ex rel. Rodd v. Verage*, 177 Wis. 295, 187 N. W. 830, 23 A. L. R. 491.

"The common law is rather an intangible something as viewed by our courts; that is, they hold it is the declaration of the courts of the different States of the United States, regardless of whether it is in conflict with what has generally been adopted as

claimed the benefit of such statutes as from time to time had been enacted in modification of this body of rules.<sup>1</sup> And when the difficulties with the home government sprung up, it was a source of immense moral power to the colonists that they were able to show that the rights they claimed were conferred by the common law, and that the king and Parliament were seeking to deprive them of the common birthright of Englishmen. Did Parliament attempt to levy taxes in America, the people demanded the benefit of that maxim with which for many generations every intelligent subject had been familiar, that those must vote the tax who are to pay it.<sup>2</sup>

the common law of England." *Graphite Co. v. Burnet Nat. Bank*, (Tex. Civ. App.) 255 S. W. 676.

When it becomes necessary to determine the common law of another State, the decisions of the courts of final resort of that State will be followed, regardless of precedents to the contrary in the State where the trial is held. *Sykes v. Citizens' National Bank*, 78 Kan. 688, 98 Pac. 206, 19 L. R. A. (N. S.) 665; *Root v. Kansas City Southern R. Co.*, 195 Mo. 348, 92 S. W. 621, 6 L. R. A. (N. S.) 212; *Johnson v. Union Pac. Coal Co.*, 28 Utah, 46, 76 Pac. 1089, 67 L. R. A. 506. But the courts of one State will presume the common law of a sister State to be the same as their own, in the absence of evidence to the contrary. *Dunn v. Adams*, 1 Ala. 527, s. c. 35 Am. Dec. 42; *Abell v. Douglass*, 4 Denio, 305; *Kermott v. Ayer*, 11 Mich. 181; *Schurman v. Marley*, 29 Ind. 458; *Buckles v. Ellers*, 72 Ind. 220; *Tinkler v. Cox*, 68 Ill. 119; *Flagg v. Baldwin*, 38 N. J. Eq. 219; *Eureka Springs Ry. Co. v. Timmons*, 51 Ark. 459, 11 S. W. Rep. 690; *Southern Express Co. v. Owens*, 146 Ala. 412, 41 So. 752, 119 Am. St. Rep. 41, 8 L. R. A. (N. S.) 369, 9 Ann. Cas. 1143; *Thompson v. Clarkson*, 125 Ga. 72, 54 S. E. 77, 6 L. R. A. (N. S.) 658; *Sykes v. Citizens' National Bank*, 78 Kan. 688, 98 Pac. 206, 19 L. R. A. (N. S.) 665; *Cherry v. Sprague*, 187 Mass. 113, 72 N. E. 456, 105 Am. St. Rep. 381, 67 L. R. A. 33; *Beard v. Chicago, etc. R. Co.*, 134 Minn. 162, 158 N. W. 815, L. R. A. 1916 F, 866; *Mount v. Tuttle*, 183 N. Y. 358, 76 N. E. 873, 2 L. R. A. (N. S.) 428. So of

the law of a foreign country. *Carpenter v. Grand Trunk Ry. Co.*, 72 Me. 388. So, that statutory modifications of the common law are the same. *Shattuck v. Chandler*, 40 Kan. 516, 20 Pac. 225; *Buchanan v. Hubbard*, 119 Ind. 187, 21 N. E. 538.

<sup>1</sup> The acts of Parliament passed after the settlement of a colony were not in force therein, unless made so by express words, or by adoption. *Commonwealth v. Lodge*, 2 Gratt. 579; *Pemble v. Clifford*, 2 McCord, 31. See *Swift v. Tousey*, 5 Ind. 196; *Baker v. Mattocks*, Quincy, 72; *Fechheimer v. Washington*, 77 Ind. 366; *Ray v. Sweeney*, 14 Bush, 1; *Lavalle v. Strobel*, 89 Ill. 370; *Cathcart v. Robinson*, 5 Pet. 264, 8 L. ed. 120. Those amendatory of the common law, if suited to the condition of things in America, were generally adopted by tacit consent. For the differing views taken by English and American statesmen upon the general questions here discussed, see the observations by Governor Pownall, and the comments of Franklin thereon, 4 Works of Franklin, by Sparks, 271.

<sup>2</sup> "The blessing of Judah and Issachar will never meet; that the same people or nation should be both the lion's whelp and the ass between burdens; neither will it be that a people overlaid with taxes should ever become valiant and martial. It is true that taxes levied by consent of the State do abate men's courage less, as it hath been seen notably in the exercise of the Low Countries, and in some degree in the subsidies of England, for you must note that we speak now of the heart and not of the purse; so that although

Did Parliament order offenders against the laws in America to be sent to England for trial, every American was roused to indignation, and protested against the trampling under foot of that time-honored principle, that trials for crime must be by a jury of the vicinage. Contending thus behind the bulwarks of the common law, Englishmen would appreciate and sympathize with their position, and Americans would feel doubly strong in a cause that not only was right, but the justice of which must be confirmed by an appeal to the consciousness of their enemies themselves.

The evidence of the common law consisted in part of the declaratory statutes we have mentioned,<sup>1</sup> in part of the commentaries of such men learned in the law as had been accepted as authority, but mainly in the decisions of the courts applying the law to actual controversies. While colonization continued, — that is to say, until the war of the Revolution actually commenced, — these decisions were authority in the colonies, and the changes made in the common law up to the same period were operative in America also if suited to the condition of things here. The opening of the war of the Revolution is the point of time at which the continuous stream of the common law became divided, and that portion which had been adopted in America flowed on by itself, no longer subject to changes from across the ocean, but liable still to be gradually modified through changes in the modes of thought and of business among the people, as well as through statutory enactments.<sup>2</sup>

The colonists also had legislatures of their own, by which laws had been passed which were in force at the time of the separation, and which remained unaffected thereby. When, therefore, they emerged from the colonial condition into that of independence, the laws which governed them consisted, *first*, of the common law of England, so far as they had tacitly adopted it as suited to

the same tribute or tax laid by consent or by imposing be all one to the purse, yet it works diversely upon the courage. So that you may conclude that no people overcharged with tribute is fit for empire." Lord Bacon on the True Greatness of Kingdoms.

<sup>1</sup> These statutes upon the points which are covered by them are the best evidence possible. They are the living charters of English liberty, to the present day; and as the forerunners of the American constitutions and the source from which have been derived many of the most important articles

in their bills of rights, they are constantly appealed to when personal liberty or private rights are placed in apparent antagonism to the claims of government.

<sup>2</sup> The common law of England, as it exists in the States of this country, means that body of jurisprudence as applied and modified by the courts of this country up to the time it became a rule of decision in each particular State adopting it. *Gas Products Co. v. Rankin*, 63 Mont. 372, 207 Pac. 993, 24 A. L. R. 294.

their condition; *second*, of the statutes of England, or of Great Britain, amendatory of the common law, which they had in like manner adopted; and, *third*, of the colonial statutes.<sup>1</sup> The first and second constituted the American common law, and by this in

<sup>1</sup>The like condition of things is found to exist in the new States formed and admitted to the Union since the Constitution was adopted. Congress creates territorial governments of different grades, but generally with plenary legislative power either in the governor and judges, a territorial council, or a territorial legislature chosen by the people; and the authority of this body extends to all rightful subjects of legislation, subject, however, to the disapproval of Congress. *Vincennes University v. Indiana*, 14 How. 268, 14 L. ed. 416; *Miners' Bank v. Iowa*, 12 How. 1, 13 L. ed. 867; *Gromer v. Standard Dredging Co.*, 224 U. S. 362, 56 L. ed. 801, 32 Sup. Ct. Rep. 499; *Tiaco v. Forbes*, 228 U. S. 549, 57 L. ed. 960, 33 Sup. Ct. Rep. 585. Such legislation will remain in force until Congress exercises its power to annul it. *Atchison, etc., R. Co. v. Sowers*, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397.

The legislature of a territory "has all the legislative power except as limited by the Constitution of the United States and the organic act and the laws of Congress appertaining thereto." *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 41 L. ed. 837, 17 Sup. Ct. Rep. 421; *Baldrige v. Morgan*, 15 N. M. 249, 106 Pac. 342, Ann. Cas. 1912 C, 337. Thus the Territory of Oregon had power to grant a legislative divorce. *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723. A territorial legislature may empower a probate court to grant a divorce. *Whitmore v. Harden*, 3 Utah, 121, 1 Pac. 465. In *Treadway v. Schnauber*, 1 Dak. 236, it was decided that without express authority a territorial legislature could not vote aid to a railroad company.

The legislation, of course, must not be in conflict with the law of Congress conferring the power to legislate, but a variance from it may be supposed approved by that body, if suffered to

remain without disapproval for a series of years after being duly reported to it. *Clinton v. Englebrecht*, 13 Wall. 434, 446, 20 L. ed. 659. See *Williams v. Bank of Michigan*, 7 Wend. 539; *Swan v. Williams*, 2 Mich. 427; *Stout v. Hyatt*, 13 Kan. 232; *Himman v. Warren*, 6 Ore. 408.

In general as to the control of Congress over the Territories, see *Reynolds v. U. S.*, 98 U. S. 145, 25 L. ed. 244; *National Bank v. Yankton*, 101 U. S. 129, 25 L. ed. 1046; *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787; *Binns v. United States*, 194 U. S. 486, 48 L. ed. 1087, 24 Sup. Ct. Rep. 816; *Dorr v. United States*, 195 U. S. 138, 49 L. ed. 128, 24 Sup. Ct. Rep. 808, 1 Ann. Cas. 697; *Rasmussen v. United States*, 197 U. S. 516, 49 L. ed. 862, 25 Sup. Ct. Rep. 514; *De La Rama v. De La Rama*, 201 U. S. 303, 50 L. ed. 765, 26 Sup. Ct. Rep. 485; *El Paso, etc., R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21. *Interstate Commerce Commission v. United States*, 224 U. S. 474, 56 L. ed. 849, 32 Sup. Ct. Rep. 556.

Congress may legislate directly in respect to the local affairs of a territory, or transfer the power of such legislation to a legislature elected by the citizens of the territory. *Binns v. United States*, 194 U. S. 486, 48 L. ed. 1087, 24 Sup. Ct. Rep. 816; *De La Rama v. De La Rama*, 201 U. S. 303, 50 L. ed. 765, 26 Sup. Ct. Rep. 485. It may exclude polygamists from the right to vote. *Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747. It may declare void the charter of a church granted by the legislature of the Territory. *Church of Jesus Christ of Latter Day Saints v. United States*, 136 U. S. 1, 34 L. ed. 478, 10 Sup. Ct. Rep. 792. It may impose a tax exclusively in a territory without violating the clause of the Constitution requiring taxes to be uniform throughout the United States.

great part are rights adjudged and wrongs redressed in the American States to this day.<sup>1</sup>

Every colony had also its charter, emanating from the Crown, and constituting its colonial constitution. All but two of these were swept away by the whirlwind of revolution, and others substituted which had been framed by the people themselves, through the agency of conventions which they had chosen. The exceptions were those of Connecticut and Rhode Island, each of which

*Binns v. United States*, 194 U. S. 486, 48 L. ed. 1087, 24 Sup. Ct. Rep. 816; *Rasmussen v. United States*, 197 U. S. 516, 49 L. ed. 862, 25 Sup. Ct. Rep. 514.

An act of Congress undertaking to regulate commerce in the District of Columbia and the territories of the United States would necessarily supersede the territorial law regulating the same subject. *El Paso, etc., R. Co. v. Gutierrez*, 215 U. S. 87, 54 L. ed. 106, 30 Sup. Ct. Rep. 21.

<sup>1</sup> A few of the States, to get rid of confusion in the law, deemed it desirable to repeal the acts of Parliament, and to re-enact such portions of them as were regarded important here. See the Michigan repealing statute, copied from that of Virginia, in Code of 1820, p. 459. Others named a date or event, and provided by law that English statutes passed subsequently should not be of force within their limits. In some of the new States there were also other laws in force than those to which we have above alluded, as for example, the ordinance of 1787, in the Northwest Territory. There has been much discussion of the question whether that ordinance was superseded in each of the States formed out of that Territory by the adoption of a State constitution, and admission to the Union.

In *Hogg v. The Zanesville Canal Manufacturing Co.*, 5 Ohio, 410, it was held that the provision of the ordinance that the navigable waters of the Territory and the carrying-places between should be common highways, and forever free, was permanent in its obligation, and could not be altered without the consent both of the people of the State and of the United States, given through their representatives. "It is an article of compact; and until

we assume the principle that the sovereign power of a State is not bound by compact, this clause must be considered obligatory." Justice *McLean* and Judge *Leavitt*, in *Spooner v. McConnell*, 1 *McLean*, 337, examine this subject at considerable length, and both arrive at the same conclusion with the Ohio court. The like opinion was subsequently expressed in *Palmer v. Commissioners of Cuyahoga Co.*, 3 *McLean*, 226, and in *Jolly v. Terre Haute Drawbridge Co.*, 6 *McLean*, 237. See also *United States v. New Bedford Bridge*, 1 Wood. & M. 401; *Strader v. Graham*, 10 How. 82, 13 L. ed. 337; *Doe v. Douglass*, 8 Blackf. 12; *Connecticut Mutual Life Ins. Co. v. Cross*, 18 Wis. 109; *Milwaukee Gaslight Co. v. Schooner Gamecock*, 23 Wis. 144; *Wisconsin River Improvement Co. v. Lyons*, 30 Wis. 61; *Attorney-General v. Eau Claire*, 37 Wis. 400; *Keokuk v. Packet Co.*, 45 Iowa, 196. Compare *Woodburn v. Kilbourn Manuf. Co.*, 1 Abb. U. S. 158; s. c. 1 Biss. 546. But in *Escanaba Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185, it was decided that limitations on legislative power imposed by the ordinance ceased to have effect within a State upon its admission to the Union, except as the State had voluntarily adopted them. See *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113; *Higgins v. Farmers' Ins. Co.*, 60 Iowa, 50, 14 N. W. 118; *La Plaisance Bay Harbor Co. v. Monroe*, Walk. Ch. 155; *Depew v. Trustees*, 5 Ind. 8; *Coyle v. Smith*, 221 U. S. 559, 55 L. ed. 853, 31 Sup. Ct. Rep. 688; *Hawkins v. Bleakly*, 243 U. S. 210, 61 L. ed. 678, 37 Sup. Ct. Rep. 255, Ann. Cas. 1917 D, 637; *State ex rel. Donahey v. Edmondson*, 89 Ohio St. 93, 105 N. E.

States had continued its government under the colonial charter, finding it sufficient and satisfactory for the time being, and accepting it as the constitution for the State.<sup>1</sup>

New States have since, from time to time, formed constitutions, either regularly in pursuance of enabling acts passed by Congress, or irregularly by the spontaneous action of the people, or under the direction of the legislative or executive authority of the Territory to which the State succeeded. Where irregularities existed,

269, 52 L. R. A. (N. S.) 305, Ann. Cas. 1915 D, 934. And with reference to the enabling acts of Oregon, Louisiana, and California, *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; *Hamilton v. Vicksburg, &c. R. R. Co.*, 119 U. S. 280, 30 L. ed. 393, 7 Sup. Ct. Rep. 206; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; *People v. Potrero, &c. R. R. Co.*, 67 Cal. 166, 7 Pac. 445.

The provision that the rivers shall be forever free refers not to physical obstructions, but to the imposition of duties for the use of the navigation, and any discrimination against citizens of other States. *Escanaba Co. v. Chicago*, *supra*; *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313, and cases last cited. But a State may charge tolls for the use of improvements it has made in its navigable rivers. *Huse v. Glover*, *supra*; *Sands v. Manistee River Imp. Co.*, *supra*; *Palmer v. Com'rs*, 3 McLean, 226; *Spooner v. McConnell*, 1 McLean, 337. See also, *post*, 1291 *et seq.*

In some of the States formed out of the territory acquired by the United States from foreign powers, traces will be found of the laws existing before the change of government. Louisiana has a code peculiar to itself, based upon the civil law. Much of Mexican law, and especially as regards lands and land titles, is retained in the systems of Texas and California. In Michigan, when the acts of Parliament were repealed, it was also deemed important to repeal all laws derived from France, through the connection with the Canadian provinces, including the *Coutume de Paris*, or ancient French common law. In the mining States and Territories a peculiar species of common

law, relating to mining rights and titles, has sprung up, having its origin among the miners, but recognized and enforced by the courts.

Regarding the canon and ecclesiastical law, and their force in this country, see *Crump v. Morgan*, 3 Ired. Eq. 91; *Le Barron v. Le Barron*, 35 Vt. 365.

That constitutions are supposed to be framed in reference to existing institutions, see *Pope v. Phifer*, 3 Heisk. 686.

A change in a constitution cannot retroact upon legislation so as to enlarge its scope. *Dewar v. People*, 40 Mich. 401. See *Dullam v. Willson*, 53 Mich. 392, 19 N. W. 112.

<sup>1</sup> It is worthy of note that the first well-authenticated case in which a legislative act was held void for incompatibility with the constitution of the State, was decided under one of these charters. It was that of *Trevett v. Weeden*, decided in Rhode Island in 1786. See *Arnold's History of Rhode Island*, Vol. II. c. 24. Mr. Brinton Coxe, in his book on *Judicial Power and Constitutional Legislation*, makes much use of this case, and refers to others decided near the same time. Mr. Gouveneur Morris, in an address to the Pennsylvania Assembly in 1785, speaks of a law passed in New Jersey having been declared unconstitutional and void, and is supposed to have referred to the unreported case of *Holmes v. Wallow*, which Mr. Coxe thought must have been decided in 1786 or 1787, but which President Scott of Rutgers College, who has examined the original files and records, informs us was decided in 1780. The next reported case in which a like result was reached was *Bayard v. Singleton*, to be found in *Martin*, N. C. Rep. p. 48.



they must be regarded as having been cured by the subsequent admission of the State into the Union by Congress; and there were not wanting in the case of some States plausible reasons for insisting that such admission had become a matter of right, and that the necessity for an enabling act by Congress was dispensed with by the previous stipulations of the national government in acquiring the territory from which such States were formed.<sup>1</sup> Some of these constitutions pointed out the mode for their own modification; others were silent on that subject; but it has been assumed that in such cases the power to originate proceedings for that purpose rested with the legislature of the State, as the department most nearly representing its general sovereignty; and this is doubtless the correct view to take of this subject.<sup>2</sup>

The theory of our political system is that the ultimate sovereignty is in the people, from whom springs all legitimate authority.<sup>3</sup> The people of the Union created a national constitution, and conferred upon it powers of sovereignty over certain subjects, and the people of each State created a State government, to exercise the remaining powers of sovereignty so far as they were disposed to allow them to be exercised at all. By the constitution which they establish, they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the State, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law. But in

<sup>1</sup> This was the claim made on behalf of Michigan; it being insisted that the citizens, under the provisions of the ordinance of 1787, whenever the Territory acquired the requisite population, had an absolute right to form a constitution and be admitted to the Union under it. See *Scott v. Detroit Young Men's Society's Lessee*, 1 Doug. (Mich.) 119, and the contrary opinion in *Myers v. Manhattan Bank*, 20 Ohio, 283. The debates in the Senate of the United States on the admission of Michigan to the Union go fully into this question. See Benton's *Abridgment of Congressional Debates*, Vol. XIII. pp. 69-72. And as to the right of the people of a Territory to originate measures looking to an application for admission to the Union, see *Opinions of Attorneys-General*, Vol. II. p. 726.

<sup>2</sup> See Jameson on *Constitutional Conventions*, c. 8.

<sup>3</sup> *McLean*, J., in *Spooner v. McConnell*, 1 McLean, 347; *Waite*, Ch. J., in *Minor v. Happersett*, 21 Wall. 162, 172, 22 L. ed. 627, 629; *Campbell's Case*, 2 Bland Ch. 209, 20 Am. Dec. 360; *Reynolds v. Baker*, 6 Cold. 221; *Potter's Dwaris on Stat. c. 1*; *State v. Edmondson*, 89 Ohio St. 93, 105 N. E. 269, 52 L. R. A. (N. S.) 305, Ann. Cas. 1915 D, 934; *Hackett v. State Liquor Licensing Board*, 91 Ohio St. 176, 110 N. E. 485, L. R. A. 1917 B, 7; *Ekern v. McGovern*, 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 796.

The basic idea of the State constitution is that this is a popular representative government, the officers being mere agents not rulers of the people, — one where no man is so high as to be above the Constitution and no one so low as to be beneath its protection. *Ekern v. McGovern*, 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 796.

every State, although all persons are under the protection of the government, and obliged to conform their action to its laws, there are always some who are altogether excluded from participation in the government, and are compelled to submit to be ruled by an authority in the creation of which they have no choice. The political maxim, that government rests upon the consent of the governed, appears, therefore, to be practically subject to many exceptions; and when we say the sovereignty of the State is vested in the people, the question very naturally presents itself, What are we to understand by *The People* as used in this connection?

What *should be* the correct rule upon this subject, it does not fall within our province to consider. Upon this men will theorize; but the practical question precedes the formation of the Constitution and is addressed to the people themselves. As a practical fact the sovereignty is vested in those persons who are permitted by the constitution of the State to exercise the elective franchise.<sup>1</sup> Such persons may have been designated by description in the enabling act of Congress permitting the formation of the constitution, if any such there were, or the convention which framed the constitution may have determined the qualifications of electors without external dictation. In either case, however, it was essential to subsequent good order and contentment with the government, that those classes in general should be admitted to a voice in its administration, whose exclusion on the ground of want of capacity or of moral fitness could not reasonably and to the general satisfaction be defended.

Certain classes have been almost universally excluded, — the slave, because he is assumed to be wanting alike in the intelligence and the freedom of will essential to the proper exercise of the right; the woman, from mixed motives, but mainly, perhaps, because, in the natural relation of marriage, she was supposed to be under the influence of her husband, and, where the common law prevailed, actually was in a condition of dependence upon and subjection to him;<sup>2</sup> the infant, for reasons similar to those which exclude the slave; the idiot, the lunatic, and the felon, on obvious grounds; and sometimes other classes for whose exclusion it is difficult to assign reasons so generally satisfactory.

The theory in these cases we take to be that classes are excluded

<sup>1</sup> "The people, for political purposes, must be considered as synonymous with qualified voters." Blair v. Ridgely, 41 Mo. 63.

<sup>2</sup> Some reference is made to the rea-

sons for the exclusion in the opinions in Bradwell v. State, 16 Wall. 130, 21 L. ed. 442, and Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627.

because they lack either the intelligence, the virtue, or the liberty of action essential to the proper exercise of the elective franchise. But the rule by which the presence or absence of these qualifications is to be determined, it is not easy to establish on grounds the reason and propriety of which shall be accepted by all. It must be one that is definite and easy of application, and it must be made permanent, or an accidental majority may at any time change it, so as to usurp all power to themselves. But to be definite and easy of application, it must also be arbitrary. The infant of tender years is wanting in competency, but he is daily acquiring it, and a period is fixed at which he shall conclusively be presumed to possess what is requisite. The alien may know nothing of our political system and laws, and he is excluded until he has been domiciled in the country for a period judged to be sufficiently long to make him familiar with its institutions; races are sometimes excluded arbitrarily; and at times in some of the States the possession of a certain amount of property, or the capacity to read, seems to have been regarded as essential to satisfactory proof of sufficient freedom of action and intelligence.<sup>1</sup>

Whatever rule is once established must remain fixed until those who by means of it have the power of the State put into their hands see fit to invite others to participate with them in its exercise. Any attempt of the excluded classes to assert their right to a share in the government, otherwise than by operating upon the public opinion of those who possess the right of suffrage, would be regarded as an attempt at revolution, to be put down by the strong arm of the government of the State, assisted, if need be, by the military power of the Union.<sup>2</sup>

In regard to the formation and amendment of State constitutions, the following appear to be settled principles of American constitutional law:—

I. The people of the several Territories may form for them-

<sup>1</sup> *State v. Woodruff*, 2 Day, 504; *Catlin v. Smith*, 2 S. & R. 267; *Opinions of Judges*, 18 Pick. 575. See Mr. Bancroft's synopsis of the first constitutions of the original States, in his *History of the American Revolution*, c. 5.

For some local elections it is quite common still to require property qualification or the payment of taxes in the voter; but statutes of this description are generally construed liberally. See *Crawford v. Wilson*, 4 Barb. 504.

Many special statutes, referring to the people of a municipality the question of voting aid to internal improvements, have confined the right of voting on the question to taxpayers.

<sup>2</sup> The case of Rhode Island and the "Dorr Rebellion", so popularly known, will be fresh in the minds of all. For a discussion of some of the legal aspects of the case, see *Luther v. Borden*, 7 How. 1, 12 L. ed. 581.

selves State constitutions whenever enabling acts for that purpose are passed by Congress, but only in the manner allowed by such enabling acts, and through the action of such persons as the enabling acts shall clothe with the elective franchise to that end. If the people of a Territory shall, of their own motion, without such enabling act, meet in convention, frame and adopt a constitution, and demand admission to the Union under it, such action does not entitle them, as matter of right, to be recognized as a State; but the power that can admit can also refuse, and the territorial status must be continued until Congress shall be satisfied to suffer the Territory to become a State. There are always in these cases questions of policy as well as of constitutional law to be determined by the Congress before admission becomes a matter of right, — whether the constitution formed is republican; whether suitable and proper State boundaries have been fixed upon; whether the population is sufficient; whether the proper qualifications for the exercise of the elective franchise have been agreed to; whether any inveterate evil exists in the Territory which is now subject to control, but which might be perpetuated under a State government, — these and the like questions, in which the whole country is interested, cannot be finally solved by the people of the Territory for themselves, but the final decision must rest with Congress, and the judgment must be favorable before admission can be claimed or expected.<sup>1</sup>

II. In the original States, and all other subsequently admitted to the Union, the power to amend or revise their constitutions resides in the great body of the people as an organized body politic, who, being vested with ultimate sovereignty, and the source of all State authority, have power to control and alter at will the law which they have made. But the people, in the legal sense, must be understood to be those who, by the existing constitution, are clothed with political rights, and who, while that instrument remains, will be the sole organs through which the will of the body politic can be expressed.<sup>2</sup>

III. But the will of the people to this end can only be expressed

<sup>1</sup> When a constitution has been adopted by the people of a Territory, preparatory to admission as a State, and Congress prescribes certain changes and additions to be adopted by the legislature as part of the constitution, and declares such changes and additions to be fundamental conditions of admission of the State, and the legislature accepts such changes and

additions, and it is admitted, the changes become a part of the constitution, and binding as such, although not submitted to the people for approval. *Brittle v. People*, 2 Neb. 198; *Secombe v. Kittelson*, 29 Minn. 555, 12 N. W. 519.

<sup>2</sup> *Luther v. Borden*, 7 How. 1, 12 L. ed. 581; *Wells v. Bain*, 75 Penn. St. 39.

in the legitimate modes by which such a body politic can act, and which must either be prescribed by the constitution whose revision or amendment is sought, or by an act of the legislative department of the State, which alone would be authorized to speak for the people upon this subject, and to point out a mode for the expression of their will in the absence of any provision for amendment or revision contained in the constitution itself.<sup>1</sup>

<sup>1</sup> Opinions of Judges, 6 Cush. 573; *People v. Loomis*, 135 Mich. 556, 98 N. W. 262, 3 Ann. Cas. 751; *State v. Dahl*, 6 N. D. 81, 68 N. W. 418, 34 L. R. A. 97.

"There was a time in the early history of this country when in certain quarters the view was entertained that the people could legally assemble in convention and revise their constitution, without the sanction of legislative action. See Jameson, *Const. Conv.* pp. 383-387, 663-666. But this opinion no longer prevails. Jameson, *Const. Conv.* §§ 219, 394-403, 570, 571, 574 h. Judge Jameson says: 'The making of provision for assembling of conventions, and the hedging of them about with restrictions needed, as well for their efficiency as for the safety of the Commonwealth, is emphatically a matter of legislation. It is, moreover, a matter of legislation not fundamental in character, but of that species which our constitutions apportion exclusively to the legislative departments created by them. The legislation necessary to initiate and to temper the operations of a convention no department of the government is competent to effect but the legislature. The sovereign itself could not do it, nor the electors — bodies whose organization is such as to make deliberation upon the details of laws impossible. Nor is it true . . . that the giving to the legislature, in a constitution, express power to recommend specific amendments to that instrument involves, by implication, the denial to that body of power to call conventions for a general revision of it.'" *State v. Dahl*, 6 N. D. 81, 68 N. W. 418, 34 L. R. A. 97.

The first constitution of New York contained no provision for its own amendment, and Mr. Hammond, in his *Political History of New York*, Vol. I.

c. 26, gives a very interesting account of the controversy before the legislature and in the council of revision as to the power of the legislature to call a convention for revision, and as to the mode of submitting its work to the people.

If essential mandatory provisions of the organic law are ignored in amending the Constitution it violates the right of all the people of the State to government regulated by law. *Crawford v. Gilchrist*, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914 B, 916.

In *Collier v. Frierson*, 24 Ala. 100, it appeared that the legislature had proposed eight different amendments to be submitted to the people at the same time; the people had approved them, and all the requisite proceedings to make them a part of the constitution had been had, except that in the subsequent legislature the resolution for their ratification had, by mistake, omitted to recite one of them. On the question whether this one had been adopted, we quote from the opinion of the court: "The constitution can be amended in but two ways: either by the people who originally framed it, or in the mode prescribed by the instrument itself. . . . We entertain no doubt that to change the constitution in any other mode than by a convention, every requisition which is demanded by the instrument itself must be observed, and the omission of any one is fatal to the amendment. We scarcely deem any argument necessary to enforce this proposition. The constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It has been said that certain acts are to be done, certain requisitions are to be observed, before a change can be effected. But to

what purpose are those acts required or those requisitions enjoined, if the legislature or any department of the government can dispense with them? To do so would be to violate the instrument which they are sworn to support, and every principle of public law and sound constitutional policy requires the courts to pronounce against any amendment which is not shown to have been made in accordance with the rules prescribed by the fundamental law." See also *State v. McBride*, 4 Mo. 303; *State v. Tuffy*, 19 Nev. 391, 12 Pac. 835; *In re Const. Convention*, 14 R. I. 649; *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609; *Livermore v. Waite*, 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312; *Crawford v. Gilchrist*, 64 Fla. 41, 59 So. 693, Ann. Cas. 1914 B, 916; *Ellingham v. Dye*, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915 C, 200; *State v. Powell*, 77 Miss. 543, 27 So. 927, 48 L. R. A. 652; *State v. Roach*, 230 Mo. 408, 130 S. W. 689, 139 Am. St. Rep. 639; *State v. Winnett*, 78 Neb. 379, 110 N. W. 1113, 10 L. R. A. (N. S.) 149, 15 Ann. Cas. 781; *Bott v. Wurts*, 63 N. J. L. 289, 43 Atl. 744, 45 L. R. A. 251. But in Nebraska it has been held that the self-imposed limitations on the power of the people to amend their fundamental law should not be so construed as to defeat the will of the people, plainly expressed, on account of a slight and unimportant failure to comply literally with such limitations, if the requirements are substantially observed. *State ex rel. Thompson v. Winnett*, 78 Neb. 379, 110 N. W. 1113, 10 L. R. A. (N. S.) 149, 15 Ann. Cas. 781. See also *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 479, 38 L. R. A. (N. S.) 77.

Where the Constitution required that, when proposed amendments thereto were submitted to the vote of the people, such amendments should be "published at least once each week in at least one newspaper in each county where a newspaper is published for three months immediately preceding the next election of senators and representatives, at which election the same shall be submitted to the electors for approval or rejection", it was held

that where there was a substantial compliance with such requirement, the fact that the publication was made for one week less than the required time in one county of the State did not invalidate the amendment. *State ex rel. Thompson v. Winnett*, 78 Neb. 379, 110 N. W. 1113, 10 L. R. A. (N. S.) 149, 15 Ann. Cas. 781.

Where an amendment to the Constitution has been proposed by the Legislature in the manner provided by that instrument, and it has been submitted to the voters for ratification at the prescribed time and in substantially the prescribed manner, and has been ratified by them, such amendment will not be declared void, even if it should appear that an executive or ministerial officer did not comply strictly with the law as to the extent of publication in a particular newspaper. *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 479, 38 L. R. A. (N. S.) 77.

In some States proposed amendments are required to be entered in full upon the journals of each house of the legislature. This requirement is mandatory and a failure to observe it is fatal to the adoption of the amendment. *People v. Loomis*, 135 Mich. 556, 98 N. W. 262, 3 Ann. Cas. 751; *Bott v. Wurts*, 63 N. J. L. 289, 43 Atl. 744, 45 L. R. A. 251; *State v. Tuffy*, 19 Nev. 391, 12 Pac. 835, 3 Am. St. Rep. 895. See also *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 429, 38 L. R. A. (N. S.) 77. But see *People v. Sours*, 31 Colo. 369, 74 Pac. 167, 102 Am. St. Rep. 34.

In *Koehler v. Hill*, 60 Iowa, 543, 14 N. W. 738, 15 N. W. 609, it is held that where a proposed amendment *must* be entered *at length* upon the journal, neither the enrolled resolution embodying it nor parol evidence can be received to contradict the journal; nor are the courts debarred from ascertaining the truth by the fact that a second general assembly passed the amendment as enrolled. But if the proposition is recorded in the Senate journal and amended in the House and the amendment is then recorded in the Senate, it is not a valid objection that the whole proposition is not recorded

IV. In accordance with universal practice, and from the very necessity of the case, amendments to an existing constitution, or entire revisions of it, must be prepared and matured by some body of representatives chosen for the purpose.<sup>1</sup> It is obviously impossible for the whole people to meet, prepare, and discuss the proposed alterations, and there seems to be no feasible mode by which an expression of their will can be obtained, except by asking it upon the single point of assent or disapproval. But no

in one place in the Senate journal. *In re* Senate File, 25 Neb. 864, 41 N. W. Rep. 981. It is enough if the journal entry is by reference to the title. *Thomason v. Ruggles*, 69 Cal. 465, 11 Pac. 20.

Where the constitution provided that amendments should be proposed by one general assembly, and approved and submitted to popular vote by a second, and seventeen amendments were thus approved together, and the second general assembly passed upon and submitted eight by one bill and nine by another, the submission was held sufficient and valid. *Trustees of University v. McIver*, 72 N. C. 76.

Several propositions which in effect are but one amendment may be submitted to the people as one amendment. *State v. Timme*, 54 Wis. 318, 11 N. W. 785. A high license amendment and a prohibitory amendment may be submitted at one time. *In re* Senate File, *supra*.

An amendment becomes effective when the votes are canvassed. The Governor need not make a proclamation. *Sewall v. State*, 15 Tex. App. 56; *Wilson v. State*, *id.* 150.

A proposed amendment which has duly passed the legislature does not require to be passed upon by the Governor before it can be submitted to the people. *Com. v. Griest*, 196 Pa. 396, 46 Atl. 505, 50 L. R. A. 568; *State v. Dahl*, 6 N. D. 81, 68 N. W. 418, 34 L. R. A. 97; *In re* Opinion of Justices, 118 Me. 544, 107 Atl. 673, 5 A. L. R. 1412; *Warfield v. Vandiver*, 101 Md. 78, 61 Atl. 568, 4 Ann. Cas. 492.

In the absence of some other exclusive method of determination provided by the Constitution, whether an amendment has been legally proposed

and adopted is a question for the courts. *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 479, 38 L. R. A. (N. S.) 77; *State v. Wurts*, 63 N. J. L. 289, 43 Atl. 744, 45 L. R. A. 251; *Boyd v. Olcott*, 102 Ore. 327, 202 Pac. 431; *Gottstein v. Lister*, 88 Wash. 462, 153 Pac. 595, Ann. Cas. 1917 D, 1008.

Where the Governor has under statute appointed a commission to determine the result of the popular vote upon the proposed amendment, the proceedings of such commission may be reviewed by *certiorari*, notwithstanding the Governor's proclamation that the amendment has been duly adopted. *State v. Wurts*, 63 N. J. L. 289, 43 Atl. 744, 45 L. R. A. 251.

In voting on a constitutional amendment voters exercise a legislative function and courts cannot enjoin the Secretary of State from publishing notice of the election even though the amendment, if adopted, may be invalid. *People v. Mills*, 30 Col. 262, 70 Pac. 322.

Under a State Constitution vesting the legislative power in the legislature and the people and giving the legislature power to submit constitutional amendments, when the legislature authorizes the submission of a proposed amendment to the Constitution to the people, it merely places in motion the process of the people exercising their reserve legislative power, and a court of equity will not assume in advance jurisdiction to determine whether the proposed amendment, if adopted, is submitted and adopted in accordance with the law governing the same. *McAlister v. State ex rel. Short*, 95 Okla. 200, 219 Pac. 134, 33 A. L. R. 1370.

<sup>1</sup> *Ellingham v. Dye*, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915 C, 200.

body of representatives, unless specially clothed with power for that purpose by the people when choosing them, can rightfully take definitive action upon amendments or revisions; they must submit the result of their deliberations to the people — who alone are competent to exercise the powers of sovereignty in framing the fundamental law — for ratification or rejection. The constitutional convention is the representative of sovereignty only in a very qualified sense, and for the specific purpose, and with the restricted authority to put in proper form the questions of amendment upon which the people are to pass; but the changes in the fundamental law of the State must be enacted by the people themselves.<sup>1</sup>

V. The power of the people to amend or revise their constitutions is limited by the Constitution of the United States in the following particulars: —

<sup>1</sup> See, upon this subject, Jameson on the Constitutional Convention, §§ 415-418, and 479-520. This work is so complete and satisfactory in its treatment of the general subject as to leave little to be said by one who shall afterwards attempt to cover the same ground. Where a convention to frame amendments to the constitution is sitting under a legislative act from which all its authority is derived, the submission of its labors to a vote of the people in a manner different from that prescribed by the act is nugatory. *Wells v. Bain*, 75 Pa. St. 39. Such a convention has no inherent rights; it has delegated powers only, and must keep within them. *Wood's Appeal*, 75 Pa. St. 59. Compare *Loomis v. Jackson*, 6 W. Va. 613, 708.

"A constitutional convention is not a co-ordinate branch of the government. It exercises no governmental power, but is a body raised by law in aid of the popular desire to discuss and propose amendments, which have no governing force as long as they remain propositions." *State v. Doyle*, 138 La. 350, 70 So. 322.

The Supreme Court of Missouri has expressed the opinion that it was competent for a convention to put a new constitution in force without submitting it to the people. *State v. Neal*, 42 Mo. 119. But this was *obiter*. But if, after being accepted by the people,

the convention modifies it and promulgates it as modified, and the constitution as promulgated is recognized as valid by the executive and legislative branches of the government, the modifications must be deemed valid. *Miller v. Johnson*, 92 Ky. 589, 18 S. W. 522, 15 L. R. A. 524.

Where proposed amendments are required to be submitted to the people, and approved by a majority vote, it is a mooted question whether a majority of those voting thereon is sufficient, when it appears that they do not constitute a majority of all who voted at the same election. See *State v. Swift*, 69 Ind. 505; and cases cited, *post*, 1349 *et seq.*

"The customary manner of calling constitutional conventions . . . is by resolution of the Legislature followed by a submission of the question to the electorate. In the absence of any provision in the Constitution on the subject, it seems that the Legislature alone can give validity to a convention." *State v. American Sugar Refining Co.*, 137 La. 407, 68 So. 742.

That publication of proposed amendments with the statutes adopted at same session of the legislature as that in which the amendments were proposed is a sufficient publication if made a sufficiently long time before election, see *State v. Grey*, 21 Nev. 378, 32 Pac. 190, 19 L. R. A. 134.



1. It must not abolish the republican form of government, since such act would be revolutionary in its character, and would call for and demand direct intervention on the part of the government of the United States.<sup>1</sup>

2. It must not provide for titles of nobility, or assume to violate the obligation of any contract, or attain persons of crime, or provide *ex post facto* for the punishment of acts by the courts which were innocent when committed, or contain any other provision which would, in effect, amount to the exercise of any power expressly or impliedly prohibited to the States by the Constitution of the Union. For while such provisions would not call for the direct and forcible intervention of the government of the Union, it would be the duty of the courts, both State and national, to refuse to enforce them, and to declare them altogether void, as much when enacted by the people in their primary capacity as makers of the fundamental law, as when enacted in the form of statutes, through the delegated power of their legislatures.<sup>2</sup>

VI. Subject to the foregoing principles and limitations, each State must judge for itself what provisions shall be inserted in its constitution; how the powers of government shall be apportioned in order to their proper exercise; what protection shall be thrown around the person or property of the citizen; and to what extent private rights shall be required to yield to the general good.<sup>3</sup> And

<sup>1</sup> Const. of U. S. art. 4, § 4; Federalist, No. 43. *Chisholm v. Georgia*, 2 Dall. 419, 1 L. ed. 440.

<sup>2</sup> *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173; *State v. Keith*, 63 N. C. 140; *Jacoway v. Denton*, 25 Ark. 525; *Union Bank v. State*, 9 Yerg. 490; *Girdner v. Stephens*, 1 Heisk. 280; *Lawson v. Jeffries*, 47 Miss. 686, 12 Am. Rep. 342; *Penn v. Tollison*, 26 Ark. 545; *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *Pacific R. R. Co. v. Maguire*, 20 Wall. 36, 22 L. ed. 282; *Railroad Co. v. McClure*, 10 Wall. 511, 19 L. ed. 997; *White v. Hart*, 13 Wall. 646, 20 L. ed. 685; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. Rep. 329; *Bier v. McGehee*, 148 U. S. 137, 37 L. ed. 397, 13 Sup. Ct. Rep. 580.

The fact that the constitution containing the obnoxious provision was

submitted to Congress, and the State admitted to full rights in the Union under it, cannot make such provision valid. *Gunn v. Barry*, 15 Wall. 610, 21 L. ed. 212.

<sup>3</sup> *Matter of the Reciprocity Bank*, 22 N. Y. 9; *McMullen v. Hodge*, 5 Texas, 34; *Penn v. Tollison*, 26 Ark. 545; *Matter of Oliver Lee & Co.'s Bank*, 21 N. Y. 9; *Edwards v. Lesueur*, 132 Mo. 410, 33 S. W. 1130, 31 L. R. A. 815; *State v. Edmondson*, 89 Ohio St. 93, 105 N. E. 269, 52 L. R. A. (N. S.) 305, Ann. Cas. 1915 D, 934; *Hackett v. State Liquor License Board*, 91 Ohio St. 176, 110 N. E. 485, L. R. A. 1917 B, 7.

In *matter of Oliver Lee & Co.'s Bank*, 21 N. Y. 9, *Denio, J.*, says: "The [constitutional] convention was not obliged, like the legislative bodies, to look carefully to the preservation of vested rights. It was competent to deal, subject to ratification by the people and to the Constitution of the Federal government, with all private

the courts of the State, still more the courts of the Union, would be precluded from inquiring into the justice of their action, or questioning its validity, because of any supposed conflict with fundamental rules of right or of government, unless they should be able to show collision at some point between the instrument thus formed and that paramount law which constitutes, in regard to the subjects it covers, the fundamental rule of action throughout the whole United States.<sup>1</sup>

and social rights, and with all the existing laws and institutions of the State. If the convention had so willed, and the people had concurred, all former charters and grants might have been annihilated. When, therefore, we are seeking for the true construction of a constitutional provision, we are constantly to bear in mind that its authors were not executing a delegated authority, limited by other constitutional restraints, but are to look upon them as the founders of a State, intent only upon establishing such principles as seemed best calculated to produce good government and promote the public happiness, at the expense of any and all existing institutions which might stand in their way."

<sup>1</sup> All the State constitutions now contain within themselves provisions for their amendment. Some require the question of calling a convention to revise the constitution to be submitted to the people at stated periods; others leave it to the legislature to call a convention, or to submit to the people the question of calling one; while the major part allow the legislature to mature specific amendments to be submitted to the people separately, and these become a part of the constitution if adopted by the requisite vote.

When the late rebellion had been put down by the military forces of the United States, and the State governments which constituted a part of the disloyal system had been displaced, serious questions were raised as to the proper steps to be taken in order to restore the States to their harmonious relations to the Union. These questions, and the controversy over them, constituted an important part of the history of our country during the administration of President Johnson;

but as it is the hope and trust of our people that the occasion for discussing such questions will never arise again, we do not occupy space with them in this work. It suffices for the present to say, that Congress claimed, insisted upon, and enforced the right to prescribe the steps to be taken and the conditions to be observed in order to restore these States to their former positions in the Union, and the right also to determine when the prescribed conditions had been complied with, so as to entitle them to representation in Congress. There is some discussion of the general subject in *Texas v. White*, 7 Wall. 700, 19 L. ed. 227. And see *Gunn v. Barry*, 15 Wall. 610, 21 L. ed. 212.

Some States permit the amendment of the Constitution by the method of the initiative and referendum and such method has been held constitutional. *State v. Roach*, 230 Mo. 408, 130 S. W. 689, 139 Am. St. Rep. 639; *State v. Brantley*, 113 Miss. 786, 74 So. 662, Ann. Cas. 1917 E, 723; *Hackett v. State Liquor Licensing Board*, 91 Ohio St. 176, 110 N. E. 485, L. R. A. 1917 B, 7; *Kiernan v. Portland*, 57 Ore. 454, 111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 332.

When a constitution has been regarded by the people of a State as valid, and it has never been adjudged illegal by the courts, a Federal circuit court will not question its legal adoption. *Smith v. Good*, 34 Fed. Rep. 204.

It has been decided in some cases that a constitution is to have effect from the time of its adoption by the people, and not from the time of the admission of the State into the Union by Congress. *Scott v. Young Men's Society's Lessee*, 1 Doug. (Mich.) 119; *Campbell v. Fields*, 35 Texas, 751.

How far the constitution of a State shall descend into the particulars of government, is a question of policy addressed to the convention which forms it. Certain things are to be looked for in all these instruments; though even as to these there is great variety, not only of substance, but also in the minuteness of their provisions to meet particular cases.

I. We are to expect a general framework of government to be designed, under which the sovereignty of the people is to be exercised by representatives chosen for the purpose, in such manner as the instrument provides, and with such reservations as it makes.

II. Generally the qualifications for the right of suffrage will be declared, as well as the conditions under which it shall be exercised.

III. The usual checks and balances of republican government, in which consists its chief excellence, will be retained. The most important of these are the separate departments for the exercise of legislative, executive, and judicial power; and these are to be kept as distinct and separate as possible, except in so far as the action of one is made to constitute a restraint upon the action of the others, to keep them within proper bounds, and to prevent hasty and improvident action.<sup>1</sup> Upon legislative action there is,

The Texas reconstruction constitution became operative before the State was admitted to representation in Congress. *Peak v. Swindle*, 68 Texas, 242, 4 S. W. 478.

An amendment to the Minnesota original constitution adopted before formal admission of the State is valid. Any irregularity is healed by the admission, and the subsequent recognition of the validity of the amendment by the State. *Secombe v. Kittelson*, 29 Minn. 555, 12 N. W. 519.

<sup>1</sup> Authority in one department of government to interfere with another will always be strictly construed. Where the constitution provides for sessions of the legislature to be held at the State capitol, "except in case of war, insurrection or pestilence, when it may by proclamation of the governor assemble for the time being elsewhere", it does not empower the governor to adjourn the Houses after they have convened, even though he declares a state of insurrection to exist; neither can he under his power to adjourn the legislature, in case of dis-

agreement between the two Houses in regard to their adjournment, adjourn them to meet at a stated time at another place when there has been no disagreement between the two Houses. *Taylor v. Beckham*, 108 Ky. 278, 49 L. R. A. 258, 56 S. W. 177. See this case in Supreme Court of the United States, where the writ of error after discussion was dismissed on the ground that no deprivation of rights secured by the fourteenth amendment, without due process, was shown, nor was there any case made of a violation of the guaranty of a republican form of government. *Taylor v. Beckham*, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890. Dissenting opinion of *Harlan, J.*, 20 Sup. Ct. Rep. 1009.

Where the legislature is empowered to remove judges for cause, but is required to give notice and opportunity to appear, this imports that the cause shall be one personal to the judge, and he cannot be removed merely to cut down expenses. But if his court is one which the legislature is authorized to ordain and establish,

first, the check of the executive, who will generally be clothed with a qualified veto power, and who may refuse to execute laws deemed unconstitutional; and, second, the check of the judiciary, who may annul unconstitutional laws, and punish those concerned in enforcing them. Upon judicial action there is the legislative check, which consists in the power to prescribe rules for the courts, and perhaps to restrict their authority; and the executive check, of refusing aid in enforcing any judgments which are believed to be in excess of jurisdiction. Upon executive action the legislature has a power of restraint, corresponding to that which it exercises upon judicial action; and the judiciary may punish executive agents for any action in excess of executive authority. And the legislative department has an important restraint upon both the executive and the judiciary, in the power of impeachment for illegal or oppressive action, or for any failure to perform official duty. The executive, in refusing to execute a legislative enactment, will always do so with the peril of impeachment in view.

IV. Local self-government having always been a part of the English and American systems, we shall look for its recognition in any such instrument. And even if not expressly recognized, it is still to be understood that all these instruments are framed with its present existence and anticipated continuance in view.<sup>1</sup>

the legislature may abolish the court, and the judge's office and salary will thereupon cease. *McCulley v. State*, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567.

That all the territory of one judicial district may be distributed among other districts or annexed to one district, and the judge thus deprived of office, see *Aikman v. Edwards*, 55 Kan. 751, 42 Pac. 366, 30 L. R. A. 149; but this cannot be done where the judge's term of office is fixed by the constitution. *State v. Friedley*, 135 Ind. 119, 34 N. E. 872, 21 L. R. A. 634.

Court will not enjoin any attempted exercise of legislative power by legislature. *State v. Thorson*, 9 S. D. 149, 68 N. W. 202, 33 L. R. A. 582.

<sup>1</sup> *Park Commissioners v. Common Council of Detroit*, 28 Mich. 228; *People v. Albertson*, 55 N. Y. 50.

Under the constitution of Georgia it is held that municipalities cannot maintain the proposition of absolute local self-government and the State legislature may by direct enactment

control the local police. *Americus v. Perry*, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230.

It is held in *State ex rel. White v. Barker*, 116 Iowa, 96, 89 N. W. 204, 57 L. R. A. 244, that the legislature could not take from the municipality the management of a municipal water supply system. That action to that effect was invalid for violation of the principle of municipal self-government. This case is valuable for its historical discussion of the principle.

The legislature cannot fix the salaries of firemen employed by municipalities, although there is no limitation on such action in the constitution, since this is a matter of purely local concern. *Lexington v. Thompson*, 113 Ky. 540, 68 S. W. 477, 57 L. R. A. 775.

A legislature may create a school district and appoint its officers. *Kies v. Lowery*, 131 Mich. 639, 92 N. W. 289.

For a discussion of the "Right to Local Self-Government", see article by Mr. Amasa M. Eaton, 13 Harv. L. Rev. 441, 570, 638, 14 *id.* 20, 116.

V. We shall also expect a declaration of rights for the protection of individuals and minorities. This declaration usually contains the following classes of provisions : —

1. Those declaratory of the general principles of republican government ; such as, that all freemen, when they form a social compact, are equal, and no man, or set of men, is entitled to exclusive, separate public emoluments or privileges<sup>1</sup> from the community but in consideration of public services ; that absolute, arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority ; that all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, happiness, security, and the protection of property ; that for the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform, or abolish their government in such manner as they may think proper ; that all elections shall be free and equal ; that no power of suspending the laws shall be exercised except by the legislature or its authority ; that standing armies are not to be maintained in time of peace ; that representation shall be in proportion to population ; that the people shall have the right freely to assemble to consult of the common good, to instruct their representatives, and petition for redress of grievances ; and the like.

<sup>1</sup>The provision that no corporation shall be granted any special or exclusive privilege or immunity is not violated by an act which allows trustees of an estate to charge the estate any reasonable sum which they may have paid "to a company", authorized by law so to do, for becoming surety upon their bonds. *Re Clark*, 195 Pa. St. 520, 48 L. R. A. 587.

The privilege of taking oysters in public waters cannot be restricted to taxpayers. *Gustafson v. State*, 40 Tex. Cr. 67, 45 S. W. 717, 48 S. W. 518, 43 L. R. A. 615.

Labor unions may be granted right to register their trade-marks and labels and have them protected from infringement. *Schmalz v. Woolley*, 57 N. J. Eq. 303, 41 Atl. 939, 43 L. R. A. 86, 73 Am. St. 637 ; *Perkins v. Heert*, 158 N. Y. 306, 53 N. E. 18, 43 L. R. A. 858, 70 Am. St. 483.

Sale of ferry franchise to highest bidder is not a grant of special or exclusive privilege, even though the franchise be exclusive, all persons

being free to bid. *Patterson v. Wollman*, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 536 ; *Nixon v. Reid*, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315.

Law making an exception from civil service regulations in case of veteran soldiers, and compelling their appointment to vacancies upon their sworn statements of qualification, is void. *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. 357.

Statute authorizing the levy of an arbitrary tax upon ordinary and lawful occupations is void. *State v. Conlon*, 65 Conn. 478, 33 Atl. 519, 31 L. R. A. 55, 48 Am. St. 227.

Statute granting to trade-unions copyright in their trade-marks is valid. *State v. Bishop*, 128 Mo. 373, 31 S. W. 9, 29 L. R. A. 200, 49 Am. St. 569, and see note hereto in L. R. A.

Statute specifying number of deputies to be allowed county officers in certain counties, but leaving it to discretion of county court in other counties is void. *Weaver v. Davidson County*, 104 Tenn. 315, 59 S. W. 1105.

2. Those declaratory of the fundamental rights of the citizen : as that all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness; that the right to property is before and higher than any constitutional sanction; that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed ;<sup>1</sup> that every man may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that every man may bear arms for the defense of himself and of the State; that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, nor shall soldiers be quartered upon citizens in time of peace; and the like.

3. Those declaratory of the principles which insure to the citizen an impartial trial, and protect him in his life, liberty, and property against the arbitrary action of those in authority : as that no bill of attainder or *ex post facto* law shall be passed; that the right to trial by jury shall be preserved; that excessive bail shall not be required, nor excessive punishments inflicted; that no person shall be subject to be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without compensation; and the like.<sup>2</sup>

<sup>1</sup> Hale v. Everett, 53 N. H. 9; Board of Education v. Minor, 23 Ohio St. 211.

<sup>2</sup> The provision that courts of justice shall be open to every person and that right and justice shall be administered without denial, sale, or delay is violated by a statute which allows an attorney's fee to successful lien claimants but not to successful defendants. Davidson v. Jennings, 27 Colo. 187, 60 Pac. 354, 48 L. R. A. 340, 83 Am. St. 49. Such fees are allowed in Florida. Dell v. Marvin, 41 Fla. 221, 26 So. 188, 45 L. R. A. 201, 79 Am. St. 171. Further proceedings in an action may be stayed until costs of an appeal are paid. Knee v. Baltimore City Pass. Ry. Co., 87 Md. 623, 40 Atl. 890, 42 L. R. A. 363.

A person is not deprived of property or particular services without compen-

sation by a statute which compels him to appear before the court and testify in criminal cases, and deprives him of all right to fees therefor or makes such right contingent upon conviction of accused. State v. Henley, 98 Tenn. 665, 41 S. W. 352, 39 L. R. A. 126. And an expert witness cannot claim higher fees than other witnesses, nor can he refuse to testify until such fees are secured to him. Dixon v. People, 168 Ill. 179, 48 N. E. 108, 39 L. R. A. 116; upon right of State to require services of witnesses without compensation, see note to Dixon v. People, above, in L. R. A.

Moderate court fees may be exacted of parties to legal proceedings. Northern Counties Invt. Trust v. Sears, 30 Oreg. 388, 41 Pac. 931, 35 L. R. A. 188.

Repeal of statute giving right of

Other clauses are sometimes added declaratory of the principles of morality and virtue; and it is also sometimes expressly declared — what indeed is implied without the declaration — that everything in the declaration of rights contained is excepted out of the general powers of government, and all laws contrary thereto shall be void.

Many other things are commonly found in these charters of government;<sup>1</sup> but since, while they continue in force, they are to remain absolute and unchangeable rules of action and decision, it is obvious that they should not be made to embrace within their iron grasp those subjects in regard to which the policy or interest of the State or of its people may vary from time to time, and which are therefore more properly left to the control of the legislature, which can more easily and speedily make the required changes.

In considering State constitutions we must not commit the mistake of supposing that, because individual rights are guarded and protected by them, they must also be considered as owing their origin to them. These instruments measure the powers of the rulers, but they do not measure the rights of the governed. "What is a constitution, and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government; it is not the cause, but consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience. Designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made, it is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought. There is nothing primitive in it: it is all derived from a known source. It pre-

action against county for injury resulting from defective bridge does not violate a provision that every man shall have remedy by due course of law for all injuries done him. *Templeton v. Linn. Co.*, 22 Oreg. 313, 29 Pac. 795, 15 L. R. A. 730.

Proceedings in a second action in ejectment may be stayed until costs in the first are paid. *Shear v. Box*, 92 Ala. 596, 8 So. 792, 11 L. R. A. 620, and note.

<sup>1</sup> "This, then, is the office of a written [free] constitution: to delegate

to various public functionaries such of the powers of government as the people do not intend to exercise for themselves; to classify these powers, according to their nature, and to commit them to separate agents; to provide for the choice of these agents by the people; to ascertain, limit, and define the extent of the authority thus delegated; and to reserve to the people their sovereignty over all things not expressly committed to their representatives." E. P. Hurlbut in *Human Rights and their Political Guaranties*.

supposes an organized society, law, order, property, personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard it against the encroachments of tyranny. A written constitution is in every instance a limitation upon the powers of government in the hands of agents; for there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition.”<sup>1</sup>

<sup>1</sup> *Hamilton v. St. Louis County Court*, 15 Mo. 13, per *Bates, arguendo*. And see *Matter of Oliver Lee & Co.'s Bank*, 21 N. Y. 9; *Lee v. State*, 26 Ark. 265-6; *State v. Noble*, 118 Ind. 350, 21 N. E. 244, 10 Am. St. Rep. 143, 4 L. R. A. 101; *State v. Denny*, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; *Lexington v. Thompson*, 113 Ky. 540, 68 S. W. 477, 101 Am. St. Rep. 361, 57 L. R. A. 775; *Humes v. Missouri*, etc., R. Co., 82 Mo. 221, 52 Am. Rep. 369; *Atchison*, etc., R. Co. v. *Baty*, 6 Neb. 37, 29 Am. Rep. 356; *Stratton v. Morris*, 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70; *Dennis v. Moses*, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302.

“Written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former.” 2 Webster's Works, 392. See also 1 Bl. Com. 124; 2 Story, *Life and Letters*, 278; *Sidney on Government*, c. 3, secs. 27 and 33.

“It (the Constitution) is the protector of the people, placed on guard by them to save the rights of the people against injury by the people.” *Hunter v. Colfax Consol. Coal Co.*, 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917 D, 15, Ann. Cas. 1917 E, 803.

“Constitutions are intended to preserve practical and substantial rights, not to maintain theories.” Mr. Justice *Holmes* in *Davis v. Mills*, 194 U. S. 451, 48 L. ed. 1067, 24 Sup. Ct. Rep. 692.

“If this charter of State government which we call a constitution were all there was of constitutional command; if the usages, the customs, the maxims that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests; the precepts that have come to us from the revolutions which overturned tyrannies; the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so, — if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit; that which gives it force and attraction, which makes it valuable and draws to it the affections of the people; that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give, — this living and breathing spirit which supplies the interpretation of the words of the written charter would be utterly lost and gone.” *People v. Hurlbut*, 24 Mich. 44, 107.



## CHAPTER IV

### OF THE CONSTRUCTION OF STATE CONSTITUTIONS

THE deficiencies of human language are such that, if written instruments were always prepared carefully by persons skilled in the use of words, we should still expect to find their meaning often drawn in question, or at least to meet with difficulties in their practical application. But when draughtsmen are careless or incompetent, these difficulties are greatly increased; and they multiply rapidly when the instruments are to be applied, not only to the subjects directly within the contemplation of those who framed them, but also to a great variety of new circumstances which could not have been anticipated, but which must nevertheless be governed by the general rules which the instruments establish. Moreover, the different points of view from which different individuals regard these instruments incline them to different views of the instruments themselves. All these circumstances tend to give to the subjects of interpretation and construction great prominence in the practical administration of the law, and to suggest questions which often are of no little difficulty.

Interpretation differs from construction in that the former is the art of finding out the true sense of any form of words; that is, the sense which their author intended to convey; and of enabling others to derive from them the same idea which the author intended to convey. Construction, on the other hand, is the drawing of conclusions, respecting subjects that lie beyond the direct expressions of the text, from elements known from and given in the text; conclusions which are in the spirit, though not within the letter of the text. Interpretation only takes place if the text conveys some meaning or other. But construction is resorted to when, in comparing two different writings of the same individual, or two different enactments by the same legislative body, there is found contradiction where there was evidently no intention of such contradiction one of another, or where it happens that part of a writing or declaration contradicts the rest. When this is the case, and the nature of the document or declaration, or

whatever else it may be, is such as not to allow us to consider the whole as being invalidated by a partial or other contradiction, then resort must be had to construction; so, too, if required to act in cases which have not been foreseen by the framers of those rules, by which we are nevertheless obliged, for some binding reason, faithfully to regulate as well as we can our action respecting the unforeseen case.<sup>1</sup> In common use, however, the word *construction* is generally employed in the law in a sense embracing all that is properly covered by both when each is used in a sense strictly and technically correct; and we shall so employ it in the present chapter.

From the earliest periods in the history of written law, rules of construction, sometimes based upon sound reason, and seeking the real intent of the instrument, and at other times altogether arbitrary or fanciful, have been laid down by those who have assumed to instruct in the law, or who have been called upon to administer it, by the aid of which the meaning of the instrument was to be resolved. Some of these rules have been applied to particular classes of instruments only; others are more general in their application, and, so far as they are sound, may be made use of in any case where the meaning of a writing is in dispute. To such of these as seem important in constitutional law we shall refer, and illustrate them by references to reported cases, in which they have been applied.

A few preliminary words may not be out of place, upon the questions, who are to apply these rules; what person, body, or department is to enforce the construction; and how far a determination, when once made, is to be binding upon other persons, bodies, or departments.

We have already seen that we are to expect in every constitution an apportionment of the powers of government. We shall also find certain duties imposed upon the several departments, as well as upon specified officers in each, and we shall likewise discover that the constitution has sought to hedge about their action in various ways, with a view to the protection of individual rights, and the proper separation of duties. And wherever any one is called upon to perform any constitutional duty, or to do any act

<sup>1</sup> Lieber, *Legal and Political Hermeneutics*. See Smith on Stat. and Const. Construction, 600.

Bouvier defines the two terms succinctly as follows: "*Interpretation*, the discovery and representation of the true meaning of any signs used to con-

vey ideas." "*Construction*, in practice, determining the meaning and application as to the case in question of the provisions of a constitution, statute, will, or other instrument, or of an oral agreement." Law. Dict.

in respect to which it can be supposed that the constitution has spoken, it is obvious that a question of construction may at once arise, upon which some one must decide before the duty is performed or the act done. From the very nature of the case, this decision must commonly be made by the person, body, or department upon whom the duty is imposed, or from whom the act is required.

Let us suppose that the constitution requires of the legislature, that, in establishing municipal corporations, it shall restrict their powers of taxation; and a city charter is proposed which confined the right of taxation to the raising of money for certain specified purposes, but in regard to those purposes leaves it unlimited; or which allows to the municipality unlimited choice of purposes, but restricts the rate; or which permits persons to be taxed indefinitely, but limits the taxation of property: in either of these cases the question at once arises, whether the limitation in the charter is such a restriction as the constitution intends. Let us suppose, again, that a board of supervisors is, by the constitution, authorized to borrow money upon the credit of the county for any county purpose, and that it is asked to issue bonds in order to purchase stock in some railway company which proposes to construct a road across the county; and the proposition is met with the query, Is this a county purpose, and can the issue of bonds be regarded as a borrowing of money, within the meaning of the people as expressed in the constitution? And once again: let us suppose that the governor is empowered to convene the legislature on extraordinary occasions, and he is requested to do so in order to provide for a class of private claims whose holders are urgent; can this with any propriety be deemed an extraordinary occasion?

In these and the like cases our constitutions have provided no tribunal for the specific duty of solving in advance the questions which arise. In a few of the States, indeed, the legislative department has been empowered by the constitution to call upon the courts for their opinion upon the constitutional validity of a proposed law, in order that, if it be adjudged without warrant, the legislature may abstain from enacting it.<sup>1</sup> But those provisions

<sup>1</sup> By the constitutions of Maine, New Hampshire, and Massachusetts, the judges of the Supreme Court are required, when called upon by the governor, council, or either house of the legislature, to give their opinions "upon important questions of law, and upon solemn occasions." In Maine

it has been held that the giving of advisory opinions by Justices of the Supreme Court, while entitled to great consideration, is not the exercise of the judicial function, and the opinions thus given have not the quality of judicial authority. *Laughlin v. Portland*, 111 Me. 486, 90 Atl. 318, 50 L.

R. A. (N. S.) 1143, Ann. Cas. 1916 C, 734. In Massachusetts the way prescribed by the Constitution is the only way open to either branch of the legislature to obtain the assistance of the judicial department of government in the performance of the duties reposed in it by the Constitution, and it does not extend to the determination of questions of fact, nor authorize the imposition upon the courts of functions vested by the Constitution exclusively in other departments of government. Case of Supervisors of Elections, 114 Mass. 247, 19 Am. Rep. 341; *Boston v. Chelsea*, 212 Mass. 127, 98 N. E. 620; *Dinan v. Swig*, 223 Mass. 516, 112 N. E. 91. In Massachusetts the justices will not give an opinion on the proper construction of an existing act which the legislature may amend. Opinion of Justices, 148 Mass. 623, 21 N. E. 439.

In Rhode Island the governor or either house of the general assembly may call for the opinions of the judges of the Supreme Court upon any question of law.

In Florida the governor may require an opinion on any question affecting his executive powers and duties. A duty with reference to a bill before it becomes a law, is not an executive duty, and as to it the judges cannot advise. Opinion of Justices, 23 Fla. 297, 6 So. 925. So in South Dakota. *Re Constitutional Provision*, 3 S. D. 548, 54 N. W. 650, 19 L. R. A. 575.

In Missouri, previous to the constitution of 1875, the judges were required to give their opinions "upon important questions of constitutional law, and upon solemn occasions"; and the Supreme Court held that while the governor determined for himself, whether the occasion was such as to authorize him to call on the judges for their opinion, they must decide for themselves whether the occasion was such as to warrant the governor in making the call. Opinions of Judges, 49 Mo. 216.

By a constitutional amendment of 1885, the Colorado Supreme Court is required to give its opinion upon important questions upon solemn occasions to the governor or either house of

the legislature. The intention, it is held, is not "to authorize an *ex parte* adjudication of individual or corporate rights", nor to exact "a wholesale exposition of all constitutional questions relating to a given subject, in anticipation of the possible introduction or passage of measures bearing upon particular branches of such subject." It appearing that the question was covered by pending litigation, the court refused to answer. *In re Irrigation Resolution*, 9 Col. 620, 21 Pac. 470. Nor should it give an opinion on provisions which do not affect a pending act. *In re Irrigation Resolution*, *supra*. Questions must affect purely public rights. *In re Senate Resolution*, No. 65, 12 Col. 466, 21 Pac. 478; *Re House Bill*, No. 99, 26 Col. 140, 56 Pac. 181; *Re Senate Bill*, No. 27, 28 Col. 359, 65 Pac. 50.

In Alabama a statute providing for obtaining the opinions of the Justices of the Supreme Court, or a majority thereof, by the Governor or either House of the Legislature, upon important constitutional questions, has been held to contemplate merely advisory opinions of the individual justices, not of the court, binding neither the justices nor the department or officer requesting the opinion; and not to be invalid as being an encroachment by one department upon the powers of another. *In re Opinions of the Justices*, 209 Ala. 593, 96 So. 487.

In Vermont, by statute the governor may require an opinion on questions connected with the discharge of his duties; and in Kentucky an opinion has been given without requirement of law on the power of the governor to fill a vacancy on the Supreme Bench. Opinion of Judges, 79 Ky. 621.

In New York it has been held that the giving of advisory opinions is not the exercise of the judicial functions, and that no such duty attaches to the judicial office in the absence of an express provision of the Constitution. *In re Workmen's Compensation Fund*, 224 N. Y. 13, 119 N. E. 1027.

The jurisdiction of the United States courts is limited to cases and controversies in such form that the judicial

are not often to be met with, and judicial decisions, especially upon delicate and difficult questions of constitutional law, can seldom be entirely satisfactory when made, as they commonly will be under such calls, without the benefit of argument at the bar, and of that light upon the questions involved which might be afforded by counsel learned in the law, and interested in giving them a thorough investigation.

It follows, therefore, that every department of the government and every official of every department may at any time, when a duty is to be performed, be required to pass upon a question of constitutional construction.<sup>1</sup> Sometimes the case will be such that the decision when made must, from the nature of things, be conclusive and subject to no appeal or review, however erroneous it may be in the opinion of other departments or other officers; but in other cases the same question may be required to be passed upon again before the duty is completely performed. The first of these classes is where, by the constitution, a particular question is plainly addressed to the discretion or judgment of some one department or officer, so that the interference of any other department or officer, with a view to the substitution of its own discretion or judgment in the place of that to which the constitution has confided the decision, would be impertinent and intrusive. Under every constitution, cases of this description are to be met with; and, though it will sometimes be found difficult to classify them, there can be no doubt, when the case is properly determined to be one of this character, that the rule must prevail which makes the decision final.<sup>2</sup>

power is capable of acting on them and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of the Supreme Court without real parties or a real case, or to administrative or legislative issues or controversies. *Muskrat v. United States*, 219 U. S. 346, 31 Sup. Ct. Rep. 250, 55 L. ed. 246; *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 67 L. ed. 731, 43 Sup. Ct. Rep. 445.

<sup>1</sup> "It is argued that the legislature cannot give a construction to the constitution relative to private rights secured by it. It is true that the legislature, in consequence of their construction of the constitution, cannot make laws repugnant to it. But every department of government, invested with certain constitutional powers,

must, in the first instance, but not exclusively, be the judge of its powers, or it could not act." *Parsons*, Ch. J., in *Kendall v. Inhabitants of Kingston*, 5 Mass. 524, 533.

The decision of a governor, having jurisdiction to decide in the first instance whether tax exemption is constitutional, must be obeyed by inferior executive officers. *State v. Buchanan*, 24 W. Va. 362. But a patent commissioner may not refuse to perform a ministerial act on the ground that the statute requiring it is unconstitutional. *United States v. Marble*, 3 Mackey, 32. Notwithstanding a void proviso as to an officer's salary, it is his duty to give the act effect. *State v. Kelsey*, 44 N. J. L. 1.

<sup>2</sup> *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60; *State v. Joseph*, 175

We will suppose, again, that the constitution empowers the executive to convene the legislature on extraordinary occasions, and does not in terms authorize the intervention of any one else in determining what is and what is not such an occasion in the constitutional sense; it is obvious that the question is addressed exclusively to the executive judgment, and neither the legislative nor the judicial department can intervene to compel action, if the executive decide against it, or to enjoin action if, in his opinion, the proper occasion has arisen.<sup>1</sup> And again, if, by the constitution,

Ala. 579, 57 So. 942, Ann. Cas. 1914 D, 248; *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184; *Carpenter v. Peo.*, 8 Colo. 116, 5 Pac. 828; *In re Moyer*, 35 Colo. 159, 85 Pac. 190, 117 Am. St. Rep. 189, 12 L. R. A. (N. S.) 979; *Gillinwater v. Mississippi, etc., R. Co.*, 13 Ill. 1; *Johnson v. Wells County*, 107 Ind. 15, 8 N. E. 1; *State v. Tucker*, 46 Ind. 355; *Marks v. Purdue University*, 37 Ind. 155; *Richman v. Muscatine County*, 77 Iowa, 513, 42 N. W. 422, 14 Am. St. Rep. 308, 4 L. R. A. 445; *State v. Hitchcock*, 1 Kan. 178, 81 Am. Dec. 503; *St. Louis v. Shields*, 62 Mo. 247; *People v. Parker*, 3 Neb. 409, 19 Am. Rep. 634; *Newson v. Rainier*, 94 Ore. 199, 185 Pac. 296; *Buist v. Charleston*, 77 S. C. 260, 57 S. E. 862; *State v. Owen*, 97 Wash. 466, 166 Pac. 793.

Where the constitution empowers the legislature to determine an election contest for offices of governor and lieutenant-governor, the decision of the legislature in any such contest is not subject to review in the courts. *Taylor v. Beckham*, 108 Ky. 278, 49 L. R. A. 258, 56 S. W. 177. See this case in Supreme Court of the United States, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890; Dissenting opinion of *Harlan, J.*, 20 Sup. Ct. Rep. 1009.

Courts have jurisdiction to review apportionment statutes for abuses of discretion, amounting to violations of the constitution. *Carter v. Rice*, 135 N. Y. 473, 31 N. E. 921; *State v. Cunningham*, 83 Wis. 90, 51 N. W. 724, 35 Am. St. 27; *Giddings v. Secretary of State*, 93 Mich. 1, 52 N. W. 944. In *Giddings v. Secretary of State*, 93 Mich. 1, 52 N. W. 944, the question

was expressly determined to be a judicial one. But see *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, 42 Am. St. 220, in which case it was held that a bill, which raised the question of the validity of an apportionment act, filed by an elector for the enforcement of his right to the elective franchise, would not lie since the right involved was a purely political one.

<sup>1</sup> *Whiteman v. Railroad Co.*, 2 Harr. (Del.) 514, 33 Am. Dec. 411; *In re State Census*, 9 Col. 642, 21 Pac. Rep. 477; *Farrelly v. Cole*, 60 Kan. 356, 56 Pac. 492, 44 L. R. A. 464.

Under the Constitution of Oklahoma the action of the Governor in convoking the legislature at, or adjourning it to, another place than the seat of government "when in his opinion the public safety or welfare, or the safety or health of the members require it", such convoking or adjournment having been separately concurred in by a two-thirds vote of all the members elected to each branch of the Legislature, is conclusive upon, and not subject to be reviewed by, the Supreme Court. *Coyle v. Smith*, 28 Okla. 121, 113 Pac. 944.

In *People v. Parker*, 3 Neb. 409, 19 Am. Rep. 634, it appeared that an officer, assuming to act as governor in the absence of the governor from the State, had issued a proclamation convening the legislature in extraordinary session. The governor returned previous to the time named for the meeting, and issued a second proclamation, revoking the first. Held, that the power of convening the legislature being a discretionary power, it might be recalled before the meeting took place.

laws are to take effect at a specified time after their passage, unless the legislature for urgent reasons shall otherwise order, we must perceive at once that the legislature alone is competent to pass upon the urgency of the alleged reasons.<sup>1</sup> And to take a judicial instance: If a court is required to give an accused person a trial at the first term after indictment, unless good cause be shown for continuance, it is obvious that the question of good cause is one for the court alone to pass upon, and that its judgment when exercised is, and must be from the nature of the case, final. And when in these or any similar case the decision is once made, other departments or other officers, whatever may have been their own opinions, must assume the decision to be correct, and are not at liberty to raise any question concerning it, unless some duty is devolved upon them which presents the same question anew.

But there are cases in which the question of construction is

In exercising his power to call out the militia in certain exigencies, the President is the exclusive and final judge when the exigency has arisen. *Martin v. Mott*, 12 Wheat. 19, 6 L. ed. 537.

Under the Constitution and statutes of Colorado, the Governor having determined that an insurrection exists, authorizing him to call out the militia, his determination is not subject to review by the courts. *In re Moyer*, 35 Colo. 159, 85 Pac. 190, 117 Am. St. Rep. 189, 12 L. R. A. (N. S.) 979.

<sup>1</sup> See *post*, p. 326.

It is clear that courts cannot interfere with matters of legislative discretion. *Maloy v. Marietta*, 11 Ohio St. 636; *State v. Hitchcock*, 1 Kan. 178; *State v. Boone County Court*, 50 Mo. 317; *Patterson v. Barlow*, 60 Pa. St. 54; *Kimball v. Grantsville City*, 19 Utah, 368, 57 Pac. 1, 45 L. R. A. 628, and see cases *post*, 258. As to self-executing provisions in general, see *post*, p. 165.

In *Gillinwater v. Mississippi & Atlantic Railroad Co.*, 13 Ill. 1, it was urged that a certain restriction imposed upon railroad corporations by the general railroad law was a violation of the provision of the constitution which enjoins it upon the legislature "to encourage internal improvements by passing liberal general laws of incorporation for that purpose." The

court say of this provision: "This is a constitutional command to the legislature, as obligatory on it as any other of the provisions of that instrument; but it is one which cannot be enforced by the courts of justice. It addresses itself to the legislature alone, and it is not for us to say whether it has obeyed the behest in its true spirit. Whether the provisions of this law are liberal, and tend to encourage internal improvements, is matter of opinion, about which men may differ; and as we have no authority to revise legislative action on the subject, it would not become us to express our views in relation to it. The law makes no provision for the construction of canals and turnpike roads, and yet they are as much internal improvements as railroads, and we might as well be asked to extend what we might consider the liberal provisions of this law to them, because they are embraced in the constitutional provision, as to ask us to disregard such provisions of it as we might regard as illiberal. The argument proceeds upon the idea that we should consider that as done which ought to be done; but that principle has no application here. Like laws upon other subjects within legislative jurisdiction, it is for the courts to say what the law is, not what it should be."

equally addressed to two or more departments of the government, and it then becomes important to know whether the decision by one is binding upon the others, or whether each is to act upon its own judgment. Let us suppose once more that the governor, being empowered by the constitution to convene the legislature upon extraordinary occasions, has regarded a particular event as being such an occasion, and has issued his proclamation calling them together with a view to the enactment of some particular legislation which the event seems to call for, and which he specifies in his proclamation. Now, the legislature are to enact laws upon their own view of necessity and expediency; and they will refuse to pass the desired statute if they regard it as unwise or unimportant. But in so doing they indirectly review the governor's decision, especially if, in refusing to pass the law, they do so on the ground that the specific event was not one calling for action on their part. In such a case it is clear that, while the decision of the governor is final so far as to require the legislature to meet, it is not final in any sense that would bind the legislative department to accept and act upon it when they enter upon the performance of their duty in the making of laws.<sup>1</sup>

So also there are cases where, after the two houses of the legislature have passed upon the question, their decision is in a certain sense subject to review by the governor. If a bill is introduced the constitutionality of which is disputed, the passage of the bill by the two houses must be regarded as the expression of their judgment that, if approved, it will be a valid law. But if the constitution confers upon the governor a veto power, the same question of constitutional authority will be brought by the bill before him, since it is manifestly his duty to withhold approval from any bill which, in his opinion, the legislature ought not for any reason to pass. And what reason so forcible as that the constitution confers upon them no authority to enact it? In all these and the like cases, each department must act upon its own judgment, and cannot be required to do that which it regards as a violation of the constitution, on the ground solely that another department which, in the course of the discharge of its own duty, was called upon first to act, has reached the conclusion that it will not be violated by the proposed action.

But setting aside now those cases to which we have referred, where from the nature of things, and perhaps from explicit terms of the constitution, the judgment of the department or officer acting must be final, we shall find the general rule to be, that when-

<sup>1</sup> See Opinions of Judges, 49 Mo. 216.



ever action is taken which may become the subject of a suit or proceeding in court, any question of constitutional power or right that was involved in such action will be open for consideration in such suit or proceeding, and that as the courts must finally settle the particular controversy, so also will they finally determine the question of constitutional law.<sup>1</sup>

For the constitution of the State is higher in authority than any law, direction, or order made by any body or any officer assuming to act under it, since such body or officer must exercise a delegated authority, and one that must necessarily be subservient to the instrument by which the delegation is made. In any case of conflict the fundamental law must govern, and the act in conflict with it must be treated as of no legal validity. But no mode has yet been devised by which these questions of conflict are to be discussed and settled as abstract questions, and their determination is necessary or practicable only when public or private rights would be affected thereby.<sup>2</sup> They then become the subject of legal controversy; and legal controversies must be settled by the courts.<sup>3</sup> The courts have thus devolved upon them the duty to pass upon the constitutional validity, sometimes of legislative, and sometimes of

<sup>1</sup> *Frink v. Darst*, 14 Ill. 304, 58 Am. Dec. 575; *Dugan v. Hollins*, 13 Md. 149; *Law v. O'Regan*, 179 Mass. 107, 60 N. E. 397; *Emerson v. Atwater*, 7 Mich. 12; *Boon v. Bowers*, 30 Miss. 246, 64 Am. Dec. 159; *Palmer v. Lawrence*, 5 N. Y. 389; *Bates v. Relyea*, 23 Wend. 336; *Goodell v. Jackson*, 20 Johns. 693; 11 Am. Dec. 351; *Anderson v. Jackson*, 16 Johns. 382, 8 Am. Dec. 330; *Nelson v. Allen*, 1 Yerg. 360; *Lewis v. Thornton*, 6 Munf. 87; *Kneeland v. Milwaukee*, 15 Wis. 454.

<sup>2</sup> *Ogden v. Blackledge*, 78 Cranch, 272, 2 L. ed. 276; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Calhoun v. McLendon*, 42 Ga. 405; *Sawyer v. Blakely*, 2 Ga. App. 159, 58 S. E. 399; *Durham v. Lewiston*, 4 Me. 140; *Lewis v. Webb*, 3 Me. 326; *King v. Dedham Bank*, 15 Mass. 447, 8 Am. Dec. 112; *Westinghausen v. People*, 44 Mich. 265, 6 N. W. 641; *In re Consolidated Gas Co.*, 190 N. Y. 350, 83 N. E. 299, 16 L. R. A. (n. s.) 335; *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567; *Haley v. Philadelphia*, 68 Pa. St. 45, 8 Am. Rep. 153; *Governor v.*

*Porter*, 5 Humph. 165; *Powell v. State*, 17 Tex. App. 345.

<sup>3</sup> *Governor v. Porter*, 5 Humph. 165. The legislature cannot by statute define the words of the constitution for the courts. *Westinghausen v. People*, 44 Mich. 265; *Powell v. State*, 17 Tex. App. 345. Compare *People v. Supervisors of La Salle*, 100 Ill. 495. And see *post*, p. 190, note. The legislative construction of a constitutional provision must, however, be considered, the theory being that it entered into the legislative consideration of the act in question; but that construction cannot be considered as final by the courts, and can have no effect against the plain mandate of the Constitution. *Willett v. Weaver*, 205 Ala. 268, 87 So. 601. The right to declare an act unconstitutional is purely a judicial power and cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the Constitution. *State ex rel. Atlantic Coast Line Railroad Co. v. State Board of Equalizers*, 84 Fla. 592, 94 So. 681.

executive acts. And as judicial tribunals have authority, not only to judge, but also to enforce their judgments, the result of a decision against the constitutionality of a legislative or executive act will be to render it invalid through the enforcement of the paramount law in the controversy which has raised the question.<sup>1</sup>

The same conclusion is reached by stating in consecutive order a few familiar maxims of the law. The administration of public justice is referred to the courts. To perform this duty, the first requisite is to ascertain the facts, and the next to determine the law applicable to such facts. The constitution is the fundamental law of the State, in opposition to which any other law, or any direction or order, must be inoperative and void. If, therefore, such other law, direction, or order seems to be applicable to the facts, but on comparison with the fundamental law the latter is found to be in conflict with it, the court, in declaring what the law of the case is, must necessarily determine its invalidity, and thereby in effect annul it.<sup>2</sup> The right and the power of the courts to do this are so plain,

<sup>1</sup> "When laws conflict in actual cases, they [the courts] must decide which is the superior law, and which must yield; and as we have seen that, according to our principles, every officer remains answerable for what he officially does, a citizen, believing that the law he enforces is incompatible with the superior law, the constitution, simply sues the officer before the proper court as having unlawfully aggrieved him in the particular case. The court, bound to do justice to every one, is bound also to decide this case as a simple case of conflicting laws. The court does not decide directly upon the doings of the legislature. It simply decides for the case in hand, whether there actually are conflicting laws, and, if so, which is the higher law that demands obedience, when both may not be obeyed at the same time. As, however, this decision becomes the leading decision for all future cases of the same import, until, indeed, proper and legitimate authority should reverse it, the question of constitutionality is virtually decided, and it is decided in a natural, easy, legitimate and safe manner, according to the principle of the supremacy of the law and the dependence of justice. It is one of the most interesting and important evolutions

of the government of law, and one of the greatest protections of the citizen. It may well be called a very jewel of Anglican liberty and one of the best fruits of our political civilization." Lieber, *Civil Liberty and Self-Government*.

"Whenever a law which the judge holds to be unconstitutional is argued in a tribunal of the United States, he may refuse to admit it as a rule; this power is the only one which is peculiar to the American magistrate, but it gives rise to immense political influence. Few laws can escape the searching analysis; for there are few which are not prejudicial to some private interest or other, and none which may not be brought before a court of justice by the choice of parties, or by the necessity of the case. But from the time that a judge has refused to apply any given law in a case, that law loses a portion of its moral sanction. The persons to whose interest it is prejudicial learn that means exist for evading its authority; and similar suits are multiplied until it becomes powerless. One of two alternatives must then be resorted to, — the people must alter the constitution, or the legislature must repeal the law." De Tocqueville, *Democracy in America*, c. 6.

<sup>2</sup> "It is idle to say that the authority of each branch of the government is

and the duty is so generally — we may almost say universally — conceded, that we should not be justified in wearying the patience of the reader in quoting from the very numerous authorities upon the subject.<sup>1</sup>

defined and limited by the constitution, if there be not an independent power able and willing to enforce the limitations. Experience proves that the constitution is thoughtlessly but habitually violated; and the sacrifice of individual rights is too remotely connected with the objects and contests of the masses to attract their attention. From its very position it is apparent that the conservative power is lodged in the judiciary, which, in the exercise of its undoubted rights, is bound to meet any emergency; else causes would be decided, not only by the legislature, but sometimes without hearing or evidence." Per *Gibson*, Ch. J., in *De Chastellux v. Fairchild*, 15 Pa. St. 18.

"Nor will this conclusion, to use the language of one of our most eminent jurists and statesmen, by any means suppose a superiority of the judicial to the legislative power. It will only be supposing that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that declared by the people in the constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental. Neither would we, in doing this, be understood as impugning the honest intentions, or sacred regard to justice, which we most cheerfully accord to the legislature. But to be above error is to possess an entire attribute of the Deity; and to spurn its correction is to reduce to the same degraded level the most noble and the meanest of his works." *Bates v. Kimball*, 2 Chip. 77. See *Bailey v. Gentry*, 1 Mo. 164, 13 Am. Dec. 484.

"Without the limitations and restraints usually found in written constitutions, the government could have no elements of permanence and durability; and the distribution of its

powers, and the vesting their exercise in separate departments, would be an idle ceremony." *Brown, J.*, in *People v. Draper*, 15 N. Y. 532, 558.

<sup>1</sup> 1 Kent, 500-507; *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60; see *post*, p. 332; Webster on the Independence of the Judiciary, Works, Vol. III. p. 29. In this speech, Mr. Webster has forcibly set forth the necessity of leaving with the courts the power to enforce constitutional restrictions. "It cannot be denied," says he, "that one great object of written constitutions is, to keep the departments of government as distinct as possible; and for this purpose to impose restraints designed to have that effect. And it is equally true that there is no department on which it is more necessary to impose restraints than upon the legislature. The tendency of things is almost always to augment the power of that department in its relation to the judiciary. The judiciary is composed of few persons, and those not such as mix habitually in the pursuits and objects which most engage public men. They are not, or never should be, political men. They have often unpleasant duties to perform, and their conduct is often liable to be canvassed and censured where their reasons for it are not known or cannot be understood. The legislature holds the public purse. It fixes the compensation of all other departments; it applies as well as raises all revenue. It is a numerous body, and necessarily carries along with it a great force of public opinion. Its members are public men, in constant contact with one another and with their constituents. It would seem to be plain enough that, without constitutional provisions which should be fixed and certain, such a department, in case of excitement, would be able to encroach on the judiciary." . . . "The constitution being the supreme law, it follows, of course, that every

*Conclusiveness of Judicial Decisions.*

But a question which has arisen and been passed upon in one case may arise again in another, or it may present itself under different circumstances for the decision of some other department or officer of the government. It therefore becomes of the highest importance to know whether a principle once authoritatively declared is to be regarded as conclusively settled for the guidance, not only of the court declaring it, but of all courts and all departments of the government; or whether, on the other hand, the decision settles the particular controversy only, so that a different decision may be possible, or, considering the diversity of human judgments, even probable, whenever in any new controversy other tribunals may be required to examine and decide upon the same question.

In some cases and for some purposes the conclusiveness of a judicial determination is, beyond question, final and absolute. A decision once made in a particular controversy, by the highest court empowered to pass upon it, is conclusive upon the parties to the litigation and their privies, and they are not allowed afterwards to revive the controversy in a new proceeding for the purpose of raising the same or any other questions. The matter in dispute has become *res judicata*, a thing definitely settled by judicial decision; and the judgment of the court imports absolute verity. Whatever the question involved, — whether the interpretation of a private contract, the legality of an individual act, or the validity of a legislative enactment, — the rule of finality is the same. The controversy has been adjudged; and, once finally passed upon, it is never to be renewed.<sup>1</sup> It must frequently happen, therefore, that

act of the legislature contrary to that law must be void. But who shall decide this question? Shall the legislature itself decide it? If so, then the constitution ceases to be a legal, and becomes only a moral restraint upon the legislature. If they, and they only, are to judge whether their acts be conformable to the constitution, then the constitution is admonitory or advisory only, not legally binding, because if the construction of it rests wholly with them, their discretion, in particular cases, may be in favor of very erroneous and dangerous constructions. Hence the courts of law necessarily, when the case arises, must decide on the validity of particular

acts." "Without this check, no certain limitations could exist on the exercise of legislative power." See also, as to the dangers of legislative encroachments, De Tocqueville, *Democracy in America*, c. 6; Story on Const. (4th ed.) § 532 and note.

The legislature, though possessing a larger share of power, no more represents the sovereignty of the people than either of the other departments; it derives its authority from the same high source. *Bailey v. Philadelphia, &c. Railroad Co.*, 4 Harr. 389; *Whittington v. Polk*, 1 H. & J. 236; *McCaulley v. Brooks*, 16 Cal. 11.

<sup>1</sup> *Duchess of Kingston's Case*, 11 State Trials, 261, 2 Smith, Lead. Cas.

- 424; *Young v. Black*, 7 Cranch, 565, 3 L. ed. 440; *Chapman v. Smith*, 16 How. 114, 14 L. ed. 868; *Aurora City v. West*, 7 Wall. 82, 19 L. ed. 42; *Tioga R. R. Co. v. Blossburg, &c. R. R. Co.*, 20 Wall. 137, 22 L. ed. 331; *The Rio Grande*, 23 Wall. 458, 23 L. ed. 159; *Coffey v. United States*, 116 U. S. 436; 29 L. ed. 684, 6 Sup. Ct. Rep. 437; *United States v. Parker*, 120 U. S. 89, 30 L. ed. 601, 7 Sup. Ct. Rep. 454; *Wilson's Exec. v. Deen*, 121 U. S. 525, 30 L. ed. 980, 7 Sup. Ct. Rep. 1004; *Skelding v. Whitney*, 3 Wend. 154; *Etheredge v. Osborn*, 12 Wend. 399; *Hayes v. Reese*, 34 Barb. 151; *Hyatt v. Bates*, 35 Barb. 308; *Harris v. Harris*, 36 Barb. 88; *Maddox v. Graham*, 2 Met. (Ky.) 56; *Porter v. Hill*, 9 Mass. 34; *Norton v. Doherty*, 3 Gray, 372; *Thurston v. Thurston*, 99 Mass. 39; *Way v. Lewis*, 115 Mass. 26; *Blackinton v. Blackinton*, 113 Mass. 231; *Witmer v. Schlatter*, 15 S. & R. 150; *Warner v. Scott*, 39 Pa. St. 274; *Verner v. Carson*, 66 Pa. St. 440; *Kerr v. Union Bank*, 18 Md. 396; *Whitehurst v. Rogers*, 38 Md. 503; *Wales v. Lyon*, 2 Mich. 276; *Prentiss v. Holbrook*, 2 Mich. 372; *Van Kleek v. Eggleston*, 7 Mich. 511; *Newberry v. Trowbridge*, 13 Mich. 278; *Barker v. Cleveland*, 19 Mich. 230; *Winslow v. Grindall*, 2 Me. 64; *Slade v. Slade*, 58 Me. 157; *Crandall v. James*, 6 R. I. 144; *Babcock v. Camp*, 12 Ohio St. 11; *Hawkins v. Jones*, 19 Ohio St. 22; *George v. Gillespie*, 1 Greene (Iowa), 421; *Taylor v. Chambers*, 1 Iowa, 124; *Wright v. Leclair*, 3 Iowa, 221; *Clark v. Sammons*, 12 Iowa, 368; *Whittaker v. Johnson Co.*, 12 Iowa, 595; *Dwyer v. Goran*, 29 Iowa, 126; *Fairfield v. McNany*, 37 Iowa, 75; *Eimer v. Richards*, 25 Ill. 289; *Wells v. McClenning*, 23 Ill. 409; *Crow v. Bowlby*, 68 Ill. 23; *Peay v. Duncan*, 20 Ark. 85; *Perrine v. Serrell*, 30 N. J. 454; *Weber v. Morris, &c.*, 36 N. J. 213; *Fischil v. Cowan*, 1 Blackf. 350; *Denny v. Reynolds*, 24 Ind. 248; *Bates v. Spooner*, 45 Ind. 489; *Davenport v. Barnett*, 51 Ind. 329; *Center Tp. v. Com'rs Marion Co.*, 110 Ind. 579, 10 N. E. 291; *Warwick v. Underwood*, 3 Head, 238; *Jones v. Weathersbee*, 4 Strob. 50; *Hoover v. Mitchell*, 25 Gratt. 387; *Hungerford's Appeal*, 41 Conn. 322; *Union R. R. Co. v. Traube*, 59 Mo. 355; *Perry v. Lewis*, 49 Miss. 443; *Harris v. Colquit*, 44 Ga. 663; *McCauley v. Hargroves*, 48 Ga. 50, 15 Am. Rep. 660; *Castellaw v. Guilmartin*, 54 Ga. 299; *Sloan v. Cooper*, 54 Ga. 486; *Doyle v. Hallam*, 21 Minn. 515; *Philpotts v. Blasdel*, 10 Nev. 19; *Case v. New Orleans, &c. R. R.*, 2 Woods, 236; *Geary v. Simmons*, 39 Cal. 224; *Gee v. Williamson*, 1 Port. (Ala.) 313, 27 Am. Dec. 628; *Cannon v. Brame*, 45 Ala. 262; *Finney v. Boyd*, 26 Wis. 366; *Warner v. Trow*, 36 Wis. 195; *Schroers v. Fisk*, 10 Col. 599, 16 Pac. 285; *Ram on Legal Judgment*, c. 14; *Northern Pac. R. Co. v. Slaght*, 205 U. S. 122, 51 L. ed. 738, 27 Sup. Ct. Rep. 442; *Virginia-Carolina Chemical Co. v. Kirven*, 215 U. S. 252, 54 L. ed. 179, 30 Sup. Ct. Rep. 78; *Traxell v. Delaware, etc., R. Co.*, 227 U. S. 434, 57 L. ed. 586, 33 Sup. Ct. Rep. 274; *Bates v. Bodie*, 245 U. S. 520, 62 L. ed. 444, 38 Sup. Ct. Rep. 182, L. R. A. 1918 C, 355; *Gordon v. Ware National Bank*, 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 5 Ann. Cas. 314, 3 L. R. A. (N. S.) 954; *Pindel v. Holgate*, 221 Fed. 342, 137 C. C. A. 158, Ann. Cas. 1916 C, 983; *Quillian v. Henderson-Mizell Mercantile Co.*, 179 Ala. 548, 60 So. 820, 43 L. R. A. (N. S.) 950; *Scott v. Scott*, 83 Conn. 634, 78 Atl. 314, 21 Ann. Cas. 965; *Thompson v. Hemenway*, 218 Ill. 46, 75 N. E. 791, 109 Am. St. Rep. 239; *Commercial Loan, etc., Co. v. Mallers*, 242 Ill. 50, 89 N. E. 661, 134 Am. St. Rep. 306, 17 Ann. Cas. 224; *South Park Com'rs v. Ward*, 248 Ill. 299, 93 N. E. 910, 21 Ann. Cas. 127; *Whitesell v. Strickler*, 167 Ind. 602, 78 N. E. 845, 119 Am. St. Rep. 524; *Graves v. Graves*, 132 Iowa, 199, 109 N. W. 707, 10 L. R. A. (N. S.) 216; *Garden City v. Merchants, etc., National Bank*, 65 Kan. 345, 69 Pac. 325, 93 Am. St. Rep. 284; *Elswick v. Matney*, 132 Ky. 294, 116 S. W. 718, 136 Am. St. Rep. 180; *Campbell v. Gello*, 142 La. 1082, 78 So. 124, L. R. A. 1918 D,

a question of constitutional law will be decided in a private litigation, and the parties to the controversy, and all others subsequently acquiring rights under them, in the subject-matter of the suit, will thereby become absolutely and forever precluded from renewing the question in respect to the matter then involved. The rule of conclusiveness to this extent is one of the most inflexible principles of the law; insomuch that even if it were subsequently held by the courts that the decision in the particular case was erroneous, such holding would not authorize the reopening of the old controversy in order that the final conclusion might be applied thereto.<sup>1</sup>

251; *Newhall v. Enterprise Min. Co.*, 205 Mass. 585, 91 N. E. 905, 137 Am. St. Rep. 461; *Telford v. McGillis*, 130 Minn. 397, 153 N. W. 758, Ann. Cas. 1916 E, 157; *Leonard v. Schall*, 132 Minn. 446, 157 N. W. 723, 4 A. L. R. 1166; *Tax Lien Co. v. Schultze*, 213 N. Y. 9, 106 N. E. 751, L. R. A. 1915 D, 1115, Ann. Cas. 1916 C, 636; *Cook v. Conners*, 215 N. Y. 175, 109 N. E. 78, L. R. A. 1916 A, 1074, Ann. Cas. 1917 A, 248; *Sheridan v. McCormick*, 39 N. D. 641, 168 N. W. 59, 8 A. L. R. 523; *Corrugated Culvert Co. v. Simpson Tp.*, 51 Okla. 178, 151 Pac. 854, 4 A. L. R. 1170; *White v. Ladd*, 41 Oreg. 324, 68 Pac. 739, 93 Am. St. Rep. 732; *Adams v. Church*, 42 Oreg. 270, 70 Pac. 1037, 95 Am. St. Rep. 740, 59 L. R. A. 782; *Yuen Suey v. Fleshman*, 65 Oreg. 606, 133 Pac. 803, Ann. Cas. 1915 A, 1072; *Averbuch v. Averbuch*, 80 Wash. 257, 141 Pac. 701; Ann. Cas. 1916 B, 873; *Diamond Ice, etc., Co. v. Klock Produce Co.*, 103 Wash. 369, 174 Pac. 435, 8 A. L. R. 685; *Barbour v. Tompkins*, 58 W. Va. 572, 52 S. E. 707, 3 L. R. A. (N. S.) 715; *Huntzicker v. Crocker*, 135 Wis. 38, 115 N. W. 340, 15 Ann. Cas. 444.

A judgment, however, is conclusive as an estoppel, as to those facts only without the existence and proof of which it could not have been rendered; and if it might have been given on any one of several grounds, it is conclusive between the parties as to neither of them. *Lea v. Lea*, 99 Mass. 493. And see *Dickinson v. Hayes*, 31 Conn. 417; *Church v. Chapin*, 35 Vt. 223; *Packet Co. v. Sickles*, 5 Wall. 580, 18 L. ed. 550; *Spencer v. Dearth*, 43 Vt. 98; *Hill v. Morse*, 61 Me. 541; *Rus-*

*sell v. Place*, 94 U. S. 606, 24 L. ed. 214; *De Sollar v. Hanscombe*, 158 U. S. 216, 39 L. ed. 956, 15 Sup. Ct. Rep. 816; *Horton v. Goodenough*, 184 Cal. 451, 194 Pac. 34; *Clifton v. Meuser*, 88 Kan. 408, 129 Pac. 159, 43 L. R. A. (N. S.) 124; *Providence-Washington Ins. Co. v. Owens*, (Tex.) 210 S. W. 558.

A judicial sale by an administrator will pass title though the supposed intestate proves to be living. *Rodrigas v. Savings Institution*, 63 N. Y. 460; s. c. 20 Am. Rep. 555; *contra*, *Johnson v. Beazley*, 65 Mo. 250; s. c. 27 Am. Rep. 285, and note.

Death of the alleged intestate is a jurisdictional fact, and in the absence of such fact any administration upon his estate is null. *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; rev. 5 Wash. 309, 31 Pac. 873, 34 Am. St. 863. Many authorities are cited in 154 U. S. at page 43, 38 L. ed. 900.

<sup>1</sup> *McLean v. Hugarin*, 13 Johns. 184; *Morgan v. Plumb*, 9 Wend. 287; *Wilder v. Case*, 16 Wend. 583; *Baker v. Rand*, 13 Barb. 152; *Kelley v. Pike*, 5 Cush. 484; *Hart v. Jewett*, 11 Iowa, 276; *Colburn v. Woodworth*, 31 Barb. 381; *Newberry v. Trowbridge*, 13 Mich. 278; *Skeldin v. Whitney*, 3 Wend. 154; *Brockway v. Kinney*, 2 Johns. 210; *Platner v. Best*, 11 Johns. 530; *Phillips v. Berick*, 16 Johns. 136; *Page v. Fowler*, 37 Cal. 100; *Howison v. Weeden*, 77 Va. 704; *Fourniquet v. Perkins*, 7 How. 160, 12 L. ed. 650; *Gordon v. Ware National Bank*, 65 C. C. A. 580, 132 Fed. 444, 67 L. R. A. 550; *Lamb v. Wahlenmaier*, 144 Cal. 91, 77 Pac. 765, 103 Am. St. Rep.

But if important principles of constitutional law can be thus disposed of in suits involving only private rights, and when private individuals and their counsel alone are heard, it becomes of interest to know how far, if at all, other individuals and the public at large are affected by the decision. And here it will be discovered that quite a different rule prevails, and that a judicial decision has no such force of absolute conclusiveness as to other parties as it is allowed to possess between the parties to the litigation in which the decision has been made, and those who have succeeded to their rights.

A party is concluded by a judgment against him from disputing its correctness, so far as the point directly involved in the case was concerned, whether the reasons upon which it was based were sound or not, and even if no reasons were given therefor. And if the parties themselves are concluded, so also should be all those who, since the decision, claim to have acquired interests in the subject-matter of the judgment from or under the parties, as personal representatives, heirs-at-law, donees, or purchasers, and who are therefore considered in the law as privies.<sup>1</sup> But if strangers who have no interest in that subject-matter are to be in like manner concluded, because their controversies are supposed to involve the same question of law, we shall not only be forced into a series of endless inquiries, often resulting in little satisfaction, in order to ascertain whether the question is the same, but we shall also be met by the query, whether we are not concluding parties by decisions which others have obtained in fictitious controversies and by collusion, or have suffered to pass without sufficient consideration and discussion, and which might perhaps have been

66; *Irvin v. Spratlin*, 127 Ga. 240, 52 S. E. 1037, 9 Ann. Cas. 341; *People ex rel. First National Bank v. Russel*, 283 Ill. 520, 119 N. E. 617; *Cain v. Union Cent. Life Ins. Co.*, 123 Ky. 59, 95 S. W. 622, 124 Am. St. Rep. 313; *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 104 Pac. 159, 133 Am. St. Rep. 1005. The rule laid down becomes the law of the case. *Bibb v. Bibb*, 79 Ala. 437; *Weare v. Dearing*, 60 N. H. 56; *Pittsburgh, &c. Ry. Co. v. Hixon*, 110 Ind. 225, 11 N. E. 285; *Heinlein v. Martin*, 59 Cal. 181; *Frankland v. Cassaday*, 62 Texas, 418; *Adams Co. v. Burlington & M. R. R. Co.*, 55 Iowa, 94, 7 N. W. 471; *Westfall v. Wait*, 165 Ind. 353, 73 N. E. 1089, 6 Ann. Cas. 788;

*Alderding v. Allison*, 170 Ind. 252, 83 N. W. 1006, 127 Am. St. Rep. 363; *Kaler v. Puget Sound Bridge, etc., Co.*, 72 Wash. 497, 130 Pac. 894, 20 A. L. R. 674. But see *Barton v. Thompson*, 56 Iowa, 571, 9 N. W. 899.

<sup>1</sup> The question whether a judgment, by force of its recitals, shall operate as a technical estoppel, or whether it shall operate as a bar only after the proper parol evidence shall have been given to identify the subject of litigation, is one which our subject does not require us to discuss. The cases are examined fully and with discrimination in *Robinson's Practice*, Vol. VI., and are also discussed in *Bigelow on Estoppel*.

given otherwise had other parties had an opportunity of being heard.

We have already seen that the force of a judgment does not depend upon the reasons given therefor, or upon the circumstance that any were or were not given. If there were, they may have covered portions of the controversy only, or they may have had such reference to facts peculiar to that case, that in any other controversy, though somewhat similar in its facts, and apparently resembling it in its legal bearings, grave doubts might arise whether it ought to fall within the same general principle. If one judgment were absolutely to conclude the parties to any similar controversy, we ought at least to be able to look into the judicial mind, in order that we might ascertain of a surety that all those facts which should influence the questions of law were substantially the same in each, and we ought also to be able to see that the first litigation was conducted in entire good faith, and that every consideration was presented to the court which could properly have weight in the construction and application of the law. All these things, however, are manifestly impossible; and the law therefore wisely excludes judgments from being used to the prejudice of strangers to the controversy, and restricts their conclusiveness to the parties thereto and their privies.<sup>1</sup> Even parties and privies are bound only so

<sup>1</sup> *Burrill v. West*, 2 N. H. 190; *Davis v. Wood*, 1 Wheat. 6, 4 L. ed. 22; *Jackson v. Vedder*, 3 Johns. 8; *Case v. Reeve*, 14 Johns. 79; *Alexander v. Taylor*, 4 Denio, 302; *Van Bokkelen v. Ingersoll*, 5 Wend. 315; *Smith v. Ballantyne*, 10 Paige, 101; *Orphan House v. Lawrence*, 11 Paige, 80; *Thomas v. Hubbell*, 15 N. Y. 405; *Masten v. Olcott*, 101 N. Y. 152, 4 N. E. 274; *Wood v. Stephen*, 1 Serg. & R. 175; *Peterson v. Lothrop*, 34 Pa. St. 223; *Twambly v. Henley*, 4 Mass. 441; *Este v. Strong*, 2 Ohio, 402; *Cowles v. Harts*, 3 Conn. 516; *Floyd v. Mintsey*, 5 Rich. 361; *Riggin's Ex'rs v. Brown*, 12 Ga. 271; *Persons v. Jones*, 12 Ga. 371; *Buckingham v. Ludlum*, 37 N. J. Eq. 137; *Scates v. King*, 110 Ill. 456; *Leslie v. Bonte*, 130 Ill. 498, 22 N. E. 594; *Tiffany v. Stewart*, 60 Iowa, 207, 14 N. W. 241; *Lord v. Wilcox*, 99 Ind. 491; *Pardee v. Aldridge*, 189 U. S. 429, 47 L. ed. 883, 23 Sup. Ct. Rep. 514; *G. & C. Merriam Co. v. Saalfeld*, 241 U. S. 22, 60 L. ed. 868, 36 Sup. Ct. Rep. 477; *New York L. Ins. Co. v.*

*Dunlevy*, 241 U. S. 518, 60 L. ed. 1140, 36 Sup. Ct. Rep. 613; *Harnage v. Martin*, 242 U. S. 386, 61 L. ed. 382, 37 Sup. Ct. Rep. 148; *Baker v. Baker*, 242 U. S. 394, 61 L. ed. 386, 37 Sup. Ct. Rep. 152; *United States v. California Bridge, etc., Co.*, 245 U. S. 337, 62 L. ed. 332, 38 Sup. Ct. Rep. 91; *Arkansas v. Tennessee*, 246 U. S. 158, 62 L. ed. 638, 38 Sup. Ct. Rep. 301, L. R. A. 1918 D, 258; *Postal Tel. Cable Co. v. Newport*, 247 U. S. 464, 62 L. ed. 1215, 38 Sup. Ct. Rep. 566; *Gratiot County State Bank v. Johnson*, 249 U. S. 246, 63 L. ed. 587, 39 Sup. Ct. Rep. 263; *Sage v. United States*, 250 U. S. 33, 63 L. ed. 828, 39 Sup. Ct. Rep. 415; *Privett v. United States*, 256 U. S. 201, 65 L. ed. 889, 41 Sup. Ct. Rep. 455; *Elmore, etc., Co. v. Henderson-Mizell Mercantile Co.*, 179 Ala. 548, 60 So. 820, 43 L. R. A. (N. s.) 950; *Ex parte Logan*, 185 Ala. 525, 64 So. 570, 51 L. R. A. (N. s.) 1068, Ann. Cas. 1916 C, 405; *Eldred v. Johnson*, 75 Ark. 1, 86 S. W. 670, 112 Am. St. Rep. 17, 69 L. R. A. 823, 5 Ann. Cas. 521; *Albie v. Jones*,



far as regards the subject-matter then involved, and would be at liberty to raise the same questions anew in a distinct controversy affecting some distinct subject-matter.<sup>1</sup> [Thus a judgment based

82 Ark. 414, 102 S. W. 222, 12 Ann. Cas. 433; *Chapman v. Moore*, 151 Cal. 509, 91 Pac. 324, 121 Am. St. Rep. 130; *Dundee Naval Stores Co. v. McDowell*, 65 Fla. 15, 61 So. 108, Ann. Cas. 1915 A, 387; *In re Sharp*, 15 Idaho, 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886; *Thompson v. Maloney*, 199 Ill. 276, 65 N. E. 236, 93 Am. St. Rep. 133; *People v. Amos*, 246 Ill. 299, 92 N. E. 857, 138 Am. St. Rep. 239; *Jordan v. Jordan*, 274 Ill. 251, 113 N. E. 631, L. R. A. 1917 D, 563; *Buchan v. German American Land Co.*, 180 Iowa, 911, 164 N. W. 119, L. R. A. 1918 A, 84; *Macedonia State Bank v. Graham*, 198 Iowa, 12, 199 N. W. 248, 34 A. L. R. 148; *Henry v. Missouri, etc., R. Co.*, 98 Kan. 567, 158 Pac. 857, Ann. Cas. 1918 E, 1094; *Henderson County v. Henderson Bridge Co.*, 116 Ky. 164, 75 S. W. 239, 105 Am. St. Rep. 197; *Rosenberg v. Dahl*, 162 Ky. 92, 172 S. W. 113, Ann. Cas. 1916 E, 1110; *Jones v. Caldwell*, 176 Ky. 15, 195 S. W. 122, L. R. A. 1918 B, 50; *Burchett v. Blackburne*, 198 Ky. 304, 248 S. W. 853, 34 A. L. R. 1425; *Lumpkin v. Lumpkin*, 108 Md. 470, 70 Atl. 238, 25 L. R. A. (N. S.) 1063; *Old Dominion Copper Min., etc., Co. v. Bigelow*, 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314, affirmed 225 U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641, Ann. Cas. 1913 E, 875; *McGillway v. Employers' Liability Assur. Corp.*, 214 Mass. 484, 102 N. E. 77, 46 L. R. A. (N. S.) 110; *Minnesota Debenture Co. v. Johnson*, 94 Minn. 150, 102 N. W. 381, 110 Am. St. Rep. 354; *Henry v. White*, 123 Minn. 182, 143 N. W. 324, L. R. A. 1916 D, 4; *Telford v. McGillis*, 130 Minn. 397, 153 N. W. 758, Ann. Cas. 1916 E, 157; *Butte Land, etc., Co. v. Merriman*, 32 Mont. 402, 80 Pac. 675, 108 Am. St. Rep. 590; *Westminster National Bank v. New England Electrical Works*, 73 N. H. 465, 62 Atl. 971, 111 Am. St. Rep. 637, 3 L. R. A. (N. S.) 551; *Ludy v. Larsen*, 78 N. J. Eq.

237, 79 Atl. 687, 37 L. R. A. (N. S.) 957; *Philadelphia F. Ass'n v. Wells*, 84 N. J. Eq. 484, 94 Atl. 619, L. R. A. 1916 A, 1280, Ann. Cas. 1917 A, 1296; *Fults v. Munro*, 202 N. Y. 34, 95 N. E. 23, 37 L. R. A. (N. S.) 600, Ann. Cas. 1912 D, 870; *Gadsden v. Crafts*, 175 N. C. 358, 95 S. E. 610, L. R. A. 1918 E, 226; *Corrugated Culvert Co. v. Simpson Tp.*, 51 Okla. 178, 151 Pac. 854, 4 A. L. R. 1170; *Dale v. Marvin*, 76 Ore. 528, 148 Pac. 1116, Ann. Cas. 1917 C, 557; *Cope v. Payne*, 111 Tenn. 128, 76 S. W. 820, 102 Am. St. Rep. 746; *Larsen v. Gasberg*, 30 Utah, 470, 86 Pac. 412, 116 Am. St. Rep. 859; *Coe v. Wormell*, 88 Wash. 119, 152 Pac. 716, Ann. Cas. 1917 C, 679; *Smith v. White*, 63 W. Va. 472, 60 S. E. 404, 14 L. R. A. (N. S.) 530; *Blake v. O'Neal*, 63 W. Va. 483, 61 S. E. 410, 16 L. R. A. (N. S.) 1147; *Grant v. Swank*, 74 W. Va. 93, 81 S. E. 967, L. R. A. 1915 B, 881, Ann. Cas. 1917 C, 286; *Rowell v. Smith*, 123 Wis. 510, 102 N. W. 1, 3 Ann. Cas. 773. Compare *Benedict v. Smith*, 48 Mich. 593, 12 N. W. 866; *Howison v. Weeden*, 77 Va. 704; *Robinson's Practice*, Vol. VII. 134 to 156; *Bigelow on Estoppel*, 46 *et seq.*

<sup>1</sup> *Van Alstine v. Railroad Co.*, 34 Barb. 28; *Taylor v. McCrackin*, 2 Blackf. 260; *Cook v. Vimont*, 6 T. B. Monr. 284; *Virginia-Carolina Chemical Co. v. Kirven*, 215 U. S. 252, 54 L. ed. 179, 30 Sup. Ct. Rep. 78; *Radford v. Myers*, 231 U. S. 725, 58 L. ed. 454, 34 Sup. Ct. Rep. 249; *George A. Fuller Co. v. Otis Elevator Co.*, 245 U. S. 489, 62 L. ed. 422, 38 Sup. Ct. Rep. 180; *Southern Pac. Co. v. Bogert*, 250 U. S. 483, 63 L. ed. 1099, 39 Sup. Ct. Rep. 533; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; *Water, Light, etc., Co. v. Hutchinson*, 160 Fed. 41, 90 C. C. A. 547, 19 L. R. A. (N. S.) 219; *Quillian v. Henderson-Mizell Mercantile Co.*, 179 Ala. 548, 60 So. 820, 43 L. R. A. (N. S.) 950; *Ex parte Logan*, 185 Ala.

525, 64 So. 570, 51 L. R. A. (n. s.) 1068, Ann. Cas. 1916 C, 405; *Scott v. Scott*, 83 Conn. 634, 78 Atl. 314, 21 Ann. Cas. 965; *Draper v. Medlock*, 122 Ga. 234, 50 S. E. 113, 69 L. R. A. 483, 2 Ann. Cas. 650; *Rew v. Independent School Dist.*, 125 Iowa, 28, 98 N. W. 802, 106 Am. St. Rep. 282; *McAdow v. Kansas City Western R. Co.*, 96 Kan. 423, 151 Pac. 1113, L. R. A. 1917 B, 1158; *People v. Detroit, etc., Ferry Co.*, 187 Mich. 177, 153 N. W. 799, Ann. Cas. 1918 B, 170; *Major v. Owen*, 126 Minn. 1, 147 N. W. 662, Ann. Cas. 1915 D, 589; *Leonard v. Schall*, 132 Minn. 446, 157 N. W. 723, 4 A. L. R. 1166; *Orr v. Bennett*, 135 Minn. 443, 161 N. W. 165, 4 A. L. R. 1396; *Eminent Household, etc. v. Bunch*, 115 Miss. 512, 76 So. 540, Ann. Cas. 1918 C, 110; *Tax Lien Co. v. Schultze*, 213 N. Y. 9, 106 N. E. 751, L. R. A. 1915 D, 1115, Ann. Cas. 1916 C, 636; *Murphy v. John Hoffman Co.*, 215 N. Y. 185, 109 N. E. 101, L. R. A. 1916 A, 634; *La Follett v. Mitchell*, 42 Ore. 465, 69 Pac. 916, 95 Am. St. Rep. 780; *Ruckman v. Union R. Co.*, 45 Ore. 578, 78 Pac. 748, 69 L. R. A. 480; *Macan v. Scandinavia Belting Co.*, 264 Pa. St. 384, 107 Atl. 750, 5 A. L. R. 1502; *In re Clifford*, 37 Wash. 460, 79 Pac. 1001, 107 Am. St. Rep. 819; *Pasco v. Pacific Coast Casualty Co.*, 101 Wash. 496, 172 Pac. 566, L. R. A. 1918 E, 811; *Diamond Ice, etc., Co. v. Klock Produce Co.*, 103 Wash. 369, 174 Pac. 435, 8 A. L. R. 685; *Central Banking, etc., Co. v. United States Fidelity, etc., Co.*, 73 W. Va. 197, 80 S. E. 121, 51 L. R. A. (n. s.) 797; *Pereles v. Gross*, 126 Wis. 122, 105 N. W. 217, 110 Am. St. Rep. 901; *In re Ryan*, 157 Wis. 576, 147 N. W. 993, L. R. A. 1917 A, 443, 1916 D, 840.

If certain facts were not necessarily included in the issue, a party is not concluded by the judgment as to them. *Davis v. Davis*, 65 Miss. 498, 4 So. 554; *Doonan v. Glynn*, 28 W. Va. 715; *Lorillard v. Clyde*, 99 N. Y. 196, 1 N. E. 614; *Belden v. State*, 103 N. Y. 1, 8 N. E. 363; *Umlauf v. Umlauf*, 117 Ill. 580, 6 N. E. 455; *Concha v. Concha*, L. R. 11 App. Cas. 541; *Rushville v. Rushville Natural*

*Gas Co.*, 164 Ind. 162, 73 N. E. 87, 3 Ann. Cas. 86.

Where the entry of judgment in an action involving several issues of fact recites a finding upon one of such issues that compels a judgment for the defendant, and is silent as to the rest, there is no presumption that they have been passed upon, and in the absence of some further showing they will be held open to inquiry in future litigation between the same parties, based upon a different cause of action. *Hudson v. Remington Paper Co.*, 71 Kan. 300, 80 Pac. 568, 6 Ann. Cas. 103.

If the second action is upon a different claim or demand from that in which the judgment pleaded was rendered, the judgment is an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. *Bates v. Bodie*, 245 U. S. 520, 62 L. ed. 444, 38 Sup. Ct. Rep. 182, L. R. A. 1918 C, 355.

If the second action involves the same property and more, the judgment is conclusive only as to those issues which were actually tried and determined. *Foye v. Patch*, 132 Mass. 105. See *Metcalf v. Gilmore*, 63 N. H. 174. But if the facts were within the issue, the judgment is conclusive as to them, although the question raised in the second action was not actually litigated. *Harmon v. Auditor*, 123 Ill. 123, 13 N. E. 161; *Fairchild v. Lynch*, 99 N. Y. 359, 2 N. E. 20; *Trayhern v. Colburn*, 66 Md. 277, 7 Atl. 459; *Kennedy v. McCarthy*, 73 Ga. 346; *Shenandoah V. R. R. Co. v. Griffith*, 76 Va. 913; *Cleveland v. Creviston*, 93 Ind. 31; *Chouteau v. Gibson*, 76 Mo. 38. See also *Oklahoma v. Texas*, 256 U. S. 70, 65 L. ed. 831, 41 Sup. Ct. Rep. 420; *Morgan v. Kendrick*, 91 Ark. 394, 121 S. W. 278, 134 Am. St. Rep. 78; *Hilton v. Stewart*, 15 Idaho, 150, 96 Pac. 579, 128 Am. St. Rep. 48; *Brock v. Boyd*, 211 Ill. 290, 71 N. E. 995, 103 Am. St. Rep. 200; *Teel v. Dunnihoo*, 230 Ill. 476, 82 N. E. 844, 120 Am. St. Rep. 319; *Baumhoff v. St. Louis, etc., R. Co.*, 205 Mo. 248, 104 S. W. 5, 120 Am. St. Rep. 745; *Chicago, etc., R. Co. v. Cass County*, 72 Neb. 489, 101

on a statute subsequently held to be unconstitutional is not *res judicata* when the question is again presented after the statute has been declared void, and in respect to another subject-matter though involving the same right.<sup>1</sup> And, as a general rule, parties to a judgment are not bound by it in subsequent controversies between each other unless they were adversaries in the action wherein the judgment was rendered.<sup>2</sup>

All judgments, however, are supposed to apply the existing law to the facts of the case; and the reasons which are sufficient to influence the court to a particular conclusion in one case ought to be sufficient to bring it or any other court to the same conclusion in all other like cases where no modification of the law has intervened. There would thus be uniform rules for the administration of justice, and the same measure that is meted out to one would be received by all others. And even if the same or any other court, in a subsequent case, should be in doubt concerning the correctness of the decision which has been made, there are consequences of a very grave character to be contemplated and weighed before the experiment of disregarding it should be ventured upon. That state of things, when judicial decisions conflict, so that a citizen is always at a loss in regard to his rights and his duties, is a very serious evil; and the alternative of accepting adjudged cases as precedents in future controversies resting upon analogous facts, and brought within the same reasons, is obviously preferable. Precedents, therefore, become important, and counsel are allowed and expected to call the attention of the court to them, not as concluding controversies, but as guides to the judicial mind. Chancellor *Kent* says: "A solemn decision upon a point of law arising in any given case becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If

N. W. 11, 117 Am. St. Rep. 806; *Richmond v. Sitterding*, 101 Va. 354, 43 S. E. 562, 99 Am. St. Rep. 878, 65 L. R. A. 445; *Roller v. Murray*, 71 W. Va. 161, 76 S. E. 172, L. R. A. 1915 F, 984, Ann. Cas. 1914 B, 1139.

See, for a further discussion of this doctrine, its meaning and extent, *Spencer v. Dearth*, 43 Vt. 98, and the very full and exhaustive discussion in *Robinson's Practice*, Vol. VII.

<sup>1</sup> *Security Savings Bank v. Connell*,

198 Iowa, 564, 200 N. W. 8, 36 A. L. R. 486, holding that a judgment based on a statute subsequently held to be unconstitutional is not *res judicata* in a later case involving the same right to a tax exemption, but relating to the tax of a subsequent year.

<sup>2</sup> *Keagy v. Wellington Nat. Bank*, 12 Okla. 33, 69 Pac. 811; *Snyder v. Marken*, 116 Wash. 270, 199 Pac. 302, 22 A. L. R. 1272.

a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would therefore be extremely inconvenient to the public if precedents were not duly regarded, and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and people in general can venture to buy and trust, and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has once been deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court, except for very urgent reasons, and upon a clear manifestation of error; and if the practice were otherwise, it would be leaving us in a perplexing uncertainty as to the law.<sup>1</sup>

<sup>1</sup> 1 Kent, 475. And see *Cro. Jac.* 527; *Rex v. Cox*, 2 Burr. 787; *King v. Younger*, 5 T. R. 450; *Goodtitle v. Otway*, 7 T. R. 416; *Selby v. Bardons*, 3 B. & Ad. 17; *Fletcher v. Lord Somers*, 3 Bing. 588; *Hammond v. Anderson*, 4 Bos. & P. 69; *Lewis v. Thornton*, 6 Munf. 94; *Dugan v. Hollins*, 13 Md. 149; *Anderson v. Jackson*, 16 Johns. 382; *Goodell v. Jackson*, 20 Johns. 693; *Bates v. Relyea*, 23 Wend. 336; *Emerson v. Atwater*, 7 Mich. 12; *Nelson v. Allen*, 1 Yerg. 360; *Palmer v. Lawrence*, 5 N. Y. 389; *Kneeland v. Milwaukee*, 15 Wis. 454; *Boon v. Bowers*, 30 Miss. 246; *Frink v. Darst*, 14 Ill. 304; *Broom's Maxims*, 109; *Geohegan v. Union El. R. Co.*, 266 Ill. 482, 107 N. E. 786, Ann. Cas. 1916 B, 762; *Moore-Mansfield Constr. Co. v. Indianapolis, etc., R. Co.*, 179 Ind. 356, 101 N. E. 296, 44 L. R. A. (N. S.) 816, Ann. Cas. 1915 D, 917; *Weaver v. Chicago First National Bank*, 76 Kan. 540, 94 Pac. 273, 123 Am. St. Rep. 155, 16 L. R. A. (N. S.) 110; *Oliver Co. v. Louisville Realty Co.*, 156 Ky. 628, 161 S. W. 570, 51 L. R. A. (N. S.) 293; *Mabardy v. McHugh*, 202 Mass. 148, 88 N. E. 894, 132 Am. St. Rep. 484, 23 L. R. A. (N. S.) 487, 16 Ann. Cas. 500; *Hill v. Atlantic, etc., R. Co.*, 143 N. C. 539, 55 S. E. 854, 9 L. R. A. (N. S.) 606;

*Mason v. A. E. Nelson Cotton Co.*, 148 N. C. 492, 62 S. E. 625, 128 Am. St. Rep. 635, 18 L. R. A. (N. S.) 1221.

Dr. Lieber thinks the doctrine of the precedent especially valuable in a free country. "Liberty and steady progression require the principle of the precedent in all spheres. It is one of the roots with which the tree of liberty fastens in the soil of real life, and through which it receives the sap of fresh existence. It is the weapon by which interference is warded off. The principle of the precedent is eminently philosophical. The English Constitution would not have developed itself without it. What is called the English Constitution consists of the fundamentals of the British polity, laid down in custom, precedent, decisions, and statutes; and the common law in it is a far greater portion than the statute law. The English Constitution is chiefly a common-law constitution; and this reflex of a continuous society in a continuous law is more truly philosophical than the theoretic and systematic, but lifeless, constitutions of recent France." *Civ. Lib. and Self-Gov.* See also his chapter on precedents in the *Hermeneutics*.

In *Nelson v. Allen*, 1 Yerg. 360, 376, where the constitutionality of the "Betterment Law" came under con-

sideration, the court (*White, J.*) say: "Whatever might be my own opinion upon this question, not to assent to its settlement now, after two solemn decisions of this court, the last made upwards of fourteen years ago, and not only no opposing decision, but no attempt even by any case, during all this time, to call the point again in controversy, forming a complete acquiescence, would be, at the least, inconsistent, perhaps mischievous, and uncalled for by a correct discharge of official duty. Much respect has always been paid to the contemporaneous construction of statutes, and a forbidding caution hath always accompanied any approach towards unsettling it, dictated, no doubt, by easily foreseen consequences attending a sudden change of a rule of property, necessarily introductory at least of confusion, increased litigation, and the disturbance of the peace of society. The most able judges and the greatest names on the bench have held this view of the subject, and occasionally expressed themselves to that effect, either tacitly or openly, intimating that if they had held a part in the first construction they would have been of a different opinion; but the construction having been made, they give their assent thereto. Thus Lord *Ellenborough*, in 2 East, 302, remarks: 'I think it is better to abide by that determination, than to introduce uncertainty into this branch of the law, it being often more important to have the rule settled, than to determine what it shall be. I am not, however, convinced by the reasoning in this case, and if the point were new I should think otherwise.' Lord *Mansfield*, in 1 Burr. 419, says: 'Where solemn determinations acquiesced under had settled precise cases and a rule of property, they ought, for the sake of certainty, to be observed, as if they had originally formed a part of the text of the statute.' And Sir *James Mansfield*, in 4 B. & P. 69, says: 'I do not know how to distinguish this from the case before decided in the court. It is of greater consequence that the law should be as uniform as possible, than that the equitable claim

of an individual should be attended to.'" And see *People v. Cicotte*, 16 Mich. 283.

In *Geohegan v. Union El. R. Co.*, 266 Ill. 482, 107 N. E. 786, Ann. Cas. 1916 B, 762, the court said: "The law can only be known if fixed and established rules are adhered to consistently. Manifestly, not only the interests of the State but of the individual, as well as the proper administration of justice, require that there shall be settled rules in the interpretation of the law, otherwise we would have 'confusion worse confounded.' 'After repeated decisions on the same point by this court, the maxim *stare decisis* should prevail; it being for the best interests of society that there should be some permanency in judicial decisions, so that the law may be known, and, when known, pursued and obeyed. It should be a shield and a guide, and not a snare, for those who may come within its operation.' *Hopkins v. McCann*, 19 Ill. 113."

In *Mabardy v. McHugh*, 202 Mass. 148, 88 N. E. 894, 132 Am. St. Rep. 484, 23 L. R. A. (N. S.) 487, 16 Ann. Cas. 500, Justice *Rugg*, in delivering the opinion of the court, said: "It is highly desirable that laws for conduct in ordinary affairs, in themselves easy of comprehension and memory, when once established, should remain fast. The doctrine of *stare decisis* is as salutary as it is well recognized. . . . While perhaps it is more important as to far-reaching juridical principles that the court should be right, in the light of higher civilization, later and more careful examination of authorities, wider and more thorough discussion and more mature reflection upon the policy of the law, than merely in harmony with previous decisions, *Barden v. Northern Pacific R. R.*, 154 U. S. 288-322, 38 L. ed. 992, 14 Sup. Ct. 1030, it is nevertheless vital, that there be stability in the courts in adhering to decisions deliberately made after ample consideration. Parties should not be encouraged to seek re-examination of determined principles and speculate on a fluctuation of the law with every change in the expounders of it. As to many matters

The doctrine of *stare decisis*, however, is only applicable, in its full force, within the territorial jurisdiction of the courts making the decisions, since there alone can such decisions be regarded as having established any rules. Rulings made under a similar legal system elsewhere may be cited and respected for their reasons, but are not necessarily to be accepted as guides, except in so far as those reasons commend themselves to the judicial mind.<sup>1</sup> Great Britain and the thirteen original States had each substantially the same system of common law originally, and a decision now by one of the higher courts of Great Britain as to what the common law is upon any point is certainly entitled to great respect in any of the States, though not necessarily to be accepted as binding authority any more than the decisions in any one of the other States upon the same point. It gives us the opinions of able judges as to what the law is, but its force as an authoritative declaration must be confined to the country for which the court sits and judges.<sup>2</sup> But an English decision before the Revolution is in the direct line of authority;<sup>3</sup>

of frequent occurrence, the establishment of some certain guide is of more significance than the precise form of the rule. It is likely that no positive rule of law can be laid down that will not at some time impinge with great apparent severity upon a morally innocent person. The law of gravitation acts indifferently upon the just and the unjust. A renewed declaration of law, that is already in force, supported by sound reason and not plainly wrong, in the long run probably works out substantial justice, although it may seem harsh in its application to some particular case. These considerations are regarded as so weighty by the House of Lords that it cannot overrule any of its own decisions. *London Street Tramways Co., Ltd. v. London County Council*, [1898] A. C. 375."

Where an old constitution has been construed by the court, a new court after the adoption of a new constitution will follow the old construction without regard to its own views. *Emery v. Reed*, 65 Cal. 351, 4 Pac. 200.

How far a judgment rendered by a court concludes, notwithstanding it was one given under the law of necessity, in consequence of an equal division of the court, see *Durant v. Essex*

*Co.*, 7 Wall. 107, 19 L. ed. 154; s. c. 101 U. S. 555, 25 L. ed. 961; *Hartman v. Greenhow*, 102 U. S. 672, 26 L. ed. 271; *Morse v. Goold*, 11 N. Y. 281; *Lyon v. Circuit Judge*, 37 Mich. 377; and the cases collected in *Northern R. R. v. Concord R. R.*, 50 N. H. 176.

<sup>1</sup> *Caldwell v. Gale*, 11 Mich. 77; *Koontz v. Nabb*, 16 Md. 549; *Nelson v. Goree*, 34 Ala. 565; *Jamison v. Burton*, 43 Iowa, 282; *Morris v. Indianapolis*, 177 Ind. 369, 94 N. E. 705, Ann. Cas. 1915 A, 65; *Williams v. State*, 81 N. H. 341, 125 Atl. 661, 39 A. L. R. 490; *Gorrell v. Greensboro Water Supply Co.*, 124 N. C. 328, 32 S. E. 720, 70 Am. St. Rep. 598, 46 L. R. A. 513; *Northcut v. Church*, 135 Tenn. 541, 188 S. W. 220, Ann. Cas. 1918 B, 545.

<sup>2</sup> *Dudrow v. King*, 117 Md. 182, 83 Atl. 34, 39 L. R. A. (N. s.) 955, Ann. Cas. 1913 E, 1258; *Horace Waters & Co. v. Gerard*, 189 N. Y. 302, 82 N. E. 143, 121 Am. St. Rep. 886, 24 L. R. A. (N. s.) 958, 12 Ann. Cas. 397; *Johnson v. Union Pacific Coal Co.*, 28 Utah, 46, 76 Pac. 1089, 67 L. R. A. 506.

<sup>3</sup> "English decisions rendered prior to July 4, 1776, if they are clear and consistent, while they do not constitute a part of the common law, are usually considered conclusive evidence of what the common law is." John-

and where a particular statute or clause of the constitution has been adopted in one State from the statutes or constitution of another, after a judicial construction has been given it in such last-mentioned State, it is but just to regard the construction as having been adopted, as well as the words; and all the mischiefs of disregarding precedents would follow as legitimately here as in any other case.<sup>1</sup>

son v. Union Pacific Coal Co., 28 Utah, 46, 76 Pac. 1089, 67 L. R. A. 506.

In *Lasier v. Wright*, 304 Ill. 130, 136 N. E. 545, 28 A. L. R. 674, the court said: "It has been the rule of this court to adopt the decisions of the English courts in laying down the rules of the common law, so far as they are applicable to conditions and usages in this country, and also in construing statutes taken from the mother country."

In *Horace Waters & Co. v. Gerard*, 189 N. Y. 302, 82 N. E. 143, 121 Am. St. Rep. 886, 24 L. R. A. (N. S.) 958, 12 Ann. Cas. 397, the court said: "Where recognized printed reports of the English courts prior to 1775 show that the common law on any particular subject was by such case established and determined as therein stated, such reports are the best and highest evidence of such common law."

As the writ of error *coram nobis* originated and was long recognized in the common law and the sole recognition given it in Indiana is by virtue of the adoption of the common law, it has been held in that State that its courts must be governed by the precedents established by the courts of England in relation to the writ, except where a change has been made by rulings of the Supreme Court of the State or by organic or statute law. *Partlow v. State*, 194 Ind. 172, 141 N. E. 513, 30 A. L. R. 1414. Compare *Ketelsen v. Stilz*, 184 Ind. 702, 111 N. E. 423, L. R. A. 1918 D, 303, Ann. Cas. 1918 A, 965. But in *Williams v. Miles*, 68 Neb. 463, 470, 94 N. W. 705, 96 N. W. 151, 110 Am. St. Rep. 431, 4 Ann. Cas. 306, 62 L. R. A. 383, the court said: "We do not believe that this court has ever understood that the legislature intended to petrify the common law, as embodied in judi-

cial decisions at any one time, and set it up in such inflexible form as a rule of decision." See also *Lux v. Haggin*, 69 Cal. 255; *Chilcott v. Hart*, 23 Colo. 40, 45 Pac. 391. And in Vermont it has been held that precedents do not constitute the common law, but only serve to illustrate its principles; that statutes adopting it do not require adherence to the decisions of the English courts even prior to the separation of the colonies, in case the court considers subsequent decisions, either in England or America, better expositions of the general principles of the common law. *In re Heaton's Estate*, 89 Vt. 550, 96 Atl. 21, L. R. A. 1916 D, 201. In Florida it has been held that the English decisions rendered prior to the war of the Revolution are evidence of what the common law is; but in order to be binding in the State, these decisions must be clear and unequivocal. *Ex parte Beville*, 58 Fla. 170, 50 So. 685, 27 L. R. A. (N. S.) 273, 19 Ann. Cas. 48.

<sup>1</sup> *Bond v. Appleton*, 8 Mass. 472; *Rutland v. Mendon*, 1 Pick. 154; *Commonwealth v. Hartnett*, 3 Gray, 450; *Turnpike Co. v. People*, 9 Barb. 167; *Campbell v. Quinlin*, 4 Ill. 288; *Little v. Smith*, 5 Ill. 400; *Rigg v. Wilton*, 13 Ill. 15; *Tyler v. Tyler*, 19 Ill. 151; *Fisher v. Deering*, 60 Ill. 114; *Langdon v. Applegate*, 5 Ind. 327; *Clark v. Jeffersonville, &c. R. R. Co.*, 44 Ind. 248; *Fall v. Hazelrigg*, 45 Ind. 576; *Ingraham v. Regan*, 23 Miss. 213; *Adams v. Field*, 21 Vt. 256; *Drennan v. People*, 10 Mich. 169; *Daniels v. Clegg*, 28 Mich. 32; *Harri-son v. Sager*, 27 Mich. 476; *Pangborn v. Westlake*, 36 Iowa, 546; *Attorney-General v. Brunst*, 3 Wis. 787; *Poertner v. Russell*, 33 Wis. 193; *Myrick v. Hasey*, 27 Me. 9; *People v. Coleman*, 4 Cal. 46; *Bemis v. Becker*, 1 Kan.

[In the interpretation of a statute widely adopted by the states to the end of securing uniformity in a department of commercial law, great weight should be given to harmonious decisions of courts of other states.<sup>1</sup>]

It will of course sometimes happen that a court will find a former decision so unfounded in law, so unreasonable in its deductions, or so mischievous in its consequences, as to feel compelled to disregard it. Before doing so, however, it will be well to consider whether the point involved is such as to have become a rule of property, so that titles have been acquired in reliance upon it, and vested rights will be disturbed by any change; for in such a case it may be better that the correction of the error be left to the legislature, which can control its action so as to make it prospective only, and thus prevent unjust consequences.<sup>2</sup>

226; *Walker v. Cincinnati*, 21 Ohio St. 14; *Hess v. Pegg*, 7 Nev. 23; *Freeze v. Tripp*, 70 Ill. 496; *In re Tuller*, 79 Ill. 99; *Ex parte Mathews*, 52 Ala. 51; *Danville v. Pace*, 25 Gratt. 1; *Bradbury v. Davis*, 5 Col. 265; *Lasier v. Wright*, 304 Ill. 130, 136 N. E. 545, 28 A. L. R. 674; *Rouse v. Donovan*, 104 Mich. 234, 62 N. W. 359, 53 Am. St. Rep. 457, 27 L. R. A. 577.

But it does not necessarily follow that the prior decision construing the law must be inflexibly followed, since the circumstances in the State adopting it may be so different as to require a different construction. *Little v. Smith*, 5 Ill. 400; *Lessee of Gray v. Askew*, 3 Ohio, 466; *Jamison v. Burton*, 43 Iowa, 282.

It has very properly been held that the legislature, by enacting, without material alteration, a statute which had been judicially expounded by the highest court of the State, must be presumed to have intended that the same words should be received in the new statute in the sense which had been attributed to them in the old. *Grace v. McElroy*, 1 Allen, 563; *Cronan v. Cotting*, 104 Mass. 245; *Low v. Blanchard*, 116 Mass. 272.

It is proper to accept and follow the decisions of courts of another State upon the construction and validity of their own statutes. *Sidwell v. Evans*, 1 Pen. & W. 383; s. c. 21 Am. Dec. 387; *Bank of Illinois v. Sloo*, 16

La. 539, 35 Am. Dec. 223; *Nashville, etc., Ry. v. Hubble*, 140 Ga. 368, 78 S. E. 919, L. R. A. 1915 E, 1132.

A constitutional provision derived from the common law and contained in other constitutions, which has received a settled construction by judicial decisions prior to its adoption, must be interpreted in the light of the common law and the general judicial acceptance of its meaning. *Ex parte Bornee*, 76 W. Va. 360, 85 S. E. 529, L. R. A. 1915 F, 1093. But in determining whether a statute of a State is penal in the international sense, so as to deny jurisdiction to the courts of another State in which an action thereon is brought, such courts are not absolutely bound by the construction placed upon such statute by the courts of the State which enacted it. *Whitlow v. Nashville, etc., R. Co.*, 114 Tenn. 344, 84 S. W. 618, 68 L. R. A. 503.

<sup>1</sup> *Union Trust Co. v. McGinty*, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913 C, 525.

<sup>2</sup> "The doctrine of *stare decisis*, like almost every other legal rule, is not without its exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason." *Rumsey v. New York, etc., R. Co.*, 133 N. Y. 79, 30 N. E. 654, 28 Am. St. Rep. 600, 15 L. R. A. 618. See also *Arnold v. Knoxville*, 115 Tenn.



195, 90 S. W. 469, 3 L. R. A. (N. S.) 837, 5 Ann. Cas. 881; *Rieter v. Grober*, 173 Wis. 493, 181 N. W. 739, 18 A. L. R. 362.

"While great consideration should be given to precedent, especially to one of long duration and general acceptance, it cannot be that a rule merely established by precedent is infallible. This would stay all progress and forbid all development. If the rule established by precedent is highly technical and finds its origins in reasons which no longer exist, and the courts have from time to time found it necessary to make exceptions thereto to meet the needs and methods of doing business in modern times, it would seem that the courts should adapt their procedure to the age in which we live, and cease to follow a precedent for which they have always to apologize, and declare that it is highly technical and not justified either by reason or policy." *Whitaker & Fowle v. Lane*, 128 Va. 317, 104 S. E. 252, 11 A. L. R. 1157.

Where the former decision has not become a rule of property, but pertains merely to a question of practice, and the court did not have the aid of counsel to present both sides of the question before the basic decision was made, it may, if erroneous, be overruled and the proper practice adopted. *Cain v. Miller*, 109 Neb. 441, 191 N. W. 704, 30 A. L. R. 125. See also *Spiegel's House Furnishing Co. v. Industrial Commission*, 288 Ill. 422, 123 N. E. 606, 6 A. L. R. 540.

"Courts are not bound to perpetuate errors merely upon the ground that a previous erroneous decision has been rendered on a given question. If it is wrong, it should not be continued, unless it has been so long the rule of action, and relied upon to such an extent, that greater injustice and injury will result by a reversal, though wrong, than to observe and follow it." *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 27 Colo. 1, 59 Pac. 607, 83 Ann. St. Rep. 17, 50 L. R. A. 209. See also *Norton v. Randolph*, 176 Ala. 381, 58 So. 283, 40 L. R. A. (N. S.) 129, Ann. Cas. 1915 A, 714; *Pitcock v. State*, 91 Ark. 527, 121 S. W. 742, 134

Am. St. Rep. 88; *Prall v. Burckhardt*, 299 Ill. 19, 132 N. E. 280, 18 A. L. R. 992; *Weaver v. Chicago First National Bank*, 76 Kan. 540, 94 Pac. 273, 123 Am. St. Rep. 155, 16 L. R. A. (N. S.) 110; *Oliver Co. v. Louisville Realty Co.*, 156 Ky. 628, 161 S. W. 570, 51 L. R. A. (N. S.) 293; *Foster v. Roberts*, 142 Tenn. 350, 219 S. W. 729, 9 A. L. R. 431; *State v. Mathews*, 143 Tenn. 463, 226 S. W. 203, 13 A. L. R. 314; *Mazzetti v. Armour*, 75 Wash. 622, 135 Pac. 633, 48 L. R. A. (N. S.) 213, Ann. Cas. 1915 C, 140.

"It is true that when a principle of law, doubtful in its character or uncertain in the subject-matter of its application, has been settled by a series of judicial decisions, and acquiesced in for a considerable time, and important rights and interests have become established under such decisions, courts will hesitate long before they will attempt to overturn the result so long established. But when it is apparently indifferent which of two or more rules is adopted, the one which shall have been adopted by judicial sanction will be adhered to, though it may not, at the moment, appear to be the preferable rule. But when a question involving important public or private rights, extending through all coming time, has been passed upon on a single occasion, and which decision can in no just sense be said to have been acquiesced in, it is not only the right, but the duty, of the court, when properly called upon, to re-examine the questions involved, and again subject them to judicial scrutiny. We are by no means unmindful of the salutary tendency of the rule *stare decisis*, but at the same time we cannot be unmindful of the lessons furnished by our own consciousness, as well as by judicial history, of the liability to error and the advantages of review." Per *Smith J.*, *Pratt v. Brown*, 3 Wis. 603, 609. And see *Kneeland v. Milwaukee*, 15 Wis. 454; *Taylor v. French*, 19 Vt. 49; *Bellows v. Parsons*, 13 N. H. 256; *Hannel v. Smith*, 15 Ohio, 134; *Day v. Munson*, 14 Ohio St. 488; *Green Castle, &c. Co. v. State*, 28 Ind. 382; *Harrow v. Myers*, 29 Ind. 469; *Paul v. Davis*, 100 Ind. 422; *Burks v.*

[It is necessary to the application of the doctrine of *stare decisis* that there should be essential similarity in the facts of the two cases;<sup>1</sup> and in applying the doctrine, the decision asserted to be a precedent must be construed with reference to the facts under discussion.<sup>2</sup>]

Whenever the case is such that judicial decisions which have been made are to be accepted as law, and followed by the courts in future cases, it is equally to be expected that they will be followed by other departments of the government also. Indeed, in the great majority of cases, the officers of other departments have no option; for the courts possess the power to enforce their construction of the law as well as to declare it; and a failure to accept and follow it in one case would only create a necessity for new litigation with similar result. Nevertheless, there are

Hinton, 77 Va. 1; Mead v. McGraw, 19 Ohio St. 55; Linn v. Minor, 4 Nev. 462; Willis v. Owen, 43 Texas, 41, 48; Ram on Legal Judgment, c. 14, § 3; Quaker Realty Co. v. Labasse, 131 La. 996, 60 So. 661, Ann. Cas. 1914 A, 1073; Mason v. Nelson, 148 N. C. 492, 62 S. E. 625, 128 Am. St. Rep. 635, 18 L. R. A. (N. S.) 1221.

"Common error" does not make law until sanctioned by a superior tribunal, and subsequently treated as law in business affairs. Ocean Beach Ass. v. Brinley, 34 N. J. Eq. 438. But it has been said: "After an erroneous decision touching rights of property has been followed thirty or forty years, and even a much less time, the courts cannot retrace their steps without committing a new error nearly as great as the one at the first." *Bronson, J.*, in *Sparrow v. Kingman*, 1 N. Y. 246, 260. See also *Emerson v. Atwater*, 7 Mich. 12; *Rothschild v. Grix*, 31 Mich. 150; *Loeb v. Mathis*, 37 Ind. 306; *Pond v. Irwin*, 113 Ind. 243, 15 N. E. Rep. 272; *Paulson v. Portland*, 16 Oreg. 450, 19 Pac. Rep. 450; *Adams Co. v. Burlington & M. R. R. Co.*, 55 Iowa, 94, 2 N. W. 1054; *Davidson v. Briggs*, 61 Iowa, 309, 7 N. W. 471; *State v. Whitworth*, 8 Lea, 594; *Pitcock v. State*, 91 Ark. 527, 121 S. W. 742, 134 Am. St. Rep. 88; *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209; *Geohegan*

*v. Union El. R. Co.*, 262 Ill. 482, 107 N. E. 786, Ann. Cas. 1916 B, 762; *Oliver Co. v. Louisville Realty Co.*, 156 Ky. 628, 161 S. W. 570, 51 L. R. A. (N. S.) 293; *State v. Nashville Baseball Club*, 127 Tenn. 292, 154 S. W. 1151, Ann. Cas. 1914 B, 1243; *Rieter v. Grober*, 173 Wis. 493, 181 N. W. 739, 18 A. L. R. 362.

In Missouri it is a usual rule of decision (subject to exceptions) to consider constitutional questions once decided as no longer open. *Greene County v. Lydy*, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917 C, 274.

<sup>1</sup> *Heisler v. Thomas Colliery Co.*, 274 Pa. St. 448, 118 Atl. 394, 24 A. L. R. 1215, affirmed 260 U. S. 245, 67 L. ed. 237, 43 Sup. Ct. Rep. 83. See also *Crane v. Bennett*, 177 N. Y. 106, 69 N. E. 274, 101 Am. St. Rep. 722; *Townsend v. Norfolk R. etc., Co.*, 105 Va. 22, 52 S. E. 970, 115 Am. St. Rep. 842, 4 L. R. A. (N. S.) 87, 8 Ann. Cas. 558.

The rule of *stare decisis* will not prevent the courts from reviewing a constitutional question previously decided where the facts in the instant case are slightly different from those in former decisions. *Chicago, etc., R. Co. v. Smith*, 62 Ill. 268, 14 Am. Rep. 99; *Prall v. Burckhardt*, 299 Ill. 19, 132 N. E. 280, 18 A. L. R. 992.

<sup>2</sup> *Crabtree v. Crabtree*, 154 Ark. 401, 242 S. W. 804, 24 A. L. R. 912.

exceptions to this rule which embrace all those cases where new action is asked of another department, which that department is at liberty to grant or refuse for any reasons which it may regard as sufficient. We cannot conceive that, because the courts have declared an expiring corporation to have been constitutionally created, the legislature would be bound to renew its charter, or the executive to sign an act for that purpose, if doubtful of the constitutional authority, even though no other adverse reasons existed.<sup>1</sup> In the enactment of laws the legislature must act upon its own reasons; mixed motives of power, justice, and policy influence its action; and it is always justifiable and laudable to lean against a violation of the constitution. Indeed, cases must sometimes occur when a court should refrain from declaring a statute unconstitutional, because not clearly satisfied that it is so, though, if the judges were to act as legislators upon the question of its enactment, they ought with the same views to withhold their assent, from grave doubts upon that subject. The duty is different in the two cases, and presumptions may control in one which do not exist in the other.<sup>2</sup> But those cases where new legislation is sought stand by themselves, and are not precedents for those which involve only considerations concerning the constitutional validity of existing enactments. The general acceptance of judicial decisions as authoritative, by each and all, can alone prevent confusion, doubt, and uncertainty, and any other course is incompatible with a true government of law.

### *Construction to be Uniform.*

A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to

<sup>1</sup> In the celebrated case of the application of the Bank of the United States for a new charter, President Jackson felt himself at liberty to act upon his own view of constitutional power, in opposition to that previously declared by the Supreme Court, and President Lincoln expressed similar views regarding the conclusiveness of the Dred Scott decision upon executive and legislative action. See Story on Const. (4th ed.) § 375, note. It is notorious that while the reconstruction of States was going on, after the late Civil War, Congress took especial

pains in some cases to so shape its legislation that the Federal Supreme Court should have no opportunity to question and deny its validity.

<sup>2</sup> A constitution forbade the payment of any claim arising against the State under any agreement made without authority of law. It was held that this did not prevent the legislature from awarding pay for work done under an act which after its completion had been declared unconstitutional; that the word "law" did not necessarily mean a constitutional law. *Miller v. Dunn*, 72 Cal. 462, 14 Pac. 27.

mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable.<sup>1</sup> A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of little avail. The violence of public passion is quite as likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the legislature will be influenced, by temporary excitements and passions among the people, to adopt oppressive enactments. What a court is to do, therefore, is *to declare the law as written*, leaving it to the people themselves to make such changes as new circumstances may require.<sup>2</sup> The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.<sup>3</sup>

### *The Intent to Govern.*

The object of construction, as applied to a written constitution, is *to give effect to the intent of the people in adopting it*. In

<sup>1</sup> *Scott v. Sandford*, 19 How. 393, 15 L. ed. 691; *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; *Corry v. Carter*, 48 Ind. 327, 17 Am. Rep. 738; *Murphy v. Com.*, 172 Mass. 264, 52 N. E. 505, 70 Am. St. Rep. 266, 43 L. R. A. 154; *Ex*

*parte Woods*, 52 Tex. Crim. Rep. 575, 108 S. W. 1171, 124 Am. St. Rep. 1107, 16 L. R. A. (N. S.) 450.

<sup>2</sup> *People v. Morrell*, 21 Wend. 563; *Newell v. People*, 7 N. Y. 9; *Hyatt v. Taylor*, 42 N. Y. 258; *Slack v. Jacobs*, 8 W. Va. 612, 650.

<sup>3</sup> *Campbell, J.*, in *People v. Blodgett*,

the case of all written laws, it is the intent of the lawgiver that is to be enforced. But this intent is to be found in the instrument itself. It is to be presumed that language has been employed with sufficient precision to convey it, and unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain except to enforce it. "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."<sup>1</sup> Possible or even probable meanings, when one

13 Mich. 127, 138; *Scott v. Sandford*, 19 How. 393, 15 L. ed. 691; *McPherson v. Secretary of State*, 92 Mich. 377, 52 N. W. 469, 31 Am. St. Rep. 587, 16 L. R. A. 475.

<sup>1</sup> *United States v. Fisher*, 2 Cranch, 358, 2 L. ed. 304; *Bosley v. Mattingley*, 14 B. Monr. 89; *Sturgis v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529; *Schooner Paulina's Cargo v. United States*, 7 Cranch, 52, 3 L. ed. 266; *Ogden v. Strong*, 2 Paine, C. C. 584; *United States v. Ragsdale*, 1 Hem. 497; *Southwark Bank v. Commonwealth*, 26 Penn. St. 446; *Ingalls v. Cole*, 47 Me. 530; *McCluskey v. Cromwell*, 11 N. Y. 593; *Furman v. New York*, 5 Sandf. 16; *Newell v. People*, 7 N. Y. 9; *People v. N. Y. Central R. R. Co.*, 24 N. Y. 485; *Bidwell v. Whittaker*, 1 Mich. 469; *Alexander v. Worthington*, 5 Md. 471; *Cantwell v. Owens*, 14 Md. 215; *Case v. Wildridge*, 4 Ind. 51; *Spencer v. State*, 5 Ind. 41; *Pitman v. Flint*, 10 Pick. 504; *Heirs of Ludlow v. Johnson*, 3 Ohio, 553; *District Township v. Dubuque*, 7 Iowa, 262; *Pattison v. Yuba*, 13 Cal. 175; *Ezekiel v. Dixon*, 3 Ga. 146; *In re Murphy*, 23 N. J. 180; *Attorney-General v. Detroit & Erin P. R. Co.*, 2 Mich. 138; *Smith v. Thursby*, 28 Md. 244; *State v. Blasdel*, 4 Nev. 241; *State v. Doron*, 5 Nev. 399; *Hyatt v. Taylor*, 42 N. Y. 258; *Johnson v. Hudson R. R. Co.*, 49 N. Y. 455; *Beardstown v. Virginia*, 76 Ill. 34; *St. Louis, &c. R. R. Co. v. Clark*, 53 Mo. 214; *Mundt v. Sheboygan, &c. R. R. Co.*, 31 Wis. 41; *Slack v. Jacob*, 8 W. Va. 612; *Hawbecker v. Hawbecker*, 43 Md. 516; *Ex parte Mayor of Florence*, 78 Ala. 419;

*South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 66 L. ed. 818, 42 Sup. Ct. Rep. 449, 21 A. L. R. 1432; *Pasadena v. Railroad Commission*, 183 Cal. 526, 192 Pac. 25, 10 A. L. R. 1425; *Turlock Irrigation Dist. v. White*, 186 Cal. 183, 198 Pac. 1060, 17 A. L. R. 72; *People v. Emmerson*, 302 Ill. 300, 134 N. E. 707, 21 A. L. R. 636; *State v. Mobile, etc., R. Co.*, 86 Miss. 172, 38 So. 732, 122 Am. St. Rep. 277; *Ex parte Ming*, 42 Nev. 472, 181 Pac. 319, 6 A. L. R. 1216; *Scribner v. State*, 9 Okla. Crim. Rep. 465, 132 Pac. 933, Ann. Cas. 1915 B, 381; *State v. Harris*, 74 Ore. 573, 144 Pac. 109, Ann. Cas. 1916 A, 1156; *Bronson v. Syverson*, 88 Wash. 264, 152 Pac. 1039, L. R. A. 1916 B, 993, Ann. Cas. 1917 D, 833.

The remarks of Mr. Justice *Bronson* in *People v. Purdy*, 2 Hill, 35, are very forcible in showing the impolicy and danger of looking beyond the instrument itself to ascertain its meaning, when the terms employed are positive and free from all ambiguity. "It is said that the Constitution does not extend to *public* corporations, and therefore a majority vote was sufficient. I do not so read the Constitution. The language of the clause is: 'The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to *every* bill creating, continuing, altering, or renewing *any* body politic or corporate.' These words are as broad in their signification as any which could have been selected for the occasion from our vocabulary, and there is not

a syllable in the whole instrument tending in the slightest degree to limit or qualify the universality of the language. If the clause can be so construed that it shall not extend alike to *all* corporations, whether public or private, it may then, I think, be set down as an established fact that the English language is too poor for the framing of fundamental laws which shall limit the powers of the legislative branch of the government. No one has, I believe, pretended that the Constitution, looking at that alone, can be restricted to any particular class or description of corporations. But it is said that we may look beyond the instrument for the purpose of ascertaining the mischief against which the clause was directed, and thus restrict its operation. But who shall tell us what that mischief was? Although most men in public life are old enough to remember the time when the Constitution was framed and adopted, they are not agreed concerning the particular evils against which this clause was directed. Some suppose the clause was intended to guard against legislative corruption, and others that it was aimed at monopolies. Some are of opinion that it only extends to private without touching public corporations, while others suppose that it only restricts the power of the legislature when creating a single corporation, and not when they are made by the hundred. In this way a solemn instrument — for so I think the Constitution should be considered — is made to mean one thing by one man and something else by another, until, in the end, it is in danger of being rendered a mere dead letter; and that, too, where the language is so plain and explicit that it is impossible to mean more than one thing, unless we first lose sight of the instrument itself, and allow ourselves to roam at large in the boundless fields of speculation. For one, I dare not venture upon such a course. Written constitutions of government will soon come to be regarded as of little value if their injunctions may be thus lightly overlooked; and the experiment of setting a boundary to power will prove a failure. We are

not at liberty to presume that the framers of the Constitution, or the people who adopted it, did not understand the force of language." See also same case, 4 Hill, 384, and *State v. King*, 44 Mo. 285.

Another court has said: "This power of construction in courts is a mighty one, and, unrestrained by settled rules, would tend to throw a painful uncertainty over the effect that might be given to the most plainly worded statutes, and render courts, in reality, the legislative power of the State. Instances are not wanting to confirm this. Judge-made law has overrode the legislative department. It was the boast of Chief Justice *Pemberton*, one of the judges of the despot Charles II., and not the worst even of those times, that he had entirely outdone the Parliament in making law. We think that system of jurisprudence best and safest which controls most by fixed rules, and leaves least to the discretion of the judge; a doctrine constituting one of the points of superiority in the common law over that system which has been administered in France, where authorities had no force, and the law of each case was what the judge of the case saw fit to make it. We admit that the exercise of an unlimited discretion may, in a particular instance, be attended with a salutary result; still history informs us that it has often been the case that the arbitrary discretion of a judge was the law of a tyrant, and warns us that it may be so again." *Perkins, J.*, in *Spencer v. State*, 5 Ind. 41, 46. "Judge-made law", as the phrase is here employed, is that made by judicial decisions which construe away the meanings of statutes, or find meanings in them the legislature never held. The phrase is sometimes used as meaning, simply, the law that becomes established by precedent. The uses and necessity of judicial legislation are considered and explained at length by Mr. Austin, in his *Province of Jurisprudence*.

In *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737, Mr. Justice Brewer, in delivering the

is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere.

"Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing which we are to seek is *the thought which it expresses*. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order of grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent on the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning."<sup>1</sup>

*The Whole Instrument to be Examined.*

Nor is it lightly to be inferred that any portion of a written law is so ambiguous as to require extrinsic aid in its construction. Every such instrument is adopted as a whole, and a clause which, standing by itself, might seem of doubtful import, may yet be made plain by comparison with other clauses or portions of the same law. It is therefore a very proper rule of construction, that *the whole is to be examined with a view to arriving at the true intention of each part*; and this Sir Edward Coke regards as the most natural and genuine method of expounding a statute.<sup>2</sup> If any section of a law be

opinion of the court, said: "It must also be remembered that the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of political life as they understood them; putting into form the government they were creating, and prescribing, in language clear and intelligible, the powers that government was to take. Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 1, 188 L. ed. 23, 68, well declared: 'As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be under-

stood to have employed words in their natural sense, and to have intended what they have said.'"

<sup>1</sup> *Newell v. People*, 7 N. Y. 9, 97, per *Johnson, J.*; *Chesapeake, &c. Ry. Co. v. Miller*, 19 W. Va. 409. And see *Denn v. Reid*, 10 Pet. 524, 9 L. ed. 519; *Greencastle Township v. Black*, 5 Ind. 566; *Bartlett v. Morris*, 9 Port. 266; *Leonard v. Wiseman*, 31 Md. 201, per *Bartol, Ch. J.*; *Way v. Way*, 64 Ill. 406; *McAdoo v. Benbow*, 63 N. C. 461; *Hawkins v. Carrol*, 50 Miss. 735; *Cearfoss v. State*, 42 Md. 403; *Douglas v. Freeholders, &c.*, 38 N. J. L. 214; *Gold v. Fite*, 2 Bax. 237; *State v. Gammon*, 73 Mo. 421; *Broom's Maxims* (5th Am. ed.), 551, marg.

<sup>2</sup> *Co. Lit.* 381 a; *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21

intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of another.<sup>1</sup> And in making this comparison it is not to be supposed that any words have been employed without occasion, or without intent that they should have effect as part of the law. The rule applicable here is, that *effect is to be given, if possible, to the whole instrument*, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory.<sup>2</sup>

This rule is applicable with special force to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the

Sup. Ct. Rep. 770; Old Wayne Mut. Life Ass'n v. McDonough, 204 U. S. 8, 51 L. ed. 345, 27 Sup. Ct. Rep. 236; Bailey v. Philadelphia, etc., R. Co., 4 Harr. (Del.) 389, 44 Am. Dec. 593; Cory v. Carter, 48 Ind. 327, 17 Am. Rep. 738; State v. Mockus, 120 Me. 84, 113 Atl. 39, 14 A. L. R. 871; Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572; Davidson v. Hine, 151 Mich. 294, 115 N. W. 246, 123 Am. St. Rep. 267, 15 L. R. A. (N. S.) 575, 14 Ann. Cas. 352; State v. Jackson, 119 Miss. 727, 81 So. 1; Killgrove v. Morriss, 39 Nev. 224, 156 Pac. 686; People v. Mosher, 163 N. Y. 32, 57 N. E. 88, 79 Am. St. Rep. 552; People v. Metz, 193 N. Y. 148, 85 N. E. 1070, 24 L. R. A. (N. S.) 201; Goughnour v. Brant, 47 N. D. 368, 182 N. W. 309; Blackrock Copper Min. & Mill Co. v. Tingey, 34 Utah, 369, 98 Pac. 180, 131 Am. St. Rep. 850, 28 L. R. A. (N. S.) 255.

<sup>1</sup> Stowell v. Lord Zouch, Plowd. 365; Chance v. Marion County, 64 Ill. 66; Dyer v. Bayne, 54 Md. 87; Broom's Maxims, 521; State v. Jackson, 119 Miss. 727, 81 So. 1.

<sup>2</sup> Attorney-General v. Detroit & Erin Plank Road Co., 2 Mich. 138; People v. Burns, 5 Mich. 114; District Township v. Dubuque, 7 Iowa, 262; Manly v. State, 7 Md. 135; Parkinson v. State, 14 Md. 184; Belleville Railroad Co. v. Gregory, 15 Ill. 20; Ogden v. Strong, 2 Paine, C. C. 584; Ryegate v. Wardsboro, 30 Vt. 746; Brooks v. Mobile

School Commissioners, 31 Ala. 227; Den v. Dubois, 16 N. J. L. 285; Den v. Schenck, 8 N. J. L. 29; Bigelow v. W. Wisconsin R. R., 27 Wis. 478; Gas Company v. Wheeling, 8 W. Va. 320; Parker v. Savage, 6 Lea, 406; Crawfordsville, &c. Co. v. Fletcher, 104 Ind. 97, 2 N. E. 243; Gherna v. State, 16 Ariz. 344, 146 Pac. 494, Ann. Cas. 1916 D, 94; State v. Atlantic Coast Line R. Co., 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. S.) 639; Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914 B, 916; Hammond v. Clark, 136 Ga. 313, 71 S. E. 479, 38 L. R. A. (N. S.) 77; State v. Jackson, 119 Miss. 727, 81 So. 1; Killgrove v. Morriss, 39 Nev. 224, 156 Pac. 686; Steele, etc., Co. v. Miller, 92 Ohio St. 115, 110 N. E. 648, L. R. A. 1916 C, 1023, Ann. Cas. 1917 C, 926; Blackrock Copper Min. & Mill Co. v. Tingey, 34 Utah, 369, 98 Pac. 180, 131 Am. St. Rep. 850, 28 L. R. A. (N. S.) 255; State v. Bancroft, 148 Wis. 124, 134 N. W. 330, 38 L. R. A. (N. S.) 526. See Sams v. King, 18 Fla. 557.

That the title may be considered in order to throw light upon an otherwise obscure provision, see Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747. See also People v. McElroy, 72 Mich. 446, 40 N. W. 750, 2 L. R. A. 609, and note.

To aid construction, the court may transpose sentences and sections. Gherna v. State, 16 Ariz. 344, 146 Pac. 494, Ann. Cas. 1916 D, 94.



immense importance of the powers delegated, leaving as little as possible to implication.<sup>1</sup> It is scarcely conceivable that a case can arise where a court would be justified in declaring any portion of a written constitution nugatory because of ambiguity. One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together.<sup>2</sup> [Every provision should be construed, where possible, to give effect to every other provision.<sup>3</sup>

Upon the adoption of an amendment to a constitution, the amendment becomes a part thereof; as much so as if it had been originally incorporated in the constitution; and it is to be construed accordingly.<sup>4</sup> If possible, it must be harmonized with all the other provisions of the constitution.<sup>5</sup> If this cannot be done the amendment will prevail.<sup>6</sup> If two amendments are adopted on the same day they must be construed together and effect given to

<sup>1</sup> *Wolcott v. Wigton*, 7 Ind. 44; *People v. Purdy*, 2 Hill, 31, per *Bronson*, J.; *Greencastle Township v. Black*, 5 Ind. 557; *Green v. Weller*, 32 Miss. 650.

<sup>2</sup> *People v. Wright*, 6 Col. 92.

It is a general rule in the construction of writings, that, a general intent appearing, it shall control the particular intent; but this rule must sometimes give way, and effect must be given to a particular intent plainly expressed in one part of a constitution, though apparently opposed to a general intent deduced from other parts. *Warren v. Shuman*, 5 Tex. 441. In *Quick v. Whitewater Township*, 7 Ind. 570, it was said that if two provisions of a written constitution are irreconcilably repugnant, that which is last in order of time and in local position is to be preferred. In *Gulf, C. & S. F. Ry. Co. v. Rambolt*, 67 Tex. 654, 4 S. W. 356, this rule was recognized as a last resort, but if the last provision is more comprehensive and specific, it was held that it should be given effect on that ground.

<sup>3</sup> *People v. Case*, 220 Mich. 379, 19 N. W. 289, 27 A. L. R. 686.

<sup>4</sup> *State v. Chicago, etc., R. Co.*, 195 Mo. 228, 93 S. W. 784, 113 Am. St. Rep. 661.

<sup>5</sup> "An amendment should be viewed

in connection with the previously existing Constitution and the evils and conditions which led to the change. Moreover, effect should be given to every part of the instrument as amended, and in the absence of a clear reason to the contrary no portion of a written Constitution should be regarded as superfluous." *Steele, Hopkins & Meredith Co. v. Miller*, 92 Ohio St. 115, 110 N. E. 648, L. R. A. 1916 C, 1023, Ann. Cas. 1917 C, 926.

<sup>6</sup> *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 479, 38 L. R. A. (N. S.) 77; *State v. Jackson*, 119 Miss. 727, 81 So. 1.

<sup>7</sup> *State v. Jackson*, 119 Miss. 727, 81 So. 1.

If an amendment duly adopted necessarily conflicts with some previous provision of the Constitution, the amendment, being the last expression of the sovereign will of the people, will prevail as an implied modification pro tanto of the former provision. *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 479, 38 L. R. A. (N. S.) 77.

An amendment to a Constitution operates to repeal a provision thereof inconsistent with the amendment. *People ex rel. Killeen v. Angle*, 109 N. Y. 564, 17 N. E. 413.

both. Differences, if there are any, must, if possible, be reconciled.<sup>1</sup> If reconciliation is impossible, then, it would seem, both must fall.<sup>2</sup>

In interpreting clauses we must presume that *words have been employed in their natural and ordinary meaning*. As Marshall, Ch. J., says: The framers of the constitution, and the people who adopted it, "must be understood to have employed words in their natural sense, and to have intended what they have said."<sup>3</sup>

<sup>1</sup> *Fitzgerald v. Cleveland*, 88 Ohio St. 338, 103 N. E. 512, Ann. Cas. 1915 B, 106.

<sup>2</sup> *Utter v. Moseley*, 16 Idaho, 274, 100 Pac. 1058, 133 Am. St. Rep. 94, 18 Ann. Cas. 723.

<sup>3</sup> *Gibbons v. Ogden*, 9 Wheat. 1, 188, 6 L. ed. 23. See *Settle v. Van Evrea*, 49 N. Y. 281; *Jenkins v. Ewin*, 8 Heisk. 456; *Way v. Way*, 64 Ill. 406; *Stuart v. Hamilton*, 66 Ill. 253; *Hale v. Everett*, 53 N. H. 9; *State v. Brewster*, 42 N. J. L. 125; *Carpenter v. People*, 8 Col. 116, 5 Pac. 828; *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 66 L. ed. 818, 42 Sup. Ct. Rep. 449, 21 A. L. R. 1432; *Pasadena v. Railroad Commission*, 183 Cal. 526, 192 Pac. 25, 10 A. L. R. 1425; *Turlock Irrigation Dist. v. White*, 186 Cal. 183, 198 Pac. 1060, 17 A. L. R. 72; *People v. Emmerson*, 302 Ill. 300, 134 N. E. 707, 21 A. L. R. 636; *McKinney v. Barker*, 180 Ky. 526, 203 S. W. 303, L. R. A. 1918 E, 581; *State v. Mobile, etc., R. Co.*, 86 Miss. 172, 38 So. 732, 122 Am. St. Rep. 277; *Ex parte Ming*, 42 Nev. 472, 181 Pac. 319, 6 A. L. R. 1216; *Kreps v. Brady*, 37 Okla. 754, 133 Pac. 216, 47 L. R. A. (N. S.) 106; *Scribner v. State*, 9 Okla. Crim. Rep. 465, 132 Pac. 933, Ann. Cas. 1915 B, 381; *State v. Harris*, 74 Oreg. 573, 144 Pac. 109, Ann. Cas. 1916 A, 1156; *Henry v. Cherry*, 30 R. I. 13, 73 Atl. 97, 136 Am. St. Rep. 928, 24 L. R. A. (N. S.) 991, 18 Ann. Cas. 1006; *Bronson v. Syverson*, 88 Wash. 264, 152 Pac. 1039, L. R. A. 1916 B, 993, Ann. Cas. 1917 D, 833.

"Words must be understood in their general and popular sense, as the people who voted on the Constitution understood them, and we should not

go beyond this meaning unless the language is so ambiguous that we need to ascertain the mischief to be remedied." *Kephart*, J., in *Busser v. Snyder*, 282 Pa. St. 440, 128 Atl. 80, 37 A. L. R. 1515.

In framing a Constitution, words naturally are employed in a comprehensive sense as expressive of general ideas rather than of finer shades of thought or of narrow distinctions. *Com. v. Nickerson*, 236 Mass. 281, 128 N. E. 273, 10 A. L. R. 1568.

"It is a cardinal rule of construction that the language of a State Constitution, more than that of any other of the written laws, is to be taken in its general and ordinary sense. The reason for the rule lies in the fact that its makers are the people who adopt it. Its language is their language, and words employed therein have meaning as the generality of the people understand them. When, therefore, words are used in a Constitution which have both a restricted and general meaning, the general must prevail over the restricted unless the nature of the subject-matter or the context indicates that the limited sense was intended. Says Mr. Justice *Story*: 'Every word employed in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them,

This is but saying that no forced or unnatural construction is to be put upon their language; and it seems so obvious a truism that one expects to see it universally accepted without question; but the attempt is made so often by interested subtlety and ingenious refinement to induce the courts to force from these instruments a meaning which their framers never held, that it frequently becomes necessary to re-declare this fundamental maxim.<sup>1</sup> Narrow and

the people adopt them, the people must be supposed to read them, with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.' 1 Story Const. § 451." *Bronson v. Syverson*, 88 Wash. 264, 152 Pac. 1039, L. R. A. 1916 B, 993, Ann. Cas. 1917 D, 833.

In *Epping v. Columbus*, 117 Ga. 263, 43 S. E. 803, the Court said: "Constitutions are the result of popular will, and their words are to be understood ordinarily as used in the sense that such words convey to the popular mind. 6 Am. & Eng. Enc. L. (2d ed.) pp. 924-5. There is nothing in the paragraph under consideration which indicates that the term 'debt' was used in any other way than in its ordinary and popular sense. If a person unversed in the technical niceties of the law is asked what is the amount of his debts, his answer to the question in every instance would be an amount which would represent the present liability that he was under at the moment the question was answered. A farmer who had been so unfortunate as to be compelled to place a long loan upon his farm, if asked what was the amount of the debt upon his farm would unhesitatingly answer by giving an amount which would represent the principal of the debt and any interest that was past due and payable at the time the inquiry was made. One who, in making a return of his property for taxation, is required to state to the tax receiver the amount of solvent debts due him, would not, in the case of a perfectly solvent debt, consider that he was under a moral obligation to return for taxation the value of the debt at any higher amount than one which would represent the principal

and any interest that was past due at the time the return was made. It is useless to multiply illustrations. The debt of an individual or a corporation or the public, in its usual and popular sense, means the amount for which the individual or corporation or the public would be presently liable if called upon to discharge the obligation. The law deals at all points with the man of ordinary prudence and average capacity as the standard, for the simple reason that communities and commonwealths are made up of persons of this class. Constitutions are adopted by commonwealths so made up, and the meaning to be given to such instruments is that meaning which the man of ordinary prudence and average intelligence and information would give. Generally the meaning given to words by the learned and technical is not to be given to words appearing in a Constitution. In other words, the popular meaning is to be given to the words of a Constitution, unless the context or the instrument, taken as a whole, imperatively requires some other meaning. Before the words can be given a purely technical meaning which would be different from the popular meaning, the intention that they should be so understood must be plainly apparent and palpably manifest."

<sup>1</sup> *State v. Mace*, 2 Md. 337; *Manly v. State*, 7 Md. 135; *Green v. Weller*, 32 Miss. 650; *Greencastle Township v. Black*, 5 Ind. 566; *People v. N. Y. Central Railroad Co.*, 34 Barb. 123, and 24 N. Y. 485; *Story on Const.* § 453; *Scribner v. State*, 9 Okla. Crim. Rep. 465, 132 Pac. 933, Ann. Cas. 1915 B, 381.

"The true sense in which words are used in a statute is to be ascertained generally by taking them in their

technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government.<sup>1</sup>

But it must not be forgotten, in construing our constitutions, that in many particulars they are but the legitimate successors of the great charters of English liberty, whose provisions declaratory of the rights of the subject have acquired a well-understood meaning, which the people must be supposed to have had in view in adopting them. We cannot understand these provisions unless we understand their history; and when we find them expressed in technical words, and words of art, we must suppose these words to be employed in their technical sense. When the Constitution speaks of an *ex post facto* law, it means a law technically known by that designation; the meaning of the phrase having become defined in the history of constitutional law, and being so familiar to the people that it is not necessary to employ language of a more popular character to designate it. The technical sense in these cases is the sense popularly understood, because that is the sense fixed upon the words

ordinary and popular signification, or, if they be terms of art, in their technical signification. But it is also a cardinal rule of exposition, that the intention is to be deduced from the whole and every part of the statute, taken and compared together, from the words of the context, and such a construction adopted as will best effectuate the intention of the lawgiver. One part is referred to in order to help the construction of another, and the intent of the legislature is not to be collected from any particular expression, but from a general view of the whole act. Dwarris, 658, 698, 702, 703. And when it appears that the framers have used a word in a particular sense generally in the act, it will be presumed that it was intended to be used in the same sense throughout the act, unless an intention to give it a different signification plainly appears in the particular part of the act alleged to be an exception to the general meaning indicated. Dwarris, 704 *et seq.* When words are used to which the legislature has given a plain and definite import in the act, it would be dangerous to put upon them a construction which would amount to holding that the

legislature did not mean what it has expressed. It follows from these principles that the statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from all its parts and provisions, the intention thus indicated shall prevail, without resorting to other means of aiding in the construction. And these familiar rules of construction apply with at least as much force to the construction of written constitutions as to statutes; the former being presumed to be framed with much greater care and consideration than the latter." Green *v. Weller*, 32 Miss. 650, 678.

Words re-enacted after they have acquired a settled meaning will be understood in that meaning. Fulmer *v. Commonwealth*, 97 Pa. St. 503.

The argument *ab inconvenienti* cannot be suffered to influence the courts by construction to prevent the evident intention. Chance *v. Marion County*, 64 Ill. 66.

<sup>1</sup> *Scribner v. State*, 9 Okla. Crim. Rep. 465, 132 Pac. 933, Ann. Cas. 1915 B, 381.

in legal and constitutional history where they have been employed for the protection of popular rights.<sup>1</sup>

*The Common Law to be kept in View.*

It is also a very reasonable rule that a State constitution shall be understood and construed in the light and by the assistance of the common law, and with the fact in view that its rules are still left in force.<sup>2</sup> By this we do not mean that the common law is to control the constitution, or that the latter is to be warped and perverted in its meaning in order that no inroads, or as few as possible, may be made in the system of common-law rules, but only for its definitions we are to draw from that great fountain, and that in judging what it means, we are to keep in mind that it is not the beginning of law for the State, but that it assumes the existence of a well-understood system which is still to remain in force and be administered, but under such limitations and restrictions as that instru-

<sup>1</sup> See *Jenkins v. Ewin*, 8 Heisk. 476; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Thompson v. State of Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; *Kreps v. Brady*, 73 Okla. 754, 133 Pac. 216, 47 L. R. A. (N. S.) 106; *Rasmussen v. Baker*, 7 Wyo. 117, 50 Pac. 819, 38 L. R. A. 773.

It is quite possible, however, in applying constitutional maxims, to overlook entirely the reason upon which they rest, and "considering merely the letter, go but skin deep into the meaning." On the great debate on the motion for withdrawing the confidence of Parliament from the ministers, after the surrender of Cornwallis, — a debate which called out the best abilities of Fox and Pitt as well as of the ministry, and necessarily led to the discussion of the primary principle in free government, that taxation and representation shall go together, — Sir James Mariott rose, and with great gravity proceeded to say, that if taxation and representation were to go hand in hand, then Britain had an undoubted right to tax America, because she was represented in the British Parliament. She was represented by the members for the county of Kent, of which the thirteen provinces were a part and parcel; for in their charters

they were to hold of the manor of Greenwich in Kent, of which manor they were by charter to be parcelled. The opinion, it is said, "raised a very loud laugh", but Sir James continued to support it, and concluded by declaring that he would give the motion a hearty negative. Thus would he have settled a great principle of constitutional right, for which a seven years' bloody war had been waged, by putting it in the form of a meaningless legal fiction. *Hansard's Debates*, Vol. XXII. p. 1184. Lord Mahon, following Lord Campbell, refers the origin of this wonderful argument to Mr. Hardinge, a Welsh judge, and nephew of Lord Camden; 7 Mahon's Hist. 139. He was said to have been a good lawyer, but must have read the history of his country to little purpose.

<sup>2</sup> *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456; *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 Ann. Cas. 737; *Blackwell v. State*, 79 Fla. 709, 86 So. 224, 15 A. L. R. 465; *Horace Waters & Co. v. Gerard*, 189 N. Y. 302, 82 N. E. 143, 121 Am. St. Rep. 886, 24 L. R. A. (N. S.) 958, 12 Ann. Cas. 397; *McGinnis v. State*, 9 Humph. 43, 49 Am. Dec. 697.

ment imposes.<sup>1</sup> It is a maxim with the courts that statutes in derogation of the common law shall be construed strictly,<sup>2</sup> — a maxim which we fear is sometimes perverted to the overthrow of the legislative intent; but there can seldom be either propriety or safety in applying this maxim to constitutions. When these instruments assume to make any change in the common law, the change designed is generally a radical one; but as they do not go minutely into particulars, as do statutes, it will sometimes be easy to defeat a provision, if courts are at liberty to say that they will presume against any intention to alter the common law further than is expressly declared. A reasonable construction is what such an instrument demands and should receive; and the real question is, what the people meant, and not how meaningless their words can be made by the application of arbitrary rules.<sup>3</sup>

<sup>1</sup> *State v. Noble*, 118 Ind. 350, 21 N. E. 244.

"The language of the Constitution (of the United States) cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted. The statesmen and lawyers of the Convention, who submitted it to the ratification of the Convention of the thirteen States, were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. They were familiar with other forms of government, recent and ancient, and indicated in their discussions earnest study and consideration of many of them, but when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood." *Ex parte Grossman*, 267 U. S. 87, 69 L. ed. 377, 45 Sup. Ct. Rep. 332, 38 A. L. R. 131.

<sup>2</sup> *Broom's Maxims*, 33; *Sedg. on Stat. & Const. Law*, 313. See *Harrison v. Leach*, 4 W. Va. 383; *Myers v. State*, 192 Ind. 592, 137 N. E. 547, 24 A. L. R. 1196.

<sup>3</sup> *Barry v. Truax*, 13 N. D. 131, 99 N. W. 769, 112 Am. St. Rep. 662, 65 L. R. A. 762, 3 Ann. Cas. 191.

Under a clause of the constitution of Michigan which provided that "the real and personal estate of every female

acquired before marriage, and all property to which she may afterwards become entitled, by gift, grant, inheritance, or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations, or engagements of her husband, and may be devised or bequeathed by her as if she were unmarried", it was held that a married woman could not sell her personal property without the consent of her husband, inasmuch as the power to do so was not expressly conferred, and the clause, being in derogation of the common law, was not to be extended by construction. *Brown v. Fifield*, 4 Mich. 322. The danger of applying arbitrary rules in the construction of constitutional principles might well, as it seems to us, be illustrated by this case. For while on the one hand it might be contended that, as a provision in derogation of the common law, the one quoted should receive a strict construction, on the other hand it might be insisted with perhaps equal reason that, as a remedial provision, in furtherance of natural right and justice, it should be liberally construed, to effect the beneficial purpose had in view. Thus arbitrary rules, of directly opposite tendency and force, would be contending for the mastery in the same case. The subsequent decisions under the same provision do not appear to have followed this lead. See *White v. Zane*, 10 Mich. 333; *McKee v.*

As a general thing, it is to be supposed that the same word is used in the same sense wherever it occurs in a constitution.<sup>1</sup> Here again, however, great caution must be observed in applying an arbitrary rule; for, as Mr. Justice *Story* has well observed: "It does not follow, either logically or grammatically, that because a word is found in one connection in the Constitution with a definite sense, therefore the same sense is to be adopted in every other connection in which it occurs. This would be to suppose that the framers weighed only the force of single words, as philologists or critics, and not whole clauses and objects, as statesmen and practical reasoners. And yet nothing has been more common than to subject the Constitution to this narrow and mischievous criticism.<sup>2</sup> Men of ingenious and subtle minds, who seek for symmetry and harmony in language, having found in the Constitution a word used in some sense which falls in with their favorite theory of interpreting it, have made that the standard by which to measure its use in every other part of the instrument. They have thus stretched it, as it were, on the bed of Procrustes, lopping off its meaning when it seemed too large for their purposes, and extending it when it seemed too short. They have thus distorted it to the most unnatural shapes, and crippled where they have sought only to adjust its proportions according to their own opinions."<sup>3</sup> And he gives many instances where, in the national Constitution, it is very manifest the same word is employed in different meanings. So that, while the rule may be sound as one of presumption merely, its force is but slight, and it must readily give way to a different intent appearing in the instrument.

Where a constitution is revised or amended,<sup>4</sup> the new pro-

Wilcox, 11 Mich. 358; *Farr v. Sherman*, 11 Mich. 33; *Watson v. Thurber*, 11 Mich. 457; *Burdeno v. Amperse*, 14 Mich. 91; *Tong v. Marvin*, 15 Mich. 60; *Tillman v. Shackleton*, 15 Mich. 447; *Devries v. Conklin*, 22 Mich. 255; *Rankin v. West*, 25 Mich. 195.

The common law is certainly to be kept in view in the interpretation of such a clause, since otherwise we do not ascertain the evil designed to be remedied, and perhaps are not able fully to understand and explain the terms employed; but it is to be looked at with a view to the real intent, rather than for the purpose of arbitrarily restraining it. See *Bishop, Law of Married Women*, §§ 18-20 and cases cited; *McGinnis v. State*, 9 Humph.

43; *State v. Lash*, 16 N. J. L. 380, 32 Am. Dec. 397; *Cadwallader v. Harris*, 76 Ill. 370; *Moyer v. Slate Co.*, 71 Pa. St. 293.

<sup>1</sup> *Brien v. Williamson*, 8 Miss. 14.

If in one place in a statute the meaning of a word or phrase is clear, it will generally be taken in the same sense throughout the act. *Rhodes v. Weldy*, 46 Ohio St. 234, 20 N. E. Rep. 461.

<sup>2</sup> See remarks of *Johnson, J.*, in *Ogden v. Saunders*, 12 Wheat. 213, 290, 6 L. ed. 606, 632.

<sup>3</sup> *Story on Const.* § 454. And see *Cherokee Nation v. Georgia*, 5 Pet. 1, 19, 8 L. ed. 25, 31.

<sup>4</sup> Whether the attempt to amend has sufficiently complied with the

visions come into operation at the same moment that those they take the place of cease to be of force; and if the new instrument re-enacts in the same words provisions which it supersedes, it is a reasonable presumption that the purpose was not to change the law in those particulars, but to continue it in uninterrupted operation. This is the rule in the case of statutes,<sup>1</sup> and it sometimes becomes important, where rights had accrued before the revision or amendment took place. Its application to the case of an amended or revised constitution would seem to be unquestionable.<sup>2</sup>

*Operation to be Prospective.*

We shall venture also to express the opinion that a *constitution should operate prospectively only*, unless the words employed show a clear intention that it should have a retrospective effect. This is the rule in regard to statutes, and it is "one of such obvious convenience and justice, that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively."<sup>3</sup> Retrospective legislation, except when designed to cure formal defects,

constitutional requirements of formality in amending the constitution is a question for the courts, and that the legislature has declared the amendment adopted is immaterial. *State v. Powell*, 77 Miss. 543, 27 So. 927, 48 L. R. A. 652.

That an amendment must be complete and not conditional and dependent, for its force, upon the subsequent acts and discretion of certain officers, see *Livermore v. Waite*, 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312, in which an attempted amendment relating to the relocation of the State capitol was declared invalid.

All preliminary steps prescribed for amendment of constitution must be taken in full compliance with requirements. *State v. Tooker*, 15 Mont. 8, 37 Pac. 840, 25 L. R. A. 560; *State v. Brookhart*, 113 Iowa, 250, 84 N. W. 1064.

<sup>1</sup> *Laude v. Chicago, &c. R. R. Co.*, 33 Wis. 640; *Gilkey v. Cook*, 60 Wis. 133, 18 N. W. 639; *Blackwood v. Van Vleit*, 30 Mich. 118.

<sup>2</sup> *Ex parte Owens*, 148 Ala. 402, 42

So. 676, 121 Am. St. Rep. 67, 8 L. R. A. (N. S.) 888; *Oakland Pav. Co. v. Tompkins*, 72 Cal. 5, 12 Pac. 801, 1 Am. St. Rep. 17; *Sexauer v. Star Milling Co.*, 173 Ind. 342, 90 N. E. 474, 26 L. R. A. (N. S.) 609; *Ellingham v. Dye*, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915 C, 200; *Morgan v. Dudley*, 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; *Bullitt v. Sturgeon*, 127 Ky. 332, 105 S. W. 468, 14 L. R. A. (N. S.) 268; *State v. New Orleans R. etc., Co.*, 116 La. 144, 40 So. 597, 7 Ann. Cas. 724; *Sanders v. St. Louis & N. O. Anchor Line*, 97 Mo. 26, 10 S. W. 595, 3 L. R. A. 390; *Johnson v. Great Falls*, 38 Mont. 369, 99 Pac. 1059, 16 Ann. Cas. 974; *State v. De Lorenzo*, 81 N. J. L. 613, 79 Atl. 839, Ann. Cas. 1912 D, 329; *Com. v. Reeder*, 171 Pa. St. 505, 33 Atl. 67, 33 L. R. A. 141.

<sup>3</sup> *Moon v. Durden*, 2 Exch. 22. See *Dash v. Van Kleeck*, 7 Johns. 477; *Brown v. Wilcox*, 22 Miss. 127; *Price v. Mott*, 52 Pa. St. 315; *Etchison Drilling Co. v. Flournoy*, 131 La. 442, 59 So. 676; *Broom's Maxims*, 28; *post*, p. 770 and notes.



or otherwise operate remedially, is commonly objectionable in principle, and apt to result in injustice; and it is a sound rule of construction which refuses lightly to imply an intent to enact it. And we are aware of no reasons applicable to ordinary legislation which do not, upon this point, apply equally well to constitutions. [That the rule now applies to constitutions is settled by abundant authority.<sup>1</sup>]

<sup>1</sup> *Calhoun County v. Galbraith*, 99 U. S. 214, 25 L. ed. 410; *Shreveport v. Cole*, 129 U. S. 36, 32 L. ed. 589, 9 Sup. Ct. Rep. 210; *San Antonio v. San Antonio Public Service Co.*, 255 U. S. 547, 65 L. ed. 777, 41 Sup. Ct. Rep. 428; *St. Louis, etc., R. Co. v. Cross*, 171 Fed. 480; *Harris v. Walker*, 199 Ala. 51, 74 So. 40; *McCarthy v. Tucson*, 26 Ariz. 311, 225 Pac. 329; *Wilcox v. Edwards*, 162 Cal. 455, 123 Pac. 276, Ann. Cas. 1913 C, 1392; *Flickenger v. Industrial Accident Commission*, 181 Cal. 425, 184 Pac. 851; *Worswick Street Paving Co. v. Industrial Accident Commission*, 181 Cal. 550, 185 Pac. 953; *Matthews v. Jeacle*, 61 Fla. 686, 55 So. 865; *Etchison Drilling Co. v. Flournoy*, 131 La. 442, 59 So. 867; *Lansing v. Michigan Power Co.*, 183 Mich. 400, 150 N. W. 250; *State v. Houdersheldt*, 151 Minn. 167, 186 N. W. 234; *State v. Westminster College*, 175 Mo. 52, 74 S. W. 990; *State v. Dircks*, 211 Mo. 568, 111 S. W. 1; *Lander v. Deemy*, 46 N. D. 273, 176 N. W. 922; *Muskogee Vitrified Brick Co. v. Napier*, 34 Okla. 618, 126 Pac. 792; *Hall v. Dunn*, 52 Ore. 475, 97 Pac. 811, 25 L. R. A. (N. S.) 193; *Darling v. Miles*, 57 Ore. 593, 111 Pac. 702, 112 Pac. 1084; *McCullough v. Graham*, 70 S. C. 63, 49 S. E. 1; *Prescott v. Duncan*, 126 Tenn. 106, 148 S. W. 229; *Cox v. Robison*, 105 Tex. 426, 150 S. W. 1149; *Arey v. Lindsey*, 103 Va. 250, 48 S. E. 889; *Swift v. Newport News*, 105 Va. 108, 52 S. E. 821; *Mestas v. Diamond Coal, etc., Co.*, 12 Wyo. 414, 76 Pac. 567.

In *Allbyer v. State*, 10 Ohio St. 588, a question arose under the provision of the constitution that "all laws of a general nature shall have a uniform operation throughout the State." Another clause provided that all laws then in force, not inconsistent with the

constitution, should continue in force until amended or repealed. Allbyer was convicted and sentenced to imprisonment under a crimes act previously in force applicable to Hamilton County only, and the question was, whether that act was not inconsistent with the provision above quoted, and therefore repealed by it. The court held that the provision quoted evidently had regard to future and not to past legislation, and therefore was not repealed. A similar decision was made in *State v. Barbee*, 3 Ind. 258; *Evans v. Phillipi*, 117 Pa. St. 226, 11 Atl. 630; *Pecot v. Police Jury*, 41 La. Ann. 706, 6 So. 677. So as to the effect of a provision allowing compensation for property injured, but not taken, in course of public improvements. *Folkenson v. Easton*, 116 Pa. St. 523, 8 Atl. 869. See also *State v. Thompson*, 2 Kan. 432; *Slack v. Maysville, &c. R. Co.*, 13 B. Monr. 1; *State v. Macon County Court*, 41 Mo. 453; *N. C. Coal Co. v. G. C. Coal & Iron Co.*, 37 Md. 557.

An unconstitutional act, null and void at the time of its passage, cannot be given validity and effect by the adoption of a new constitution, or an amendment of the old constitution, where the act is not referred to. *Etchison Drilling Co. v. Flournoy*, 131 La. 442, 59 So. 867.

In *Matter of Oliver Lee & Co.'s Bank*, 21 N. Y. 9, 12, *Dento, J.*, says: "The rule laid down in *Dash v. Van Kleek*, 7 Johns. 477, and other cases of that class, by which the courts are admonished to avoid, if possible, such an interpretation as would give a statute a retrospective operation, has but a limited application, if any, to the construction of a constitution. When, therefore, we read in the provision under consideration, that the

*Implications.*

The implications from the provisions of a constitution are sometimes exceedingly important, and have large influence upon its construction. In regard to the Constitution of the United States the rule has been laid down, that where a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one or the performance of the other is also conferred.<sup>1</sup> The same rule has been applied to the State constitution, with an important modification, by the Supreme Court of Illinois. "That other powers than those expressly granted may be, and often are, conferred by implication, is too well settled to be doubted. Under every constitution the doctrine of implication must be resorted to, in order to carry out the general grants of power. A constitution cannot from its very nature enter into a minute specification of all the minor powers naturally and obviously included in it and flowing from the great and important ones which are expressly granted. It is therefore established as a general rule, that when a constitution gives a general power, or enjoins a duty, it also gives, by implication, every particular power necessary for the exercise of the one or the

stockholders of every banking corporation shall be subject to a certain liability, we are to attribute to the language its natural meaning, without inquiring whether private interests may not be prejudiced by such a sweeping mandate." The remark was *obiter*, as it was found that enough appeared in the constitution to show clearly that is was intended to apply to existing, as well as to subsequently created, banking institutions. In a California case the court says: "The existence of a statute at the time of the adoption of the Constitution is no justification for sustaining its validity, if opposed to the plain terms of the new Constitution." *Veterans' Welfare Board v. Riley*, 189 Cal. 159, 208 Pac. 678, 22 A. L. R. 1531.

<sup>1</sup> Story on Const. § 430. See also *United States v. Fisher*, 2 Cranch, 358, 2 L. ed. 304; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Northwestern Fertilizing Co. v. Hyde Park*, 70 Ill. 634.

In *First National Bank v. Union Trust Co.*, 244 U. S. 416, 61 L. ed. 1233, 37 Sup. Ct. Rep. 734, the court after reviewing *McCulloch v. Maryland*, 4

*Wheat.* 316, 4 L. ed. 579, and *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204, and considering the power given to Congress to pass laws to make the specific powers granted effectual, said: "In terms it was pointed out that this broad authority was not stereotyped as of any particular time but endured, thus furnishing a perpetual and living sanction to the legislative authority within the limits of a just discretion enabling it to take into consideration the changing wants and demands of society and to adopt provisions appropriate to meet every situation which it was deemed required to be provided for." See also *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, 65 L. ed. 577, 41 Sup. Ct. Rep. 243.

Congress may establish banks for national purposes. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Farmers & Mechanics National Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 114; *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, 65 L. ed. 577, 41 Sup. Ct. Rep. 243.

performance of the other. The implication under this rule, however, must be a necessary, not a conjectural or argumentative one. And it is further modified by another rule, that where the means for the exercise of a granted power are given, no other or different means can be implied, as being more effectual or convenient."<sup>1</sup> The rule applies to the exercise of power by all departments and all officers, and will be touched upon incidentally hereafter.

Akin to this is the rule that "where the power is granted in general terms, the power is to be construed as coextensive with the terms, unless some clear restriction upon it is deducible [expressly or by implication] from the context."<sup>2</sup> This rule has been so frequently applied as a restraint upon legislative encroachment upon the grant of power to the judiciary, that we shall content ourselves in this place with a reference to the cases collected upon this subject and given in another chapter.<sup>3</sup>

Another rule of construction is, that when the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases. On this ground it has been held by the Supreme Court of Maryland, that where the constitution defines the qualifications of an officer, it is not in the power of the legislature to change or superadd to them, unless the power to do so is expressly or by necessary implication conferred by the constitution itself.<sup>4</sup> Other cases recognizing the same principle are referred to in the note.<sup>5</sup>

<sup>1</sup> *Field v. People*, 3 Ill. 79, 83. See *Fletcher v. Oliver*, 25 Ark. 289.

In Nevada it has been held that a constitutional provision that the counties shall provide for their paupers will preclude a State asylum for the poor. *State v. Hallock*, 14 Nev. 202, 33 Am. Rep. 559.

<sup>2</sup> Story on Const. §§ 424-426. See *Du Page County v. Jenks*, 65 Ill. 275.

<sup>3</sup> See *post*, pp. 173, 221.

<sup>4</sup> *Thomas v. Owens*, 4 Md. 189. And see *Barker v. People*, 3 Cow. 686; *Matter of Dorsey*, 7 Port. 293; *Dickson v. Strickland*, 114 Tex. 176, 265 S. W. 1012.

<sup>5</sup> The legislature cannot add to the constitutional qualifications of voters: *Rison v. Farr*, 24 Ark. 161; *St. Joseph, &c. R. R. Co. v. Buchanan County Court*, 39 Mo. 485; *State v. Williams*, 5 Wis. 308; *State v. Baker*, 38 Wis. 71; *Monroe v. Collins*, 17

Ohio St. 665; *State v. Symonds*, 57 Me. 148; *State v. Staten*, 6 Cold. 233; *Davies v. McKeeby*, 5 Nev. 369; *McCafferty v. Guyer*, 59 Pa. St. 109; *Quinn v. State*, 35 Ind. 485; *Clayton v. Harris*, 7 Nev. 64; *Randolph v. Good*, 3 W. Va. 551; *Morris v. Powell*, 125 Ind. 281, 25 N. E. 221, 9 L. R. A. 326; *Ferbrache v. Drainage Dist.*, 23 Idaho, 85, 128 Pac. 553, 44 L. R. A. (N. S.) 538, Ann. Cas. 1915 C, 43; *Coggeshall v. Des Moines*, 138 Iowa, 730, 117 N. W. 309, 128 Am. St. Rep. 221; *State ex rel. Gilson v. Monahan*, 72 Kan. 492, 84 Pac. 130, 115 Am. St. Rep. 224, 7 Ann. Cas. 661; *Johnson v. Grand Forks County*, 16 N. D. 363, 113 N. W. 1071, 125 Am. St. Rep. 662; *Livesley v. Litchfield*, 47 Oreg. 248, 83 Pac. 142, 114 Am. St. Rep. 920. Nor diminish them: *Allison v. Blake*, 57 N. J. L. 6, 29 Atl. 417, 25 L. R. A. 480, and note;

*Talbert v. Long*, 134 Ga. 292, 67 S. E. 826, 137 Am. St. Rep. 222; *Coggeshall v. Des Moines*, 138 Iowa, 730, 117 N. W. 309, 128 Am. St. Rep. 221; *State ex rel. Gilson v. Monahan*, 72 Kan. 492, 84 Pac. 130, 115 Am. St. Rep. 224, 7 Ann. Cas. 661. But where the Constitution is silent upon the subject the legislature may prescribe the qualifications of voters. *State v. Dillon*, 32 Fla. 545, 14 So. 383, 22 L. R. A. 124; *Plummer v. Yost*, 144 Ill. 68, 33 N. E. 191, 19 L. R. A. 110; *State ex rel. Gilson v. Monahan*, 72 Kan. 492, 84 Pac. 130, 115 Am. St. Rep. 224, 7 Ann. Cas. 661; *Hanna v. Young*, 84 Md. 179, 35 Atl. 674, 34 L. R. A. 55; *Bonham v. Fuchs*, (Tex. Civ. App.) 228 S. W. 1112; *Willis v. Kalmbach*, 109 Va. 475, 64 S. E. 342, 21 L. R. A. (N. S.) 1009.

The legislature may regulate the exercise of the constitutional right to vote, leaving the right itself untouched. They may, for example, make reasonable provisions for determining the age, length of residence, etc., of persons who offer to vote. Such regulations are valid, provided they do not amount to a denial or invasion of the right conferred by the constitution. *Edmonds v. Banbury*, 28 Iowa, 267, 4 Am. Rep. 177; *Southerland v. Norris*, 74 Md. 326, 22 Atl. 137, 28 Am. St. Rep. 255; *Pope v. Williams*, 98 Md. 59, 56 Atl. 543, 103 Am. St. Rep. 379, 66 L. R. A. 398, affirmed 193 U. S. 621, 48 L. ed. 817, 24 Sup. Ct. Rep. 573; *Capen v. Foster*, 12 Pick. 485, 23 Am. Dec. 632; *State ex rel. Klein v. Hillenbrand*, 101 Ohio St. 370, 130 N. E. 29, 14 A. L. R. 255; *State ex rel. Cothren v. Leon*, 9 Wis. 279; *State ex rel. Wood v. Baker*, 38 Wis. 71. Thus a statute requiring an applicant for registration as a qualified elector of a municipality to state his or her age has been held valid. *State ex rel. Klein v. Hillenbrand*, 101 Ohio St. 370, 130 N. E. 29, 14 A. L. R. 255.

The legislature cannot add to the constitutional qualifications of an officer: *People v. McCormick*, 261 Ill. 413, 103 N. E. 1053, Ann. Cas. 1915 A, 338; *Feibleman v. State*, 98 Ind. 516; *State v. Craig*, 132 Ind. 54, 31 N. E. 352, 32 Am. St. Rep. 237, 16 L. R. A.

688; *State v. Goldthwait*, 172 Ind. 210, 87 N. E. 133, 19 Ann. Cas. 737; *Barker v. People*, 3 Cow. 686, 15 Am. Dec. 322. But see *State v. McAllister*, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343; nor shorten the constitutional term of an office: *Howard v. State*, 10 Ind. 99; *Cotten v. Ellis*, 7 Jones, N. C. 545; *State v. Askew*, 48 Ark. 82, 2 S. W. 349. But see *State v. Plasters*, 74 Neb. 652, 105 N. W. 1092, 3 L. R. A. (N. S.) 887, 13 Ann. Cas. 154; *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917 A, 1244; nor practically abolish the office by repealing provision for salary: *Reid v. Smoulter*, 128 Pa. 324, 5 L. R. A. 517, 18 Atl. Rep. 445; *People v. Howland*, 155 N. Y. 270, 49 N. E. 775, 41 L. R. A. 838; nor extend the constitutional term: *People v. Bull*, 46 N. Y. 57; *Goodin v. Thoman*, 10 Kan. 191; *State v. Brewster*, 44 Ohio St. 589, 6 N. E. 653; *Kahn v. Sutro*, 114 Cal. 316, 46 Pac. 87, 33 L. R. A. 620; *Gemmer v. State*, 163 Ind. 150, 71 N. E. 478, 66 L. R. A. 82. But see *State v. Plasters*, 74 Neb. 652, 105 N. W. 1092, 3 L. R. A. (N. S.) 887, 13 Ann. Cas. 154. See also *Hill v. Slade*, 41 Md. 640, 48 Atl. 64; but see *Jordan v. Bailey*, 37 Minn. 174, 33 N. W. 778; nor add to the constitutional grounds for removing an officer: *Lowe v. Commonwealth*, 3 Met. (Ky.) 237; *Brown v. Grover*, 6 Bush, 1; *People v. Howland*, 155 N. Y. 270, 49 N. E. 775, 41 L. R. A. 838; as by enacting that intoxication while discharging his duties shall be deemed misfeasance in office, *Com. v. Williams*, 79 Ky. 42; but see *McComas v. Krug*, 81 Ind. 327; nor change the compensation prescribed by the constitution: *King v. Hunter*, 65 N. C. 603; see also, on these questions, *post*, p. 388, note; nor provide for the choice of officers a different mode from that prescribed by the constitution: *People v. Raymond*, 37 N. Y. 428; *Devoy v. New York*, 35 Barb. 264; 22 How. Pr. 226; *People v. Blake*, 49 Barb. 9; *People v. Albertson*, 55 N. Y. 50; *Opinions of Justices*, 117 Mass. 603; *State v. Goldstucker*, 40 Wis. 124; see *post*, p. 561, note.

A legislative extension of an elective

*The Light which the Purpose to be accomplished may afford in Construction.*

The considerations thus far suggested are such as have no regard to extrinsic circumstances, but are those by the aid of which we seek to arrive at the meaning of the constitution from an examination of the words employed. It is possible, however, that after we shall have made use of all the lights which the instrument itself affords, there may still be doubts to clear up and ambiguities to explain. Then, and only then, are we warranted in seeking elsewhere for aid. We are not to import difficulties into a constitution, by a consideration of extrinsic facts, when none appear upon its face. If, however, a difficulty really exists, which an examination of every part of the instrument does not enable us to remove, there are certain extrinsic aids which may be resorted to, and which are more or less satisfactory in the light they afford. Among these aids is a contemplation of *the object to be accomplished or the mischief designed to be remedied or guarded against* by the clause in which the ambiguity is met with.<sup>1</sup> "When we once know the reason

office is void as applied to incumbents. *People v. McKinney*, 52 N. Y. 374. Where the constitution limits the term, appointee under statute providing for holding during good behavior cannot hold beyond constitutional term. *Neumeyer v. Krakel*, 110 Ky. 624, 62 S. W. 518.

It is not unconstitutional to allow the governor to supply temporary vacancies in offices which under the constitution are elective. *Sprague v. Brown*, 40 Wis. 612. But such vacancy does not arise by mere failure to hold the election. *Ijams v. Duvall*, 85 Md. 252, 36 Atl. 819, 36 L. R. A. 127. Enumeration in constitution of certain modes in which vacancies arise does not prevent legislative creation of other modes. *State v. Lansing*, 46 Neb. 514, 64 N. W. 1104, 35 L. R. A. 124. Illness of governor which disables him to perform his duties is such vacancy as authorizes the officer designated by the constitution to assume the powers and discharge the duties of the governor until the disability is removed. *Barnard v. Taggart*, 66 N. H. 362, 29 Atl. 1027, 25 L. R. A. 613. Where the term fixed by statute is unconstitutional, the tenure is at the will of the appointing

power. *Lewis v. Lewelling*, 53 Kan. 201, 36 Pac. 351, 23 L. R. A. 510.

<sup>1</sup> *Alexander v. Worthington*, 5 Md. 471; *District Township v. Dubuque*, 7 Iowa, 262; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233; *Jarrold v. Moberly*, 103 U. S. 580, 26 L. ed. 492; *Fargo v. Powers*, 220 Fed. 697; *Greenlee County v. Laine*, 20 Ariz. 296, 180 Pac. 151; *In re Russell*, 163 Cal. 668, 126 Pac. 875, Ann. Cas. 1914 A, 152; *Story v. Richardson*, 186 Cal. 162, 198 Pac. 1057, 18 A. L. R. 750; *State v. Gibson*, 36 Ind. 389, 10 Am. Rep. 42; *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738; *Kelso v. Cook*, 184 Ind. 173, 110 N. E. 987, Ann. Cas. 1918 E, 68; *State v. Brown*, 97 Minn. 402, 106 N. W. 477, 5 L. R. A. (N. S.) 327; *Shohoney v. Quincy, etc., R. Co.*, 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912 A, 1143; *Hale v. Everett*, 53 N. H. 9, 16 Am. Rep. 82; *Wilkes County v. Call*, 123 N. C. 308, 31 S. E. 481, 44 L. R. A. 252; *Smith v. St. Paul, etc., R. Co.*, 39 Wash. 355, 81 Pac. 840, 109 Am. St. Rep. 889, 70 L. R. A. 1018. See *Smith v. People*, 47 N. Y. 330; *People v. Potter*, 47 N. Y. 375; *Ball v. Chadwick*, 46 Ill. 28; *Sawyer v. Insurance Co.*, 46 Vt. 697.

which alone determined the will of the lawmakers, we ought to interpret and apply the words used in a manner suitable and consonant to that reason, and as will be best calculated to effectuate the intent. Great caution should always be observed in the application of this rule to particular given cases; that is, we ought always to be certain that we do know, and have actually ascertained, the true and only reason which induced the act. It is never allowable to indulge in vague and uncertain conjecture, or in supposed reasons and views of the framers of an act, where there are none known with any degree of certainty.”<sup>1</sup> The prior state of the law will sometimes furnish the clue to the real meaning of the ambiguous provision,<sup>2</sup> and it is especially important to look into it if the constitution is the successor to another, and in the particular in question essential changes have apparently been made.<sup>3</sup>

*Proceedings of the Constitutional Convention.*

When the inquiry is directed to ascertaining the mischief designed to be remedied, or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument.<sup>4</sup> Where the pro-

<sup>1</sup> Smith on Stat. and Const. Construction, 634. See also remarks of *Bronson*, J., in *People v. Purdy*, 2 Hill, 35-37.

<sup>2</sup> *Baltimore v. State*, 15 Md. 376; *Henry v. Tilson*, 19 Vt. 447; *Hamilton v. St. Louis County Court*, 15 Mo. 3; *People v. Gies*, 25 Mich. 83; *Servis v. Beatty*, 32 Miss. 52; *Bandel v. Isaac*, 13 Md. 202; *Story on Const.* § 428; *Newport News v. Woodward*, 104 Va. 58, 51 S. E. 193, 7 Ann. Cas. 625.

Decisions made prior to the adoption of a constitution may be considered in construing its provisions. *In re Contested Election*, 281 Pa. St. 131, 126 Atl. 199, 35 A. L. R. 815.

<sup>3</sup> *People v. Blodgett*, 13 Mich. 127, 147; *Newport News v. Woodward*, 104 Va. 58, 51 S. E. 193, 7 Ann. Cas. 625.

<sup>4</sup> Per *Walworth*, Chancellor, *Coutant v. People*, 11 Wend. 511, 518, and *Clark v. People*, 26 Wend. 599, 602; per *Bronson*, J., *People v. Purdy*, 2 Hill, 31; *People v. N. Y. Central Railroad Co.*, 24 N. Y. 485. See *State v. Kennon*, 7 Ohio St. 546; *Wisconsin Cent. R. R. Co. v. Taylor*

*Co.*, 52 Wis. 37, 8 N. W. 833; *State v. Barnes*, 24 Fla. 29, 3 So. 433; *Legal Tender Case*, 110 U. S. 421, 28 L. ed. 204, 4 Sup. Ct. Rep. 122; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; *Kentucky Union Co. v. Commonwealth of Kentucky*, 219 U. S. 140, 55 L. ed. 137, 31 Sup. Ct. Rep. 171; *Missouri Pac. R. Co. v. Kansas*, 248 U. S. 276, 63 L. ed. 239, 39 Sup. Ct. Rep. 93, 2 A. L. R. 1589; *Story v. Richardson*, 186 Cal. 162, 198 Pac. 1057, 18 A. L. R. 750; *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 60 S. E. 149, 121 Am. St. Rep. 244, 15 L. R. A. (N. S.) 567; *Schmitt v. F. W. Cook Brewing Co.*, 187 Ind. 623, 120 N. E. 19, 3 A. L. R. 270; *Atkinson v. Woodmansee*, 68 Kan. 71, 74 Pac. 640, 64 L. R. A. 325; *State v. Sessions*, 84 Kan. 856, 115 Pac. 641, Ann. Cas. 1912 A, 796; *Com. v. International Harvester Co.*, 131 Ky. 551, 115 S. W. 703, 133 Am. St. Rep. 256; *Sherill v. O'Brien*, 188 N. Y. 185, 81 N. E. 124, 117 Am. St. Rep. 841; *Steele, etc., Co. v. Miller*, 92 Ohio St. 115, 110 N. E. 648, Ann. Cas. 1917 C, 926, L. R. A. 1916 C, 1023;

ceedings clearly point out the purpose of the provision, the aid will be valuable and satisfactory; but where the question is one of abstract meaning, it will be difficult to derive from this source much reliable assistance in interpretation. Every member of such a convention acts upon such motives and reasons as influence him personally, and the motions and debates do not necessarily indicate the purpose of a majority of a convention in adopting a particular clause. It is quite possible for a clause to appear so clear and unambiguous to the members of a convention as to require neither discussion nor illustration; and the few remarks made concerning it in the convention might have a plain tendency to lead directly away from the meaning in the minds of the majority. It is equally possible for a part of the members to accept a clause in one sense and a part in another. And even if we were certain we had attained to the meaning of the convention, it is by no means to be allowed a controlling force, especially if that meaning appears not to be the one which the words would most naturally and obviously convey.<sup>1</sup> For as the constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.<sup>2</sup> These proceedings therefore are less conclusive of the proper construction of the instrument than are legislative proceedings of the proper construction of a statute; since in the latter case it is the intent of the legislature we seek, while in the former we are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives. The history of the calling of the conven-

*Scribner v. State*, 9 Okla. Crim. Rep. 465, 132 Pac. 933, Ann. Cas. 1915 B, 387; *Sanipoli v. Pleasant Valley Coal Co.*, 31 Utah, 114, 86 Pac. 865, 10 Ann. Cas. 1142; *Cooper v. Utah Light, etc., Co.*, 35 Utah, 570, 102 Pac. 202, 136 Am. St. Rep. 1075; *Nunne-macher v. State*, 129 Wis. 190, 108 N. W. 627, 9 L. R. A. (N. S.) 121, 9 Ann. Cas. 711.

<sup>1</sup> *Taylor v. Taylor*, 10 Minn. 107. And see *Eakin v. Raub*, 12 S. & R. 352; *Aldridge v. Williams*, 3 How. 1, 11 L. ed. 469; *State v. Doron*, 5 Nev. 399; *Steele, etc., Co. v. Miller*, 92 Ohio St. 115, 110 N. E. 648, L. R. A.

1916 C, 1023, Ann. Cas. 1917 C, 926; *Scribner v. State*, 9 Okla. Crim. Rep. 465, 132 Pac. 933, Ann. Cas. 1915 B, 387.

<sup>2</sup> *State v. Mace*, 5 Md. 337; *Manly v. State*, 7 Md. 135; *Hills v. Chicago*, 60 Ill. 86; *Beardstown v. Virginia*, 76 Ill. 34; *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 60 S. E. 149, 121 Am. St. Rep. 244, 15 L. R. A. (N. S.) 567; *People v. Emmerson*, 302 Ill. 300, 134 N. E. 707, 21 A. L. R. 636; *Scribner v. State*, 9 Okla. Crim. Rep. 465, 132 Pac. 933, Ann. Cas. 1915 B, 387.

tion, the causes which led to it, and the discussions and issues before the people at the time of the election of the delegates, will sometimes be quite as instructive and satisfactory as anything to be gathered from the proceedings of the convention.<sup>1</sup>

*Contemporaneous and Practical Construction.*

An important question which now suggests itself is this: How far the contemporaneous interpretation, or the subsequent practical construction of any particular provision of the constitution, is to have weight with the courts when the time arrives at which a judicial decision becomes necessary. Contemporaneous interpretation may indicate merely the understanding with which the people received it at the time, or it may be accompanied by acts done in putting the instrument in operation, and which necessarily assume that it is to be construed in a particular way. In the first case it can have very little force, because the evidences of the public understanding, when nothing has been done under the provision in question, must always of necessity be vague and indecisive. But where there has been a practical construction, which has been acquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention.<sup>2</sup> And

<sup>1</sup> See *People v. Harding*, 53 Mich. 481, 19 N. W. 155; *Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233; *Boushaber v. Union Pac. R. Co.*, 240 U. S. 1, 60 L. ed. 493, 36 Sup. Ct. Rep. 236, L. R. A. 1907 D, 414, Ann. Cas. 1917 B, 713; *Kelso v. Cook*, 184 Ind. 173, 110 N. E. 987, Ann. Cas. 1918 E, 68; *State v. Mockus*, 120 Me. 84, 113 Atl. 39, 14 A. L. R. 871; *Bradford Construction Co. v. Heflin*, 88 Miss. 314, 42 So. 174, 12 L. R. A. (N. S.) 1040, 8 Ann. Cas. 1077; *State v. Alderson*, 49 Mont. 387, 142 Pac. 210, Ann. Cas. 1916 B, 39; *Ex parte Ming*, 42 Nev. 472, 181 Pac. 319, 6 A. L. R. 1216; *Scribner v. State*, 9 Okla. Crim. Rep. 465, 132 Pac. 933, Ann. Cas.

1915 B, 387; *State v. Clausen*, 85 Wash. 260, 148 Pac. 28, Ann. Cas. 1916 B, 810.

<sup>2</sup> *Amos v. Moseley*, 74 Fla. 555, 77 So. 619, L. R. A. 1918 C, 482; *Ellingham v. Dyer*, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915 C, 200; *State v. Mockus*, 120 Me. 84, 113 Atl. 39, 14 A. L. R. 871; *Evanhoff v. State Industrial Acc. Commission*, 78 Oreg. 503, 154 Pac. 106; *State ex rel. Blakeslee v. Clausen*, 85 Wash. 260, 148 Pac. 28, Ann. Cas. 1918 B, 810; *Duncan v. Baltimore, etc., R. Co.*, 68 W. Va. 293, 69 S. E. 1004, Ann. Cas. 1912 B, 272.

It requires a very clear case to justify changing the construction of a



where this has been given by officers in the discharge of their official duty, and rights have accrued in reliance upon it, which would be divested by a decision that the construction was erroneous, the argument *ab inconvenienti* is sometimes allowed to have very great weight.<sup>1</sup>

The Supreme Court of the United States has had frequent occasion to consider this question. In *Stuart v. Laird*,<sup>2</sup> decided in 1803, that court sustained the authority of its members to sit as circuit judges on the ground of a practical construction, commencing with the organization of the government.

In *Martin v. Hunter's Lessee*,<sup>3</sup> Justice *Story*, after holding that the appellate power of the United States extends to cases pending in the State courts, and that the 25th section of the Judiciary Act, which authorized its exercise, was supported by the letter and spirit of the Constitution, proceeds to say: "Strong as this conclusion stands upon the general language of the Constitution, it may still derive support from other sources. It is an historical fact, that this exposition of the Constitution, extending its appellate power to State courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings both in and out of the State conventions. It is an historical fact, that at the time when the Judiciary Act was submitted to the deliberations of the First Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that Constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system. It is an historical fact, that the Supreme Court of the United States have from time to time sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important States in the Union, and that no State tribunal has ever breathed a judicial doubt on the subject,

constitution, conceded to be somewhat involved, which has been uninterruptedly acquiesced in, for so long a period as fifty years. *State v. Frear*, 138 Wis. 536, 120 N. W. 216, 16 Ann. Cas. 1019.

In Wisconsin it has been held that the rule that uninterrupted practice of the government prevailing through a long series of years and the acquiescence of all its departments settle a constitutional interpretation in accordance with such practice, is not con-

trolling where there was no such acquiescence on the part of the judicial department. *Board of Trustees v. Outagamie County*, 150 Wis. 244, 136 N. W. 619, 2 A. L. R. 465.

<sup>1</sup> *Amos v. Mosley*, 74 Fla. 555, 77 So. 619, L. R. A. 1918 C, 482; *Evanhoff v. State Industrial Acc. Commission*, 78 Ore. 503, 154 Pac. 106.

<sup>2</sup> 1 Cranch, 299, 2 L. ed. 115.

<sup>3</sup> 1 Wheat. 304, 351, 4 L. ed. 97, 109. See *Story on Const.* §§ 405-408.

or declined to obey the mandate of the Supreme Court, until the present occasion. This weight of contemporaneous exposition by all parties, this acquiescence by enlightened State courts, and these judicial decisions of the Supreme Court through so long a period, do, as we think, place the doctrine upon a foundation of authority which cannot be shaken without delivering over the subject to perpetual and irremediable doubts." The same doctrine was subsequently supported by Chief Justice *Marshall* in a case involving the same point, and in which he says that "great weight has always been attached, and very rightly attached, to contemporaneous exposition." <sup>1</sup>

In *Bank of United States v. Halstead* <sup>2</sup> the question was made, whether the laws of the United States authorizing the courts of the Union so to alter the form of process of execution used in the Supreme Courts of the States in September, 1789, as to subject to

<sup>1</sup> *Cohens v. Virginia*, 6 Wheat. 264, 418, 5 L. ed. 257, 294.

As to the weight to be given to proceedings and debates in a constitutional convention in interpreting provisions of the constitution, see *Carpenter v. Pennsylvania*, 17 How. 456, 15 L. ed. 127; *Legal Tender Case*, 110 U. S. 421, 28 L. ed. 204, 4 Sup. Ct. Rep. 122; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448; *Orr v. Gilman*, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; *Kentucky Union Co. v. Commonwealth of Kentucky*, 219 U. S. 140, 55 L. ed. 137, 31 Sup. Ct. Rep. 171; *Missouri Pac. R. Co. v. Kansas*, 248 U. S. 276, 63 L. ed. 239, 39 Sup. Ct. Rep. 93, 2 A. L. R. 1589; *Story v. Richardson*, 186 Cal. 162, 198 Pac. 1057; 18 A. L. R. 750; *Norwalk St. Ry. Co.'s Appeal*, 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794; *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 60 S. E. 149, 121 Am. St. Rep. 244, 15 L. R. A. (N. S.) 567; *People v. Emmerson*, 302 Ill. 300, 134 N. E. 707, 21 A. L. R. 636; *State v. Denny*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; *State v. Denny*, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; *In re Denny*, 156 Ind. 104, 59 N. E.

359, 51 L. R. A. 722; *Schmitt v. F. W. Cook Brewing Co.*, 187 Ind. 623, 120 N. E. 19, 3 A. L. R. 270; *Atkinson v. Woodmansee*, 68 Kan. 71, 74 Pac. 640, 64 L. R. A. 325; *State v. Sessions*, 84 Kan. 856, 115 Pac. 641; *Ann. Cas.* 1912 A, 796; *Com. v. International Harvester Co.*, 131 Ky. 551, 115 S. W. 703, 133 Am. St. Rep. 256; *State v. Camp Sing*, 18 Mont. 128, 44 Pac. 516, 56 Am. St. Rep. 551, 32 L. R. A. 635; *Sherill v. O'Brien*, 188 N. Y. 185, 81 N. E. 124, 117 Am. St. Rep. 841; *Keating v. Spink*, 3 Ohio St. 105, 62 Am. Dec. 214; *State v. Foraker*, 46 Ohio St. 677, 23 N. E. 491, 6 L. R. A. 422; *Steele, etc., Co. v. Miller*, 92 Ohio St. 115, 110 N. E. 648, L. R. A. 1916 C, 1023, *Ann. Cas.* 1917 C, 926; *State v. Carew*, 13 Rich. L. (S. C.) 48, 199 Am. Dec. 245; *McCully v. State*, 102 Tenn. 509, 53 S. W. 134, 46 L. R. A. 567; *Sanipoli v. Pleasant Valley Coal Co.*, 31 Utah, 114, 86 Pac. 865, 10 *Ann. Cas.* 1142; *Cooper v. Utah Light, etc., Co.*, 35 Utah, 570, 102 Pac. 202, 136 Am. St. Rep. 1075; *Peninsular Lead & C. Works v. Union Oil & P. Co.*, 100 Wis. 488, 76 N. W. 359, 69 Am. St. Rep. 934, 42 L. R. A. 331; *Nunnemacher v. State*, 129 Wis. 190, 108 N. W. 627, 9 L. R. A. (N. S.) 121, 9 *Ann. Cas.* 711; *Rasmussen v. Baker*, 7 Wyo. 117, 50 Pac. 819, 38 L. R. A. 773.

<sup>2</sup> 10 Wheat. 51, 63, 6 L. ed. 264, 267.

execution lands and other property not thus subject by the State laws in force at that time, were constitutional; and Mr. Justice *Thompson*, in language similar to that of Chief Justice *Marshall* in the preceding case, says: "If any doubt existed whether the act of 1792 vests such power in the courts, or with respect to its constitutionality, the practical construction given to it ought to have great weight in determining both questions." And Mr. Justice *Johnson* assigns a reason for this in a subsequent case: "Every candid mind will admit that this is a very different thing from contending that the frequent repetition of wrong will create a right. It proceeds upon the presumption that the contemporaries of the Constitution have claims to our deference on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the Constitution, and of the sense put upon it by the people when it was adopted by them."<sup>1</sup> Like views have been expressed by Chief Justice *Waite* in a recent decision.<sup>2</sup>

Great deference has been paid in all cases to the action of the executive department, where its officers have been called upon, under the responsibilities of their official oaths, to inaugurate a new system, and where it is to be presumed they have carefully and conscientiously weighed all considerations, and endeavored to keep within the letter and the spirit of the Constitution. If the question involved is really one of doubt, the force of their judgment, especially in view of the injurious consequences that may result from disregarding it, is fairly entitled to turn the scale in the judicial mind.<sup>3</sup> [So a construction of the Constitution

<sup>1</sup> *Ogden v. Saunders*, 12 Wheat. 290, 6 L. ed. 632. See *Pike v. Megoun*, 44 Mo. 491; *State v. Parkinson*, 5 Nev. 15.

<sup>2</sup> *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627. To like effect is *Ex parte Reynolds*, 52 Ark. 330, 12 S. W. 570. And see *Collins v. Henderson*, 11 Bush, 74, 92.

<sup>3</sup> *Union Insurance Co. v. Hoge*, 21 How. 35, 66, 16 L. ed. 61, 68; *Edward's Lessee v. Darby*, 12 Wheat. 206, 6 L. ed. 603; *Hughes v. Hughes*, 4 T. B. Monr. 42; *Chambers v. Fisk*, 22 Tex. 504; *Britton v. Ferry*, 14 Mich. 53; *Bay City v. State Treasurer*, 23 Mich. 499; *Westbrook v. Miller*, 56 Mich. 148, 22 N. W. 256; *Plummer v. Plummer*, 37 Miss. 185; *Burgess v. Pue*, 2 Gill, 11; *State v. Mayhew*, 2

*Gill*, 487; *Baltimore v. State*, 15 Md. 376; *Coutant v. People*, 11 Wend. 511; *People v. Dayton*, 55 N. Y. 367; *Farmers' and Mechanics' Bank v. Smith*, 3 S. & R. 63; *Norris v. Clymer*, 2 Pa. St. 277; *Moers v. City of Reading*, 21 Pa. St. 188; *Washington v. Page*, 4 Cal. 838; *Surgett v. Lapice*, 8 How. 48, 12 L. ed. 982; *Bissell v. Penrose*, 8 How. 317, 12 L. ed. 1095; *Troup v. Haight*, Hopk. 239; *United States v. Gilmore*, 8 Wall. 330, 19 L. ed. 396; *Brown v. United States*, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; *Hedgecock v. Davis*, 64 N. C. 650; *Lafayette, &c. R. R. Co. v. Geiger*, 34 Ind. 185; *Bunn v. People*, 45 Ill. 397; *Scanlan v. Childs*, 33 Wis. 663; *Faribault v. Misener*, 20 Minn. 396; *State v. Glenn*, 18 Nev. 34, 1

adopted by the legislative department, and long accepted by the various agencies of government and the people, is, where the meaning of the language construed is capable of two interpretations, entitled to great weight.]<sup>1</sup>

Pac. 186; *State v. Kelsey*, 44 N. J. L. 1; *United States v. Ala. G. Southern R. Co.*, 142 U. S. 615, 12 Sup. Ct. Rep. 306; *French v. State*, 141 Ind. 618, 41 N. E. 2, 29 L. R. A. 113; *State v. Frear*, 138 Wis. 536, 120 N. W. 216, 16 Ann. Cas. 1019.

Where the Constitution has been construed by the political departments of the government in its application to a political question, the courts will not only give great consideration to their action, but will generally follow the construction implicitly. *People v. Supervisors of La Salle*, 100 Ill. 495.

Upon whether or not an executive officer may raise the question of constitutionality of an act which casts ministerial duties upon him, as a defence to a mandamus proceeding to compel performance of such duties, see *State v. Heard*, 47 La. Ann. 1679, 18 So. 746, 47 L. R. A. 513, and cases collected in note thereto in L. R. A.

<sup>1</sup> *Evanhoff v. State Industrial Acc. Commission*, 78 Oreg. 503, 154 Pac. 106. See also *Butte City Water Co. v. Baker*, 196 U. S. 119, 49 L. ed. 409, 25 Sup. Ct. Rep. 211, affirming 28 Mont. 222, 72 Pac. 617, 104 Am. St. Rep. 683; *Laird v. Sims*, 16 Ariz. 521, 147 Pac. 738, L. R. A. 1915 F, 519; *Amos v. Mosley*, 74 Fla. 555, 77 So. 619, L. R. A. 1918 C, 182; *Kelso v. Cook*, 184 Ind. 173, 110 N. E. 987, Ann. Cas. 1918 E, 68; *State v. Sessions*, 84 Kan. 865, 115 Pac. 641, Ann. Cas. 1912 A, 796; *Way v. Barney*, 116 Minn. 285, 133 N. W. 801, Ann. Cas. 1913 A, 719, 38 L. R. A. (n. s.) 648; *Wright v. May*, 127 Minn. 150, 149 N. W. 9, L. R. A. 1915 B, 151; *Johnson v. Great Falls*, 38 Mont. 369, 99 Pac. 1059, 16 Ann. Cas. 974; *Ex parte Ming*, 42 Nev. 472, 181 Pac. 319; *State v. Packard*, 35 N. D. 298, 160 N. W. 150, L. R. A. 1917 B, 710; *Duncan v. Baltimore, etc., R. Co.*, 68 W. Va. 293, 69 S. E. 1004, Ann. Cas. 1912 B, 272; *State v. Johnson*,

170 Wis. 218, 175 N. W. 589, 7 A. L. R. 1617.

A construction of the Constitution adopted by the legislative department, and long accepted by the various agencies of government and the people, will be usually accepted as correct by the courts. *State v. Nashville Baseball Club*, 127 Tenn. 292, 154 S. W. 1151, Ann. Cas. 1514 B, 1243.

While not conclusive, the construction given by the Legislature to constitutional provisions dealing with legislative procedure is entitled to great weight. *Johnson v. Great Falls*, 38 Mont. 369, 99 Pac. 1059, 16 Ann. Cas. 974.

The passage of an act by the first State legislature is a contemporary interpretation of a constitutional clause *in pari materia* of much weight. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; *People v. Wright*, 6 Col. 92.

Where nearly fifty years have elapsed since the enactment of a statute and property rights have been established in recognition of its validity, it will not be held unconstitutional unless its invalidity is clear. *Hill v. Tohill*, 225 Ill. 384, 80 N. E. 253, 8 Ann. Cas. 423.

Where, under identical provisions in two State Constitutions exempting "manufacturers" from license taxation, the Legislature has for more than twenty years imposed license taxes on the business of gas, electric, waterworks, telegraph, and telephone companies, such a construction is entitled to great weight. *State v. New Orleans Ry. & Light Co.*, 116 La. 144, 40 So. 597, 7 Ann. Cas. 724.

Where under the practical interpretation of a State constitution by the executive and legislative branches of the government for nearly half a century a statute providing for the free education of the deaf, dumb, and blind has been upheld, it is some ground for holding constitutional a statute making

Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the law-makers. "Contemporary construction . . . can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries."<sup>1</sup> While we conceive this to be the true and only safe rule, we shall be obliged to confess that some of the cases appear, on first reading, not to have observed these limitations. In the case of *Stuart v. Laird*,<sup>2</sup> above referred to, the practical construction was regarded as conclusive. To the objection that the judges of the Supreme Court had no right to sit as circuit judges, the court say: "It is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course the question is at

similar provision for others. *Veterans' Welfare Board v. Riley*, 189 Cal. 159, 208 Pac. 678, 22 A. L. R. 1531.

Where under color of authority long practical construction has sanctioned certain appointments by the legislature, it will control. *Hovey v. State*, 118 Ind. 502, 21 N. E. 890; *Biggs v. McBride*, 17 Oreg. 640, 21 Pac. 878.

<sup>1</sup> Story on Const. § 407. And see *Evans v. Myers*, 25 Pa. St. 116; *Sadler v. Langham*, 34 Ala. 311; *Barnes v. First Parish in Falmouth*, 6 Mass. 401; *Union Pacific R. R. Co. v. United States*, 10 Ct. of Cl. Rep. 548; s. c. in error, 91 U. S. 72, 23 L. ed. 224; *St. Paul, M. & M. R. Co. v. Phelps*, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168; *Merritt v. Cameron*, 137 U. S. 542, 34 L. ed. 772, 11 Sup. Ct. Rep. 174; *Amos v. Mosley*, 74 Fla. 555, 70 So. 619, L. R. A. 1918 C, 482; *Fergus v. Brady*, 277 Ill. 272, 115 N. E. 393, Ann. Cas. 1913 B, 220; *Peabody v. Russel*, 302 Ill. 111, 134 N. E. 150, 20 A. L. R. 972; *County Commissioners of Somerset County*

*v. Pocomoke Bridge Co.*, 109 Md. 1, 71 Atl. 462, 16 Ann. Cas. 874; *Stumpf v. Storz*, 156 Mich. 228, 120 N. W. 618, 132 Am. St. Rep. 521, 23 L. R. A. (N. S.) 152; *State v. Beacon*, 66 Ohio St. 491, 64 N. E. 427, 90 Am. St. Rep. 599; *Hamann v. Heekin*, 88 Ohio St. 207, 102 N. E. 730, Ann. Cas. 1915 A, 1058; *Evanhoff v. State Industrial Acc. Commission*, 78 Oreg. 503, 154 Pac. 106; *Kucker v. Sunlight Oil & G. Co.*, 230 Pa. St. 528, 79 Atl. 747, Ann. Cas. 1912 A, 503; *Kingsley v. Merrill*, 122 Wis. 185, 99 N. W. 1044, 2 Ann. Cas. 748, 67 L. R. A. 200; *State v. Frear*, 138 Wis. 536, 120 N. W. 216, 16 Ann. Cas. 1019; *Board of Trustees v. Outagamie County*, 150 Wis. 244, 136 N. W. 619, 2 A. L. R. 465.

The construction placed upon a provision of the Constitution by the legislative and executive branches of the government will not be permitted to overturn and render nugatory a clear provision of the Constitution. *Amos v. Mosley*, 74 Fla. 555, 77 So. 619, L. R. A. 1918 C, 482.

<sup>2</sup> 1 Cranch, 299, 2 L. ed. 115.

rest, and ought not now to be disturbed." This is certainly very strong language; but language very similar in character was used by the Supreme Court of Massachusetts in one case where large and valuable estates depended upon a particular construction of a statute, and very great mischief would follow from changing it. The court said that, "although if it were now *res integra*, it might be very difficult to maintain such a construction, yet at this day the argument *ab inconvenienti* applies with great weight. We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long and continued usage furnishes a contemporaneous construction which must prevail over the mere technical import of the words."<sup>1</sup> Language nearly as strong was also used by the Supreme Court of Maryland, where the point involved was the possession of a certain power by the legislature, which it had constantly exercised for nearly seventy years.<sup>2</sup>

It is believed, however, that in each of these cases an examination of the Constitution left in the minds of the judges sufficient doubt upon the question of its violation to warrant their looking elsewhere for aids in interpretation, and that the cases are not in conflict with the general rule as above laid down. Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the Constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the Constitution.<sup>3</sup> We think we allow to contemporary and

<sup>1</sup> *Rogers v. Goodwin*, 2 Mass. 475. See also *Fall v. Hazelrigg*, 45 Ind. 576; *Scanlan v. Childs*, 33 Wis. 663.

<sup>2</sup> *State v. Mayhew*, 2 Gill, 487. In *Essex Co. v. Pacific Mills*, 14 Allen, 389, the Supreme Court of Massachusetts expressed the opinion that the constitutionality of the acts of Congress making treasury notes a legal tender ought not to be treated by a State court as open to discussion after the notes had practically constituted

the currency of the country for five years. At a still later day, however, the judges of the Supreme Court of the United States held these acts void, though they afterwards receded from this position.

<sup>3</sup> *State ex rel. Attorney-General v. Beacon*, 66 Ohio St. 491, 64 N. E. 427, 90 Am. St. Rep. 599.

See further, on this subject, the cases of *Sadler v. Langham*, 34 Ala. 311, 334; *People v. Allen*, 42 N. Y.

practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed.<sup>1</sup>

378; *Brown v. State*, 5 Col. 525; *Hahn v. United States*, 14 Ct. of Cl. 305; *Swift v. United States*, 14 Ct. of Cl. 481.

Practical acquiescence in a supposed unconstitutional law is entitled to much greater weight when the defect which is pointed out relates to mere forms of expression or enactment than when it concerns the substance of legislation; and if the objection is purely technical, long acquiescence will be conclusive against it. *Continental Imp. Co. v. Phelps*, 47 Mich. 299, 11 N. W. 167.

<sup>1</sup> There are cases which clearly go further than any we have quoted, and which sustain legislative action which they hold to be usurpation, on the sole ground of long acquiescence. Thus in *Brigham v. Miller*, 17 Ohio, 446, the question was, Has the legislature power to grant divorces? The court say: "Our legislature have assumed and exercised this power for a period of more than forty years, although a clear and palpable assumption of power, and an encroachment upon the judicial department, in violation of the Constitution. To deny this long-exercised power, and declare all the consequences resulting from it void, is pregnant with fearful consequences. If it affected only the rights of property, we should not hesitate; but second marriages have been contracted and children born, and it would bastardize all these, although born under the sanction of an apparent wedlock, authorized by an act of the legislature before they were born, and in consequence of which the relation was formed which gave them birth. On account of these children, and for them only, we hesitate. And in view of this, we are constrained to content ourselves with simply declaring that the exercise of the power of granting divorces, on the part of the legislature, is unwarranted and unconstitutional, an encroachment upon the duties of the judiciary, and a striking down of

the dearest rights of individuals, without authority of law. We trust we have said enough to vindicate the Constitution, and feel confident that no department of State has any disposition to violate it, and that the evil will cease."

So in *Johnson v. Joliet & Chicago Railroad Co.*, 23 Ill. 202, 207, the question was whether railroad corporations could be created by special law, without a special declaration by way of preamble that the object to be accomplished could not be attained by general law. The court say: "It is now too late to make this objection, since, by the action of the general assembly under this clause, special acts have been so long the order of the day and the ruling passion with every legislature which has convened under the Constitution, until their acts of this description fill a huge and misshapen volume, and important and valuable rights are claimed under them. The clause has been wholly disregarded, and it would now produce far-spread ruin to declare such acts unconstitutional and void. It is now safer and more just to all parties to declare that it must be understood that, in the opinion of the general assembly at the time of passing the special act, its object could not be attained under the general law, and this without any recital by way of preamble, as in the act to incorporate the Central Railroad Company. That preamble was placed there by the writer of this opinion, and a strict compliance with this clause of the Constitution would have rendered it necessary in every subsequent act. But the legislature, in their wisdom, have thought differently, and have acted differently, until now our special legislation and its mischiefs are beyond recovery or remedy."

These cases certainly presented very strong motives for declaring the law to be what it was not; but it would have been interesting and useful if either of these learned courts had

*Unjust Provisions.*

We have elsewhere expressed the opinion that a statute cannot be declared void on the ground solely that it is repugnant to a supposed general intent or spirit which it is thought pervades or lies concealed in the Constitution, but wholly unexpressed, or because, in the opinion of the court, it violates fundamental rights or principles, if it was passed in the exercise of a power which the Constitution confers.<sup>1</sup> Still less will the injustice of a con-

enumerated the evils that must be placed in the opposite scale when the question is whether a constitutional rule shall be disregarded; not the least of which is, the encouragement of a disposition on the part of legislative bodies to set aside constitutional restrictions, in the belief that, if the unconstitutional law can once be put in force, and large interests enlisted under it, the courts will not venture to declare it void, but will submit to the usurpation, no matter how gross and daring. We agree with the Supreme Court of Indiana, that, in construing constitutions, courts have nothing to do with the argument *ab inconvenienti*, and should not "bend the Constitution to suit the law of the hour": *Greencastle Township v. Black*, 5 Ind. 557, 565; and with *Bronson*, Ch. J., in what he says in *Oakley v. Aspinwall*, 3 N. Y. 547, 568: "It is highly probable that inconveniences will result from following the Constitution as it is written. But that consideration can have no force with me. It is not for us, but for those who made the instrument, to supply its defects. If the legislature or the courts may take that office upon themselves, or if, under color of construction, or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set any boundary to the powers of the government. Written constitutions will be more than useless. Believing as I do that the success of free institutions depends upon a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for latitudinarian con-

structions which are resorted to for the purpose of acquiring power; some evil to be avoided or some good to be attained by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But if the legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the Constitution which nothing can heal. One step taken by the legislature or the judiciary, in enlarging the powers of the government, opens the door for another which will be sure to follow; and so the process goes on until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them." See also *Encking v. Simmons*, 28 Wis. 272.

Whether there may not be circumstances under which the State can be held justly estopped from alleging the invalidity of its own action in apportioning the political divisions of the State, and imposing burdens on citizens, where such action has been acquiesced in for a considerable period, and rights have been acquired through bearing the burdens under it, see *Rumsey v. People*, 19 N. Y. 41; *People v. Maynard*, 15 Mich. 470; *Kneeland v. Milwaukee*, 15 Wis. 454.

<sup>1</sup> See *post*, p. 351, and cases referred to in notes.



stitutional provision authorize the courts to disregard it, or indirectly to annul it by construing it away. It is quite possible that the people may, under the influence of temporary prejudice, or a mistaken view of public policy, incorporate provisions in their charter of government, infringing upon the proper rights of individual citizens or upon principles which ought ever to be regarded as sacred and fundamental in republican government; and it is also possible that obnoxious classes may be unjustly disfranchised. The remedy for such injustice must be found in the action of the people themselves, through an amendment of their work when better counsels prevail. Such provisions, when free from doubt, must receive the same construction as any other. We do not say, however, that if a clause should be found in a constitution which should appear at first blush to demand a construction leading to monstrous and absurd consequences, it might not be the duty of the court to question and cross-question such clause closely, with a view to discover in it, if possible, some other meaning more consistent with the general purposes and aims of these instruments. When such a case arises, it will be time to consider it.<sup>1</sup>

### *Duty in Case of Doubt.*

But when all the legitimate lights for ascertaining the meaning of the constitution have been made use of, it may still happen that the construction remains a matter of doubt. In such a case it seems clear that every one called upon to act where, in his opinion, the proposed action would be of doubtful constitutionality, is bound upon the doubt alone to abstain from acting. Whoever derives power from the constitution to perform any public function is disloyal to that instrument, and grossly derelict in duty, if he does that which he is not reasonably satisfied the constitution permits. Whether the power be legislative, executive, or judicial, there is manifest disregard of constitutional and moral obligation by one who, having taken an oath to observe that instrument, takes part in an action which he cannot say he believes to be no violation of its provisions. A doubt of the constitutionality of any proposed legislative enactment should in any case be reason sufficient for refusing to adopt it; and, if legislators do not act upon this principle, the reasons upon which are based the judicial decisions sustaining legislation in very many cases will cease to be of force.

<sup>1</sup> McMullen v. Hodge, 5 Tex. 34. Bailey v. Commonwealth, 11 Bush, See Clarke v. Irwin, 5 Nev. 111; 688. Walker v. Cincinnati, 21 Ohio St. 14;

*Directory and Mandatory Provisions.*

The important question sometimes presents itself, whether we are authorized in any case, when the meaning of a clause of the Constitution is arrived at, to give it such practical construction as will leave it optional with the department or officer to which it is addressed to obey it or not as he shall see fit. In respect to statutes it has long been settled that particular provisions may be regarded as *directory* merely; by which is meant that they are to be considered as giving directions which *ought* to be followed, but not as so limiting the power in respect to which the directions are given that it cannot effectually be exercised without observing them.<sup>1</sup> The force of many of the decisions on this subject will be readily assented to by all; while others are sometimes thought to go to the extent of nullifying the intent of the legislature in essential particulars. It is not our purpose to examine the several cases critically, or to attempt — what we deem impossible — to reconcile them all; but we shall content ourselves with quoting from a few, with a view, if practicable, to ascertaining some line of principle upon which they can be classified.

There are cases where the meaning, whether a statute was to be regarded as merely directory or not, was made to depend upon the employing or failing to employ negative words plainly importing that the act should be done in a particular manner or time, *and not otherwise*.<sup>2</sup> The use of such words is often conclusive of an intent to impose a limitation; but their absence is by no means equally conclusive that the statute was not designed to be mandatory.<sup>3</sup> Lord *Mansfield* would have the question whether mandatory or not depend upon whether that which was directed to be done was or was not of the essence of the thing required.<sup>4</sup> The Supreme Court of New York, in an opinion afterwards approved by the Court of Appeals, laid down the rule as one settled by authority, that “statutes directing the mode of proceeding by public officers are

<sup>1</sup> In *State v. Aldeson*, 49 Mont. 387, 142 Pac. 210, Ann. Cas. 1916 B, 39, the court said: “Much confusion has arisen by assuming that every mandatory provision requires literal compliance, while a directory provision only is satisfied with substantial compliance. . . . The entire disregard of a provision would not necessarily invalidate action taken under it if directory, but would if it was mandatory.”

<sup>2</sup> *Slayton v. Hulings*, 7 Ind. 144;

*King v. Inhabitants of St. Gregory*, 2 Ad. & El. 99; *King v. Inhabitants of Hipswell*, 8 B. & C. 466.

<sup>3</sup> *District Township v. Dubuque*, 7 Iowa, 262, 284.

<sup>4</sup> *Rex v. Locksdale*, 1 Burr. 447. See also, *Gallup v. Smith*, 59 Conn. 354, 22 Atl. 334, 12 L. R. A. 353; *Brennan v. Weatherford*, 53 Tex. 330, 37 Am. Rep. 758; *State v. Superior Ct.*, 81 Wash. 623, 143 Pac. 461, Ann. Cas. 1916 B, 838.

directory, and are not regarded as essential to the validity of the proceedings themselves, unless it be so declared in the statute.”<sup>1</sup> This rule strikes us as very general, and as likely to include within its scope, in many cases, things which are of the very essence of the proceeding. The questions in that case were questions of irregularity under election laws, not in any way hindering the complete expression of the will of the electors; and the court was doubtless right in holding that the election was not to be avoided for a failure in the officers appointed for its conduct to comply in all respects with the directions of the statute there in question. The same court in another case say: “Statutory requisitions are deemed directory only when they relate to some immaterial matter, where a compliance is a matter of convenience rather than of substance.”<sup>2</sup> The Supreme Court of Michigan, in a case involving the validity of proceedings on the sale of land for taxes, laid down the rule that “what the law requires to be done for the protection of the taxpayer is mandatory, and cannot be regarded as directory merely.”<sup>3</sup> A similar rule has been recognized in a case in Illinois. Commissioners had been appointed to ascertain and assess the damage and recompense due to the owners of land which might be taken, on the real estate of the persons benefited by a certain local improvement, in proportion as nearly as might be to the benefits resulting to each. By the statute,

<sup>1</sup> *People v. Cook*, 14 Barb. 290; s. c. 8 N. Y. 67.

<sup>2</sup> *People v. Schermerhorn*, 19 Barb. 540, 558.

If a statute imposes a duty and gives the means of performing that duty, it must be held to be mandatory. *Veazie v. China*, 50 Me. 518. “It would not perhaps be easy to lay down any general rule as to when the provisions of a statute are merely directory, and when mandatory or imperative. Where the words are affirmative, and relate to the manner in which power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may, and often have been, construed to be directory; but negative words, which go to the power or jurisdiction itself, have never, that I am aware of, been brought within that category. ‘A clause is directory,’ says *Taunton, J.*, ‘when the provisions contain mere matter of discretion and no more; but not so when they are followed by words of positive prohibi-

tion.’ *Pearse v. Morrice*, 2 Ad. & El. 96.” Per *Sharswood, J.*, in *Bladen v. Philadelphia*, 60 Pa. St. 464, 466. And see *Pittsburg v. Coursin*, 74 Pa. St. 400; *Kennedy v. Sacramento*, 19 Fed. Rep. 580.

Under a statute providing that a court *may* appoint three commissioners to determine public rights, “*may*” is mandatory, and parties cannot agree that less than three shall act. *Monmouth v. Leeds*, 76 Me. 28.

<sup>3</sup> *Clark v. Crane*, 5 Mich. 150, 154. See also *Young v. Joslin*, 13 R. I. 675; *Shawnee County v. Carter*, 2 Kan. 115; *Marx v. Hanthorn*, 148 U. S. 172, 37 L. ed. 410, 13 Sup. Ct. Rep. 508.

In *Life Association v. Board of Assessors*, 49 Mo. 512, it is held that a constitutional provision that “all property subject to taxation ought to be taxed in proportion to its value” is a prohibition against its being taxed in any other mode, and the word *ought* is mandatory.

when the assessment was completed, the commissioners were to sign and return the same to the city council within forty days of their appointment. This provision was not complied with, but return was made afterwards, and the question was raised as to its validity when thus made. In the opinion of the court, this question was to be decided by ascertaining whether any advantage would be lost, or right destroyed, or benefit sacrificed, either to the public or to any individual, by holding the provision directory. After remarking that they had held an assessment under the general revenue law, returned after the time appointed by law, as void, because the person assessed would lose the benefit of an appeal from the assessment,<sup>1</sup> they say of the statute before the court: "There are no negative words used declaring that the functions of the commissioners shall cease after the expiration of the forty days, or that they shall not make their return after that time; nor have we been able to discover the least right, benefit, or advantage which the property owner could derive from having the return made within that time, and not after. No time is limited and made dependent on that time, within which the owner of the property may apply to have the assessment reviewed or corrected. The next section requires the clerk to give ten days' notice that the assessment has been returned, specifying the day when objections may be made to the assessment before the common council by parties interested, which hearing may be adjourned from day to day; and the common council is empowered in its discretion to confirm or annul the assessment altogether, or to refer it back to the same commissioners, or to others to be by them appointed. As the property owner has the same time and opportunity to prepare himself to object to the assessment and have it corrected, whether the return be made before or after the expiration of the forty days, the case differs from that of *Marsh v. Chesnut*,<sup>2</sup> at the very point on which that case turned. Nor is there any other portion of the chapter which we have discovered, bringing it within the principle of that case, which is the well-recognized rule in all the books."<sup>3</sup>

The rule is nowhere more clearly stated than by Chief Justice *Shaw*, in *Torrey v. Milbury*,<sup>4</sup> which was also a tax case. "In con-

<sup>1</sup> *Wheeler v. Chicago*, 24 Ill. 105, 108.

<sup>2</sup> 14 Ill. 223.

<sup>3</sup> *Wheeler v. Chicago*, 24 Ill. 105, 108.

<sup>4</sup> 21 Pick. 64, 67. We commend in the same connection the views of *Lewis*, Ch. J., in *Corbett v. Bradley*, 7 Nev. 108: "When any requirement of a statute is held to be directory, and

therefore not material to be followed, it is upon the assumption that the legislature itself so considered it, and did not make the right conferred dependent upon a compliance with the form prescribed for securing it. It is upon this principle that the courts often hold the time designated

sidering the various statutes regulating the assessment of taxes, and the measures preliminary thereto, it is not always easy to distinguish which are conditions precedent to the legality and validity of the tax, and which are directory merely, and do not constitute conditions. One rule is very plain and well settled, that all those measures that are intended for the security of the citizen, for ensuring equality of taxation, and to enable every one to know with reasonable certainty for what polls and for what real and personal estate he is taxed, and for what all those who are liable with him are taxed, are conditions precedent; and if they are not observed, he is not legally taxed; and he may resist it in any of the modes authorized by law for contesting the validity of the tax. But many regulations are made by statutes designed for the information of assessors and officers, and intended to promote method, system, and uniformity in the modes of proceeding, a compliance or non-compliance with which does in no respect affect the rights of taxpaying citizens. These may be considered directory; officers may be liable to legal animadversion, perhaps to punishment, for not observing them; but yet their observance is not a condition precedent to the validity of the tax."

We shall quote further only from a single other case upon this point. The Supreme Court of Wisconsin, in considering the validity of a statute not published within the time required by law, "understand the doctrine concerning directory statutes to be this: that where there is no substantial reason why the thing to be done might not as well be done after the time prescribed as before, no presumption that by allowing it to be so done it may work an injury or wrong, nothing in the act itself, or in other acts relating to the same subject-matter, indicating that the legislature did not intend that it should rather be done after the time prescribed than not to be done at all, there the courts assume that the intent was, that if not done within the time prescribed it might be done afterwards. But when any of these reasons intervene, then the limit is established." <sup>1</sup>

in a statute, where a thing is to be done, to be directory. No court certainly has the right to hold any requirement of a law unnecessary to be complied with, unless it be manifest the legislature did not intend to impose the consequence which would naturally follow from a non-compliance, or which would result from holding the requirement mandatory or indispensable. If it be clear that

no penalty was intended to be imposed for a non-compliance, then, as a matter of course, it is but carrying out the will of the legislature to declare the statute in that respect to be simply directory. But if there be anything to indicate the contrary, a full compliance with it must be enforced." See also *Hurford v. Omaha*, 4 Neb. 336.

<sup>1</sup> *State v. Lean*, 9 Wis. 279, 292. See further, for the views of this court

down and restricted, the doctrine is one to be applied with much circumspection; for it is not to be denied that the courts have sometimes, in their anxiety to sustain the proceedings of careless or incompetent officers, gone very far in substituting a judicial view of what was essential for that declared by the legislature.<sup>1</sup>

But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not therefore to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only;<sup>2</sup> and we impute

<sup>1</sup> See upon this subject the remarks of Mr. Sedgwick in his work on Statutory and Constitutional Law, p. 375, and those of Hubbard, J., in *Briggs v. Georgia*, 15 Vt. 61. Also see *Dryfus v. Dridges*, 45 Miss. 247.

<sup>2</sup> See *State v. Johnson*, 26 Ark. 281; *People ex rel. Clement v. Spruance*, 8 Colo. 307, 6 Pac. 831; *State v. Patterson*, 181 Ind. 660, 105 N. E. 228; *State ex rel. Frich v. Stark County*, 14 N. D. 368, 103 N. W. 913; *Grady County v. Hammerly*, 85 Okla. 53, 204 Pac. 445; *Sapulpa v. Land*, 101 Okla. 22, 223 Pac. 640, 35 A. L. R. 872; *Parks v. West*, 102 Tex. 16, 111 S. W. 726; *State v. Tooker*, 15 Mont. 8, 37 Pac. 840, 25 L. R. A. 560; *State v. Winnett*, 78 Neb. 379, 110 N. W.

1113, 10 L. R. A. (N. S.) 149, 15 Ann. Cas. 781.

Where the Constitution provides that the legislature shall apportion the State into legislative districts every ten years, and that such apportionment shall be based upon the last preceding federal census, one exercise of this power of apportionment exhausts it, and the State cannot be reapportioned until after the next federal census. *People v. Hutchinson*, 172 Ill. 486, 50 N. E. 599, 40 L. R. A. 770.

Where a Constitution provides that the legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporations, but may, by general laws, confer on the proper authorities

These cases perhaps sufficiently indicate the rules, so far as any of general application can be declared, which are to be made use of in determining whether the provisions of a statute are mandatory or directory. Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute.<sup>1</sup> But this rule presupposes that no negative words are employed in the statute which expressly or by necessary implication forbid the doing of the act at any other time or in any other manner than as directed. Even as thus laid

on the subject here discussed, *Wendel v. Durbin*, 26 Wis. 390. The general doctrine of the cases above quoted is approved and followed in *French v. Edwards*, 13 Wall. 506, 20 L. ed. 702. In *Low v. Dunham*, 61 Me. 566, a statute is said to be mandatory where public interests or rights are concerned, and the public or third persons have a claim *de jure* that the power shall be exercised. And see *Wiley v. Flournoy*, 30 Ark. 609; *State Auditor v. Jackson Co.*, 65 Ala. 142.

<sup>1</sup> The following, in addition to those cited, are some of the cases in this country in which statutes have been declared directory only: *Odiorne v. Rand*, 59 N. H. 504; *Pond v. Negus*, 3 Mass. 230; *Williams v. School District*, 21 Pick. 75; *City of Lowell v. Hadley*, 8 Met. 180; *Holland v. Osgood*, 8 Vt. 276; *Corliss v. Corliss*, 8 Vt. 373; *People v. Allen*, 6 Wend. 486; *Marchant v. Langworthy*, 6 Hill, 646; *Ex parte Heath*, 3 Hill, 42; *People v. Holley*, 12 Wend. 481; *Jackson v. Young*, 5 Cow. 269; *Striker v. Kelley*, 7 Hill, 9; *People v. Peck*, 11 Wend. 604; *Matter of Mohawk & Hudson Railroad Co.*, 19 Wend. 135; *People v. Runkel*, 9 Johns. 147; *Gale v. Mead*, 2 Denio, 160; *Doughty v. Hope*, 3 Denio, 249; *Elmendorf v. Mayor, &c. of New York*, 25 Wend. 692; *Thames Manufacturing Co. v. Lathrop*, 7 Conn. 550; *Colt v. Eves*, 12 Conn. 243; *People v. Doe*, 1 Mich. 451; *Parks v. Goodwin*, 1 Doug.

(Mich.) 56; *Hickey v. Hinsdale*, 8 Mich. 267; *People v. Hartwell*, 12 Mich. 508; *State v. McGinley*, 4 Ind. 7; *Stayton v. Hulings*, 7 Ind. 144; *New Orleans v. St. Romes*, 9 La. Ann. 573; *Edwards v. James*, 13 Tex. 52; *State v. Click*, 2 Ala. 26; *Savage v. Walshe*, 26 Ala. 620; *Sorchan v. Brooklyn*, 62 N. Y. 339; *People v. Tompkins*, 64 N. Y. 53; *Limestone Co. v. Rather*, 48 Ala. 433; *Webster v. French*, 12 Ill. 302; *McKune v. Weller*, 11 Cal. 49; *State v. Co. Commissioners of Baltimore*, 29 Md. 516; *Fry v. Booth*, 19 Ohio St. 25; *Whalin v. Macomb*, 76 Ill. 49; *Hurford v. Omaha*, 4 Neb. 336; *Lackawanna Iron Co. v. Little Wolf*, 38 Wis. 152; *R. R. Co. v. Warren Co.*, 10 Bush, 711; *Grant v. Spencer*, 1 Mont. 136; *Ouachita Power Co. v. Donaghey*, 106 Ark. 48, 152 S. W. 1012, Ann. Cas. 1915 A, 447; *Kennerson v. Thames Towboat Co.*, 89 Com. 367, 94 Atl. 372, L. R. A. 1916 A, 436; *People v. Graham*, 267 Ill. 426, 108 N. E. 699, Ann. Cas. 1916 C, 391; *Ex parte St. Hilaire*, 101 Me. 522, 64 Atl. 882, 8 Ann. Cas. 385; *Newhouse v. Alexander*, 27 Okla. 46, 110 Pac. 1121, 30 L. R. A. (N. S.) 602, Ann. Cas. 1912 B, 674; *Dillingham v. Spartanburg*, 75 S. C. 549, 56 S. E. 381, 117 Am. St. Rep. 917, 8 L. R. A. (N. S.) 412, 9 Ann. Cas. 829; *Pearson v. School Dist. No. 8*, 144 Wis. 620, 129 N. W. 940, 140 Am. St. Rep. 1043.

to the people a want of due appreciation of the purpose and proper province of such an instrument, when we infer that such directions are given to any other end. Especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication.<sup>1</sup>

There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are so plainly at variance with the weight of authority upon the precise points considered that we feel warranted in saying that the judicial decisions as they now stand do not sanction the application. In delivering the opinion of the New York Court of Appeals in one case, Mr. Justice *Willard* had occasion to consider the constitutional provision, that on the final passage of a bill the question shall be taken by ayes and noes, which shall be duly entered upon the journals; and he expressed the opinion that it was only directory to the legislature.<sup>2</sup> The remark was *obiter dictum*, as the court had already decided that the provision had been fully complied with; and those familiar with the reasons which have induced the insertion of this clause in our constitutions will not readily concede that its sole design was to establish a mere rule of order for legislative proceedings which might be followed or not at discretion. Mr. Chief Justice *Thurman*, of Ohio, in a case not calling for a discussion of the subject, has considered a statute whose validity was assailed on the ground that it was not passed in the mode prescribed by the constitution. "By the term *mode*," he says, "I do not mean to include the *authority* in which the lawmaking power resides, or the number of votes a bill must receive to become a law. That the power to make law is vested in the assembly alone, and that no act has any

thereof, respectively, the power to assess and collect such taxes, having expressly prescribed the manner by which the legislature may authorize the assessment and collection of municipal taxes, it excludes the assessment and collection of such taxes in any other manner than pursuant to general laws. *Sapulpa v. Land*, 101 Okla. 22, 223 Pac. 640, 35 A. L. R. 872.

<sup>1</sup> *Wolcott v. Wigton*, 7 Ind. 44; per *Bronson, J.*, in *People v. Purdy*, 2 Hill, 31; *Greencastle Township v. Black*, 5 Ind. 566; *Opinions of Judges*, 18 Me. 458. See *People v. Lawrence*, 36 Barb. 177; *State v. Johnson*, 26

Ark. 281; *State v. Glenn*, 18 Nev. 34, 1 Pac. 186.

"The essential nature and object of constitutional law being restrictive upon the powers of the several departments of government, it is difficult to comprehend how its provisions can be regarded as merely directory." *Nicholson*, Ch. J., in *Cannon v. Mathes*, 8 Heisk. 504, 517. Unless expressly permissive, constitutional provisions are mandatory. *Varney v. Justice*, 86 Ky. 596, 6 S. W. 457.

<sup>2</sup> *People v. Supervisors of Chenango*, 8 N. Y. 317.



force that was not passed by the number of votes required by the constitution, are nearly, or quite, self-evident propositions. These essentials relate to the authority by which, rather than the mode in which, laws are to be made. Now to secure the careful exercise of this power, and for other good reasons, the constitution prescribes or recognizes certain things to be done in the enactment of laws, which things form a course or mode of legislative procedure. Thus we find, *inter alia*, the provision before quoted that every bill shall be fully and distinctly read on three different days, unless, in case of urgency, three-fourths of the house in which it shall be pending shall dispense with this rule. This is an important provision without doubt, but, nevertheless, there is much reason for saying that it is merely directory in its character, and that its observance by the assembly is secured by their sense of duty and official oaths, and not by any supervisory power of the courts. Any other construction, we incline to think, would lead to very absurd and alarming consequences. If it is in the power of every court (and if one has the power, every one has it) to inquire whether a bill that passed the assembly was 'fully' and 'distinctly' read three times in each house, and to hold it invalid if, upon any reading, a word was accidentally omitted, or the reading was indistinct, it would obviously be impossible to know what is the statute law of the State. Now the requisition that bills shall be fully and distinctly read is just as imperative as that requiring them to be read three times; and as both relate to the mode of procedure merely, it would be difficult to find any sufficient reason why a violation of one of them would be less fatal to an act than a violation of the other."<sup>1</sup>

A requirement that a law shall be read *distinctly*, whether mandatory or directory, is, from the very nature of the case, addressed to the judgment of the legislative body, whose decision as to what reading is sufficiently distinct to be a compliance cannot be subject to review. But in the absence of authority to the contrary, we should not have supposed that the requirement of three successive readings on different days stood upon the same footing.<sup>2</sup> To this extent a definite and certain rule is capable of being, and has been, laid down, which can be literally obeyed; and the legislative body cannot suppose or adjudge it to have been done if the fact is otherwise. The requirement has an important purpose, in making legis-

<sup>1</sup> *Miller v. State*, 3 Ohio St. 475, 483.

The provision for three readings on separate days does not apply to amendments made in the progress of the bill through the houses. *People v. Wallace*, 70 Ill. 680.

<sup>2</sup> See *People v. Campbell*, 8 Ill. 466; *McCulloch v. State*, 11 Ind. 424; *Cannon v. Mathes*, 8 Heisk. 504; *Spangler v. Jacoby*, 14 Ill. 297; *People v. Starne*, 35 Ill. 121; *Ryan v. Lynch*, 68 Ill. 160.

lators proceed in their action with caution and deliberation; and there cannot often be difficulty in ascertaining from the legislative records themselves if the constitution has been violated in this particular. There is, therefore, no inherent difficulty in the question being reached and passed upon by the courts in the ordinary mode, if it is decided that the constitution intends legislation shall be reached through the three readings, and not otherwise.

The opinion above quoted was recognized as law by the Supreme Court of Ohio in a case soon after decided. In that case the court proceed to say: "The . . . provision . . . that no bill shall contain more than one subject, which shall be clearly expressed in its title, is also made a permanent rule in the introduction and passage of bills through the houses. The subject of the bill is required to be clearly expressed in the title for the purpose of advising members of its subject, when voting in cases in which the reading has been dispensed with by a two-thirds vote. The provision that a bill shall contain but one subject was to prevent combinations by which various and distinct matters of legislation should gain a support which they could not if presented separately. As a rule of proceeding in the General Assembly, it is manifestly an important one. But if it was intended to effect any practical object for the benefit of the people in the examination, construction, or operation of acts passed and published, we are unable to perceive it. The title of an act may indicate to the reader its subject, and under the rule each act would contain one subject. To suppose that for such a purpose the Constitutional Convention adopted the rule under consideration would impute to them a most minute provision for a very imperfect heading of the chapters of laws and their subdivision. This provision being intended to operate upon bills in their progress through the General Assembly, it must be held to be directory only. It relates to bills, and not to acts. It would be most mischievous in practice to make the validity of every law depend upon the judgment of every judicial tribunal of the State, as to whether an act or a bill contained more than one subject, or whether this one subject was clearly expressed in the title of the act or bill. Such a question would be decided according to the mental precision and mental discipline of each justice of the peace and judge. No practical benefit could arise from such inquiries. We are therefore of the opinion that in general the only safeguard against the violation of these rules of the houses is their regard for, and their oath to support, the constitution of the State. We say, *in general*, the only safeguard; for whether a manifestly gross and fraudulent violation of these rules might authorize the

court to pronounce a law unconstitutional, it is unnecessary to determine. It is to be presumed no such case will ever occur.”<sup>1</sup>

If the prevailing doctrine of the courts were in accord with this decision, it might become important to consider whether the object of the clause in question, as here disclosed, was not of such a character as to make the provision mandatory even in a statute. But we shall not enter upon that subject here, as elsewhere we shall have occasion to refer to decisions made by the highest

<sup>1</sup> *Pim v. Nicholson*, 6 Ohio St. 176, 179.

Those provisions which relate to the structure of a bill or the forms to be observed in its passage are generally directory, while those as to the number of members necessary to pass a bill and as to the effect and operation of a bill when passed, are usually mandatory. *Ex parte Falk*, 42 Ohio St. 638. But the authentication of an act must be by signature, and one which though passed, is not signed nor enrolled is void. *State v. Kiesewetter*, 45 Ohio St. 254, 12 N. E. 807.

See also in line with *Pim v. Nicholson*, *supra*, *Washington v. Page*, 4 Cal. 388.

The provision in the Constitution of Illinois that “every bill, having passed both houses (of the legislature), shall be signed by the speakers thereof”, is mandatory. *Lynch v. Hutchinson*, 219 Ill. 193, 76 N. E. 370, 4 Ann. Cas. 904.

In *Hill v. Boyland*, 40 Miss. 618, a provision requiring of all officers an oath to support the constitution was held not to invalidate the acts of officials who had neglected to take such an oath. And in *McPherson v. Leonard*, 29 Md. 377, the provision that the style of all laws shall be, “Be it enacted by the General Assembly of Maryland”, was held directory. Similar rulings were made in *Cape Girardeau v. Riley*, 52 Mo. 424; *St. Louis v. Foster*, 52 Mo. 513; *Swann v. Buck*, 40 Miss. 268.

Directly the opposite has been held in Nevada. *State v. Rogers*, 10 Nev. 250. So a requirement that indictments shall conclude, “against the peace and dignity of the people of West Virginia”, was held in *Lemons v. People*, 4 W. Va. 755, 1 Green Cr. R. 666, to be mandatory, and an indictment

which complied with it, except in abbreviating the name of the State, was held bad.

A provision that the legislature shall provide for determining contested elections is mandatory upon that department, but if in its enactments it fails to carry out the provision, the courts cannot annul the acts on that ground. *Schulherr v. Bordeaux*, 64 Miss. 59, 8 So. 201. So if the legislature disregards a provision that before a special law is enacted there must be evidence of publication of notice of intention to introduce it. *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184. Compare *State ex rel. Attorney-General v. Sayre*, 142 Ala. 641, 39 So. 240, 4 Ann. Cas. 656.

If a constitution provides “that when any bill is presented for an act of incorporation, it shall be continued until another election of members of Assembly shall have taken place and public notice of the pendency thereof given, it does not necessarily follow that the organization under the charter is not as to all practical purposes valid. The provision is directory to the Assembly, and in the absence of any clause forbidding the enactment, does not affect the corporators unless the State itself intervenes. *Whitney v. Wyman*, 101 U. S. 392, 397, 25 L. ed. 1050, 1052.

“The State may waive conditions, and so long as the State raises no objection it is immaterial to other parties whether it is a corporation *de facto* or *de jure*. *Ibid.*” *McClinch v. Sturgis*, 72 Me. 288, 295.

The Constitution of Nebraska requires that, when a proposed amendment thereto is submitted to a vote of the people, such proposed amendment shall be “published at least once each

judicial tribunals in nearly all the States, recognizing similar provisions as mandatory, and to be enforced by the courts. And we concur fully in what was said by Mr. Justice *Emmot* in speaking of this very provision, that "it will be found upon full consideration to be difficult to treat any constitutional provision as merely directory and not imperative."<sup>1</sup> And with what was said by Mr. Justice *Lumpkin*, as to the duty of the courts: "It has been suggested that the prohibition in the seventeenth section of the first article of the Constitution, 'Nor shall any law or ordinance pass containing any matter different from what is expressed in the title thereof', is directory only to the legislative and executive or law-making departments of the government. But we do not so understand it. On the contrary, we consider it as much a matter of judicial cognizance as any other provision in that instrument. If the courts would refuse to execute a law suspending the writ of *habeas corpus* when the public safety did not require it, a law violatory of the freedom of the press or trial by jury, neither would they enforce a statute which contained matter different from what was expressed in the title thereof."<sup>2</sup>

week in at least one newspaper in each county where a newspaper is published for three months immediately preceding the next election of senators and representatives, at which election the same shall be submitted to the electors for approval or rejection." It was held that where there is a substantial compliance with this requirement, the fact that the publication was made for one week less than the required time in one county of the State will not invalidate the amendment. *State ex rel. Thompson v. Winnett*, 78 Neb. 379, 110 N. W. 1113, 10 L. R. A. (N. S.) 149, 15 Ann. Cas. 781. The court said: "If other provisions of the Constitution are mandatory and are to be taken literally, these provisions by which the people have consented to place restrictions upon their own power in adopting amendments to the Constitution should not be so construed. We should inquire into the fair purpose and meaning of such restrictions, and should regard the substance rather than the letter of such requirements." See also *State v. Alderson*, 49 Mont. 387, 142 Pac. 210, Ann. Cas. 1916 B, 39.

The word "may" as used in the Constitution of Mississippi, art. 10, § 225, providing that "the Legislature may place convicts on a State farm or farms and have them worked thereon under State supervision exclusively, in tilling the soil or manufacturing, or both, and may buy farms for that purpose", is not mandatory, but merely directory, and it is not compulsory upon the Legislature to place convicts on a State farm, nor to buy a farm for that purpose. *State ex rel. Greaves v. Henry*, 87 Miss. 125, 40 So. 152, 5 L. R. A. (N. S.) 340.

A statute which is passed in obedience to a constitutional requirement must be held mandatory. *State v. Pierce*, 35 Wis. 93, 99.

<sup>1</sup> *People v. Lawrence*, 36 Barb. 177, 186. See also *Mulnix v. Mutual Ben. L. Ins. Co.*, 23 Col. 85, 46 Pac. 1114, 33 L. R. A. 827; *Garrigan v. Kennedy*, 19 S. D. 11, 101 N. W. 1081, 117 Am. St. Rep. 927, 8 Ann. Cas. 1125; *Swift v. Newport News*, 105 Va. 108, 52 S. E. 821, 3 L. R. A. (N. S.) 404.

<sup>2</sup> *Prothro v. Orr*, 12 Ga. 36. See also *Opinions of Judges*, 18 Me. 458; *Indiana Central Railroad Co. v. Potts*, 7 Ind. 681; *People v. Starne*, 35 Ill.

*Self-executing Provisions.*

But although none of the provisions of a constitution are to be looked upon as immaterial or merely advisory, there are some which, from the nature of the case, are as incapable of compulsory enforcement as are directory provisions in general.<sup>1</sup> The reason is that, while the purpose may be to establish rights or to impose duties, they do not in and of themselves constitute a sufficient rule by means of which such right may be protected or such duty enforced. In such cases, before the constitutional provision can be made effectual, supplemental legislation must be had; and the provision may be in its nature mandatory to the legislature to enact the needful legislation, though back of it there lies no authority to enforce the command. Sometimes the constitution in terms requires the legislature to enact laws on a particular subject; and here it is obvious that the requirement has only a moral force: the legislature ought to obey it; but the right intended to be given is only assured when the legislation is voluntarily enacted.<sup>2</sup> Illustrations may be found in constitutional provisions requiring the legislature to provide by law uniform and just rules for the assessment and collection of taxes; these must lie dormant until the legislation is had;<sup>3</sup> they do not displace the law previously in force, though the purpose may be manifest to do away with it by the legislation required.<sup>4</sup> So, however plainly the constitution may recognize the right to appropriate private property for the general benefit, the appropriation cannot be made until the law has pointed out the cases, and given the means by which compensation may be

121; *State v. Miller*, 45 Mo. 495; *Weaver v. Lapsley*, 43 Ala. 224; *Nougues v. Douglass*, 7 Cal. 65; *State v. McCann*, 4 Lea, 1.

<sup>1</sup> There are also many which merely contemplate the exercise of powers conferred, when the legislature in its discretion shall deem it wise; like the provision that "suits may be brought against the State in such courts as may be by law provided." *Ex parte State*, 52 Ala. 231.

<sup>2</sup> *School Board v. Patten*, 62 Mo. 444. See *Schulherr v. Bordeaux*, 64 Miss. 59, 8 So. 201; *State v. Spokane*, 24 Wash. 53, 63 Pac. 1116.

A constitutional provision that "the Legislative Assembly shall by a general law exempt from taxation property used exclusively for school,

religious, cemetery or charitable purposes" is addressed to the Legislature and not to the courts. Its terms look forward to and require ulterior action upon the part of the law-making branch of the government. *State ex rel. Linde v. Packard*, 35 N. D. 298, 160 N. W. 150, L. R. A. 1917 B, 710.

<sup>3</sup> *Williams v. Detroit*, 2 Mich. 560; *People v. Lake Co.*, 33 Cal. 487; *Bowie v. Lott*, 24 La. Ann. 214; *Mississippi Mills v. Cook*, 56 Miss. 40; *Coatesville Gas Co. v. Chester Co.*, 97 Pa. St. 476.

<sup>4</sup> *Moore, J.*, in *Supervisors of Doddridge v. Stout*, 9 W. Va. 703, 705; *Cahoon v. Commonwealth*, 20 Gratt. 733; *Lehigh Iron Co. v. Lower Macungie*, 81 Pa. St. 482; *Erie Co. v. Erie*, 113 Pa. St. 360, 6 Atl. 136.

assured.<sup>1</sup> A different illustration is afforded by the new amendments to the federal Constitution. The fifteenth amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude." To this extent it is self-executing, and of its own force it abolishes all distinctions in suffrage based on the particulars enumerated. But when it further provides that "Congress shall have power to enforce this article by appropriate legislation", it indicates the possibility that the rule may not be found sufficiently comprehensive or particular to protect fully this right to equal suffrage, and that legislation may be found necessary for that purpose.<sup>2</sup> Other provisions are completely self-executing, and manifestly contemplate no legislation whatever to give them full force and operation.<sup>3</sup>

<sup>1</sup> *Lamb v. Lane*, 4 Ohio St. 167. See *School Board v. Patten*, 62 Mo. 444; *Myers v. English*, 9 Cal. 341; *Gillinwater v. Mississippi, &c. R. R. Co.*, 13 Ill. 1; *Cairo, &c. R. R. Co. v. Trout*, 32 Ark. 17.

<sup>2</sup> *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563.

The Thirteenth Amendment to the Federal Constitution provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation." In *Bailey v. Alabama*, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145, the court, referring to this amendment, said: "While the Amendment was self-executing, so far as its terms were applicable to any existing condition, Congress was authorized to secure its complete enforcement by appropriate legislation. As said in the Civil Rights Cases: 'By its unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere pro-

hibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States', 109 U. S. 20, 20 L. ed. 842, 3 Sup. Ct. Rep. 18."

Any constitutional provision is self-executing to this extent, that everything done in violation of it is void. *Brien v. Williamson*, 8 Miss. 14; *Russell v. Ayer*, 120 N. C. 180, 27 S. E. 133, 37 L. R. A. 246. A provision that "the legislature shall have no power to authorize lotteries for any purpose, and shall pass laws to prohibit the sale of lottery tickets in this State", was held to be of itself a prohibition of lotteries. *Bass v. Nashville, Meigs*, 421; *Yerger v. Rains*, 4 Humph. 259. In *State v. Woodward*, 89 Ind. 110, it was held that a like provision took away any pre-existing authority to carry them on, but that it needed legislation to make them criminal.

<sup>3</sup> See *People v. Bradley*, 60 Ill. 390; *People v. McRoberts*, 62 Ill. 38; *Mitchell v. Illinois, &c. Coal Co.*, 68 Ill. 286; *Beecher v. Baldy*, 7 Mich. 488; *People v. Rumsey*, 64 Ill. 41; *State v. Holladay*, 64 Mo. 526; *Miller v. Max*, 55 Ala. 322; *Hills v. Chicago*, 60 Ill. 86; *Kine v. Defenbaugh*, 64 Ill. 291; *People v. Hoge*, 55 Cal. 612; *Rowan v. Runnels*, 5 How. 134, 12 L. ed. 85; *Friedman v. Mathes*, 8 Heisk. 488; *Johnson v. Parkersburgh*, 16 W. Va. 402, 37 Am. Rep. 779; *De Turk v.*

A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced;<sup>1</sup> and it is not self-executing when it merely indicates prin-

Com., 129 Pa. St. 151, 18 Atl. Rep. 757.

"When a constitutional amendment is adopted in the manner specified by the Constitution, and there is nothing to indicate that the matter is referred to the Legislature for further action, it will be construed as self-executing, and effective from the date of its adoption." *Harris v. Walker*, 199 Ala. 51, 74 So. 40.

<sup>1</sup> *Friedman v. Mathes*, 8 Heisk. 488; *State v. Weston*, 4 Neb. 216; *People v. Hoge*, 55 Cal. 612; *Ewing v. Orville M. Co.*, 56 Cal. 649; *Hills v. Chicago*, 64 Ill. 86; *Davis v. Burke*, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210; *Dickinson v. Edmondson*, 120 Ark. 80, 178 S. W. 930, Ann. Cas. 1917 C, 913; *Winchester v. Howard*, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153; *State ex rel. Burnett v. Deck*, 106 Kan. 518, 188 Pac. 238; *State v. Kyle*, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115; *State ex rel. Delgado v. Romero*, 17 N. M. 81, 124 Pac. 649, Ann. Cas. 1914 C, 1114; *Kitchin v. Wood*, 154 N. C. 565, 70 S. E. 995; *State ex rel. Linde v. Hall*, 35 N. D. 34, 159 N. W. 281; *State ex rel. Twichell v. Hall*, 44 N. D. 459, 171 N. W. 213; *Acme Dairy Co. v. Astoria*, 49 Ore. 523, 90 Pac. 153; *Newport News v. Woodward*, 104 Va. 58, 51 S. E. 193, 7 Ann. Cas. 625; *Thorne v. Clarksburg*, 88 W. Va. 251, 106 S. E. 644.

"Constitutional provisions are self-executing where it is the manifest intention that they should go into immediate effect and no auxiliary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty or a liability imposed." *State ex rel. Clark v. Harris*, 74 Ore. 573, 144 Pac. 109, Ann. Cas. 1916 A, 1156. See also *Lyons v. Longmont*, 54 Colo. 112, 129 Pac. 200; *State v. Duncan*, 265 Mo. 26, 175 S. W. 940, Ann. Cas. 1916 D, 1.

"The question in every case is

whether the language of a constitutional provision is addressed to the courts or to the Legislature — does it indicate that it was intended as a present enactment, complete in itself as definitive legislation, or does it contemplate subsequent legislation to carry it into effect?" *Willis v. Mahon*, 48 Minn. 150, 50 N. W. 1110, 31 Am. St. Rep. 626, 16 L. R. A. 281.

"When a constitutional provision . . . is declarative of the common law, it is self-active." *Knight, etc., Co. v. Miller*, 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146. All negative or prohibitive provisions in a constitution are self-executing. *Law v. People*, 87 Ill. 385. A provision imposing a duty upon an officer is self-executing. *State v. Babcock*, 19 Neb. 230, 27 N. W. 98. So, one providing for jury trial in all of a certain class of cases. *Woodward Iron Co. v. Cabaniss*, 87 Ala. 328, 6 So. 300. So one providing that compensation shall be given for property "damaged" in the course of a public improvement. *Householder v. Kansas City*, 83 Mo. 488. See also *Swift v. Newport News*, 105 Va. 108, 52 S. E. 821, 3 L. R. A. (n. s.) 404. So one providing that "knowledge, by any employee injured, of the defective or unsafe character or conditions of any machinery, ways or appliances, shall be no defence to an action for injury caused thereby." *Illinois C. R. Co. v. Ihlenberg*, 75 Fed. Rep. 873, 34 L. R. A. 393. That justices of peace in cities above 5,000 shall be paid by salaries instead of fees. *Anderson v. Whatcom County*, 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137. That no county officer shall receive to his own use any fees or emoluments other than the annual salary provided by law, and all fees earned by any officer shall be by him collected and paid into the treasury of the county. *State ex rel. Delgado v. Romero*, 17 N. M. 81, 124 Pac. 649, Ann. Cas. 1914 C, 1114. That civil service appointments "shall

ciples, without laying down rules by means of which those principles may be given the force of law.<sup>1</sup> Thus, a constitution may very

be made according to merit and fitness, to be ascertained, so far as practicable, by examinations which so far as practicable shall be competitive." *People v. Roberts*, 148 N. Y. 360, 42 N. E. 1082, 31 L. R. A. 399. That no person shall hold a State and a federal office at the same time. *De Turk v. Com.*, 129 Pa. 151, 18 Atl. 757, 5 L. R. A. 853, 15 Am. St. 705. Prohibition of donations by municipalities to private corporations is self-executing. *Washingtonian Home v. Chicago*, 157 Ill. 414, 41 N. E. 893, 29 L. R. A. 798. So is a provision imposing a liability upon the stockholders of a corporation for its debts. *Way v. Barney*, 116 Minn. 285, 133 N. W. 801, 38 L. R. A. (N. S.) 648, Ann. Cas. 1913 A, 719.

A provision that "other taxes may be levied by the police juries for road and bridge purposes, not to exceed five mills for five years on the property of the parish, or any ward thereof, where the rate of taxation and the purpose thereof shall have been submitted to the property taxpayers of said ward or parish entitled to vote under the election laws of the State, and a majority in numbers and value of those voting at such election shall have voted in favor thereof" — is self-executing; and an enabling act by the legislature is not needed to enable the police juries to proceed to hold an election to take the sense of the taxpayers on the question of the levy of the tax in question. *Logan v. Parish of Ouachita*, 105 La. 499, 29 So. 975.

The Constitution of Nevada, art. 10, sec. 1, declared that the Legislature should provide a uniform and equal rate of assessment and taxation to secure a just valuation of real and personal property, mining claims, etc., and that the acreage of patented claims should be assessed at the valuation of \$10 per acre. Stats. 1905, c. 58, provided for the assessment of patented mines at such valuation. Article 10, sec. 1, as amended in 1906, provided that patented mining claims should be assessed at not less than \$500, except when \$100 in labor has

been actually performed on such mine during the year, in addition to the tax on the net proceeds, and no legislation was passed pursuant to such provision until 1913. It was held, that the constitutional amendment of 1906 was self-executing at least as to the provision for taxation of patented mines, and absolutely nullified the statute of 1905, so that an assessment thereunder in 1909 was invalid. *Wren v. Dixon*, 40 Nev. 170, 161 Pac. 722, 167 Pac. 324, Ann. Cas. 1918 D, 1064.

A constitutional provision relating to tax sales which declares that "the sale shall be without appraisement, and the property sold shall be redeemable at any time for the space of one year", is self executing. *State ex rel. Curtis v. Ross*, 144 La. 898, 81 So. 386.

A constitutional provision relating to the taking or damaging of private property for public use, providing that when required by either of the parties the compensation therefor shall be ascertained by an impartial jury of twelve freeholders, properly construed, is so far self-executing as to entitle them in a suit at common law for compensation for property not taken but damaged, to have the damages assessed by such impartial jury of twelve freeholders. *Thorne v. Clarksburg*, 88 W. Va. 251, 106 S. E. 644.

A constitutional provision prohibiting marriages between white persons and persons having one-eighth, or more, negro blood, is self-executing, in the absence of any other provision in the same instrument limiting its operation. *Succession of Gabisso*, 119 La. 704, 44 So. 438, 121 Am. St. Rep. 529, 11 L. R. A. (N. S.) 1082, 21 Ann. Cas. 574.

Where the constitution requires that all public institutions shall be located at the seat of government, the courts have power to determine whether a proposed insane asylum is a public institution, and, if it is found so to be, to enjoin its location elsewhere. *State v. Metschan*, 32 Oreg. 372, 46 Pac. 791, 41 L. R. A. 692, 53 Pac. 1071.

<sup>1</sup> *Davis v. Burke*, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210;



clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential.<sup>1</sup> Rights in such a case may lie dormant until statutes shall provide for them, though in so far as any distinct provision is made which by itself is capable of enforcement, it is law,<sup>2</sup> and all supplementary legislation must be in harmony with it.

*State ex rel. Linde v. Hall*, 35 N. D. 34, 159 N. W. 281; *State ex rel. Clark v. Harris*, 74 Oreg. 573, 144 Pac. 109, Ann. Cas. 1916 A, 1156.

Though prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void, and no legislation is required to execute such provisions, they are not self-executing when they merely indicate principles without laying down rules by which they may be given the force of law. *Wren v. Dixon*, 40 Nev. 170, 161 Pac. 722, 167 Pac. 324, Ann. Cas. 1918 D, 1064.

A provision that all printing shall be done by the lowest bidder under regulations supplied by law is not self-executing. *Brown v. Seay*, 86 Ala. 122, 5 So. 216.

The initiative and referendum provisions in the Constitution of Oklahoma are not self-executing. *Ex parte Wagner*, 210 Okla. 33, 95 Pac. 435, 18 Ann. Cas. 197.

For exemption provisions, not self-executing, see *Green v. Aker*, 11 Ind. 223; *Speidel v. Schlosser*, 13 W. Va. 686.

<sup>1</sup> *Ex parte Wall*, 48 Cal. 279; *Attorney-General v. Common Council of Detroit*, 29 Mich. 108; *Davis v. Burke*, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210.

The following constitutional provision was held not to be self-executing: "Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law." *Murray v. State*, 91 Ohio St. 220, 110 N. E. 471, Ann. Cas. 1916 D, 864.

<sup>2</sup> The Constitution of the State

of Kansas of 1859, art. 12, § 2, provides as follows: "*Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; . . .*" The portion italicized is self-executing, and enters as a part of the contractual liability of every person who voluntarily becomes a stockholder in any corporation (except railroad, charitable, and religious corporations, expressly excepted in later part of above section) created under the laws of Kansas. *Whitman v. National Bank of Oxford*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477, aff. 76 Fed. Rep. 697, and 51 U. S. App. 536, 83 Fed. Rep. 288, 28 C. C. A. 404. But see *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331, in which it is said that the use of the future tense "shall be secured" indicates that the constitutional clause above given is not self-executing.

The "double liability clause" of the Minnesota Constitution, which provides that "each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him" is held to create *ex propriis vigore* an individual liability on the part of each stockholder. *Willis v. Mabon*, 48 Minn. 140, *sub nom.* *Willis v. St. Paul Sanitation Co.*, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. 626. So too no supplementary legislation is needed to make effective the provision of the Nebraska Constitution declaring that "every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount

[In determining when a constitutional provision is self-executing, there is a distinction between a declarative limitation of legislative power on a given subject, within which legislation may or should be enacted, and positive constitutional inhibition which no legislative act can relieve or modify; the former might require future legislation; the latter must, from its nature, be self-executing.<sup>1</sup> A constitutional provision does not lose its self-executing quality merely because it provides that the legislature shall by appropriate legislation provide for carrying it into effect;<sup>2</sup> and the mere fact that legislation might supplement and add to or prescribe a penalty for the violation of a self-executing provision does not render such provision ineffective in the absence of such legislation.<sup>3</sup>]

The provisions exempting homesteads from forced sale for the satisfaction of debts furnish many illustrations of self-executing provisions, and also of those which are not self-executing. Where, as in California, the constitution declares that "the legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families", the dependence of the provision on subsequent legislative action is manifest. But where, as in some other States, the constitution defines the extent, in acres or amount, that shall be deemed to constitute a homestead, and expressly exempts from any forced sale what is thus defined, a rule is prescribed which is capable of enforcement. Perhaps even in such cases, legislation may be desirable, by way of providing convenient remedies for the protection of the right secured, or of regulating the claim of the right so that its exact limits may be known and

of stock by him held, to an amount equal to his respective stock or shares so held, for all its "liabilities accruing while he remains such stockholder." *Farmers' Loan and T. Co. v. Funk*, 49 Neb. 353, 68 N. W. 520. In this connection, see note appended to 44 L. ed. U. S. 589, and another on self-executing constitutional provisions in 16 L. R. A. 281.

<sup>1</sup> *Wren v. Dixon*, 40 Nev. 170, 161 Pac. 722, 167 Pac. 324, Ann. Cas. 1918 D, 1064.

<sup>2</sup> *Ghera v. State*, 16 Ariz. 344, 146 Pac. 494, Ann. Cas. 1916 D, 94.

A provision that the General Assembly "shall levy a capitation tax on every male inhabitant of the State which shall be equal to the tax on property valued at \$300 in cash" was held to be self-executing, on the ground that in the execution of such

command the General Assembly acts in a purely ministerial capacity; is made the agent, the accountant of the Constitution, with directions to make a calculation and record it. *Kitchin v. Wood*, 154 N. C. 565, 70 S. E. 995, overruling *Russell v. Ayer*, 120 N. C. 180, 27 S. E. 133, 37 L. R. A. 246.

A clause in a constitutional provision requiring the legislature to pass such legislation "as may aid the operation" of the provision, does not mean legislation to put it in operation, but such as will aid its operation, and the provision will not remain in abeyance until such legislation is enacted. *State ex rel. Clark v. Harris*, 74 Ore. 573, 144 Pac. 109, Ann. Cas. 1916 A, 1156.

<sup>3</sup> *State ex rel. Delgado v. Romero*, 17 N. M. 81, 124 Pac. 649, Ann. Cas. 1914 C, 1114.

understood; but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it. The provision of a constitution which defines a homestead and exempts it from forced sale is self-executing, at least to this extent, that, though it may admit of supplementary legislation in particulars where in itself it is not as complete as may be desirable, it will override and nullify whatever legislation, either prior or subsequent, would defeat or limit the homestead which is thus defined and secured.

[Many state constitutions have become in effect extensive codes of laws intended to operate directly upon the people, and there is a presumption that their provisions are self-executing, and are to be interpreted as such.<sup>1</sup> A strong reason for this rule is the fact that unless constitutional provisions were so interpreted, it would be in the power of the Legislature to practically nullify a fundamental of legislation.<sup>2</sup>]

We have thus indicated some of the rules which we think are to be observed in the construction of constitutions. It will be perceived that we have not thought it important to quote and to dwell upon those arbitrary rules to which so much attention is sometimes given, and which savor rather of the closet than of practical life. Our observation would lead us to the conclusion that they are more often resorted to as aids in ingenious attempts to make the constitution seem to say what it does not, than with a view to make that instrument express its real intent. All external aids, and especially all arbitrary rules, applied to instruments of this popular character, are of very uncertain value; and we do not regard it as out of place to repeat here what we have had occasion already to say in the course of this chapter, that they are to be made use of with hesitation, and only with much circumspection.<sup>3</sup>

<sup>1</sup> *Winchester v. Howard*, 136 Cal. 432, 64 Pac. 692, 69 Pac. 77, 89 Am. St. Rep. 153; *State ex rel. Curtis v. Ross*, 144 La. 898, 81 So. 386; *State ex rel. Twichell v. Hall*, 44 N. D. 459, 171 N. W. 213; *Brice v. McDow*, 116 S. C. 324, 108 S. E. 84.

<sup>2</sup> *Way v. Barney*, 116 Minn. 285, 133 N. W. 801, 38 L. R. A. (N. S.) 648, Ann. Cas. 1913 A, 719; *Brice v. McDow*, 116 S. C. 324, 108 S. E. 84.

<sup>3</sup> See *People v. Cowles*, 13 N. Y. 350, per *Johnson, J.*; *Temple v. Mead*, 4 Vt. 535, 540, per *Williams, J.*; *People v. Fancher*, 50 N. Y. 291.

"In construing so important an instrument as a constitution, especially those parts which affect the vital principle of a republican government, the elective franchise, or the manner of exercising it, we are not, on the one hand, to indulge ingenious speculations which may lead us wide from the true sense and spirit of the instrument, nor, on the other, to apply to it such narrow and constrained views as may exclude the real object and intent of those who framed it. We are to suppose that the authors of such an instrument had a thorough knowledge

of the force and extent of the words they employ; that they had a beneficial end and purpose in view; and that, more especially in any apparent restriction upon the mode of exercising the right of suffrage, there was some existing or anticipated evil which it was their purpose to avoid. If an enlarged sense of any particular form of expression should be necessary to accomplish so great an object as a convenient exercise of the fundamental privilege or right, — that of election — such sense must be attributed. We are to suppose that those who were delegated to the great business of distributing the powers which emanated from the sovereignty of the people, and to the establishment of the rules for the perpetual security of the rights of person and property, had the wisdom to adapt their language to future as well as existing emergencies, so that

words competent to the then existing state of the community, and at the same time capable of being expanded to embrace more extensive relations, should not be restrained to their more obvious and immediate sense, if, consistently with the general object of the authors and the true principles of the compact, they can be extended to other relations and circumstances which an improved state of society may produce. *Qui hæret in litera hæret in cortice* is a familiar maxim of the law. The letter killeth, but the spirit maketh alive, is the more forcible expression of Scripture." *Parker*, Ch. J., in *Henshaw v. Foster*, 9 Pick. 312, 316. There are some very pertinent and forcible remarks by Mr. Justice *Miller* on this general subject in *Woodson v. Murdock*, 22 Wall. 351, 381, 22 L. ed. 716, 724.

## CHAPTER V

### OF THE POWERS WHICH THE LEGISLATIVE DEPARTMENT MAY EXERCISE

IN considering the powers which may be exercised by the legislative department of one of the American States, it is natural that we should recur to those possessed by the Parliament of Great Britain, after which, in a measure, the American legislatures have been modeled, and from which we derive our legislative usages and customs, or parliamentary common law, as well as the precedents by which the exercise of legislative power in this country has been governed. It is natural, also, that we should incline to measure the power of the legislative department in America by the power of the like department in Britain; and to concede without reflection that whatever the legislature of the country from which we derive our laws can do, may also be done by the department created for the exercise of legislative authority in this country. But to guard against being misled by a comparison between the two, we must bear in mind the important distinction already pointed out, that with the Parliament rests practically the sovereignty of the country, so that it may exercise all the powers of the government if it wills so to do; while on the other hand the legislatures of the American States are not the sovereign authority, and, though vested with the exercise of one branch of the sovereignty, they are nevertheless, in wielding it, hedged in on all sides by important limitations, some of which are imposed in express terms, and others by implications which are equally imperative.

“The power and jurisdiction of Parliament, says Sir *Edward Coke*,<sup>1</sup> is so transcendent and absolute, that it cannot be confined, either for persons or causes, within any bounds. And of this high court it may truly be said: ‘*Si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima.*’ It hath sovereign and uncontrolled authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible

<sup>1</sup> 4 Inst. 36.

denominations, ecclesiastical or temporal, civil, military, maritime, or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the Crown, as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land, as was done in a variety of instances, in the reigns of King Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom and of Parliaments themselves, as was done by the Act of Union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament. True it is, that what the Parliament doth, no authority upon earth can undo; so that it is a matter most essential to the liberties of this kingdom that such members be delegated to this important trust as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apothegm of the great Lord Treasurer, Burleigh, 'that England could never be ruined but by a Parliament'; and as Sir *Matthew Hale* observes: 'This being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should anyway fall upon it, the subjects of this kingdom are left without all manner of remedy.' " <sup>1</sup>

The strong language in which the complete jurisdiction of Parliament is here described is certainly inapplicable to any authority in the American States, unless it be to the people of the States when met in their primary capacity for the formation of their fundamental

<sup>1</sup> Bl. Com. 160; Austin on Jurisprudence, Lec. 6; Fischel on English Constitution, b. 7, ch. 7.

The British legislature is above the constitution, and molds and modifies it at discretion as public exigencies and the needs of the time may require. But in the American system such a thing as unlimited power is unknown. *Loan Association v. Topeka*, 20 Wall. 655, 663, 22 L. ed. 455, 461; *Campbell's Case*, 2 Bland Ch. 209, 20 Am. Dec. 360; *Missouri Pac. R. Co. v. Nebraska*, Bd. of Transp., 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130. Every American legislature is the creature of the constitution, and

strictly subordinate to it. It may participate in making changes as the constitution itself may provide, but not otherwise, and constitutional principles which the British Parliament will deal with as shall seem needful are inflexible laws in America until the people, under the forms provided for constitutional amendments, see fit to change them. Such radical changes, for example, as recently have been made in the Irish land laws, and such forced modification in contracts, would be impossible in the United States without a change in both Federal and State constitutions.

law; and even then there rest upon them the restraints of the Constitution of the United States, which bind them as absolutely as they do the governments which they create. It becomes important, therefore, to ascertain in what respect the State legislatures resemble the Parliament in the powers they exercise, and how far we may extend the comparison without losing sight of the fundamental ideas and principles of the American system.

The first and most notable difference is that to which we have already alluded, and which springs from the different theory on which the British Constitution rests. So long as the Parliament is recognized as rightfully exercising the sovereign authority of the country, it is evident that the resemblance between it and American legislatures in regard to their ultimate powers cannot be traced very far. The American legislatures only exercise a certain portion of the sovereign power. The sovereignty is in the people;<sup>1</sup> and the legislatures which they have created are only to discharge a trust of which they have been made a depositary, but which has been placed in their hands with well-defined restrictions.

Upon this difference it is to be observed, that while Parliament, to any extent it may choose, may exercise judicial authority, one of the most noticeable features in American constitutional law is the care which has been taken to separate legislative, executive, and judicial functions. It has evidently been the intention of the people in every State that the exercise of each should rest with a separate department. The different classes of power have been apportioned to different departments; and as all derive their authority from the same instrument, there is an implied exclusion of each department from exercising the functions conferred upon the others.

There are two fundamental rules by which we may measure the extent of the legislative authority in the States:—

1. In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is intrusted with the general authority to make laws at discretion.<sup>2</sup>

<sup>1</sup> *Ante*, p. 159.

<sup>2</sup> *Greenfield v. Russel*, 292 Ill. 392, 127 N. E. 102, 9 A. L. R. 1334; *Opinions of Justices*, 103 Me. 506, 69 Atl.

2. But the apportionment to this department of legislative power does not sanction the exercise of executive or judicial functions, except in those cases, warranted by parliamentary usage, where they are incidental, necessary, or proper to the exercise of legislative authority, or where the constitution itself, in specified cases, may expressly permit it.<sup>1</sup> Executive power is so intimately connected with legislative, that it is not easy to draw a line of separation; but the grant of the judicial power to the department created for the purpose of exercising it must be regarded as an exclusive grant, covering the whole power, subject only to the limitations which the constitutions impose, and to the incidental exceptions before referred to.<sup>2</sup> While, therefore, the American legislatures may exercise the legislative powers which the Parliament of Great Britain wields, except as restrictions are imposed, they are at the same time excluded from other functions which may be, and sometimes habitually are, exercised by the Parliament.<sup>3</sup>

"The people in framing the constitution," says *Denio*, Ch. J., "committed to the legislature the whole law-making power of the State, which they did not expressly or impliedly withhold."<sup>4</sup> Plenary

627, 19 L. R. A. (N. S.) 422, 13 Ann. Cas. 745.

The test of legislative power is constitutional restriction. What the people have not said in the organic law their representatives shall not do, they may do. *Russ v. Com.*, 210 Pa. St. 544, 60 Atl. 169, 1 L. R. A. (N. S.) 409, 105 Am. St. Rep. 825.

If the Constitution has limited the exercise of the legislative power to certain times, the attempt to exercise it at other times is necessarily void. *Harmison v. Ballot Com'rs of Jefferson Co.*, 45 W. Va. 179, 31 S. E. 394, 42 L. R. A. 591; *Denney v. State*, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726.

<sup>1</sup> *Greenfield v. Russel*, 292 Ill. 392, 127 N. E. 102, 9 A. L. R. 1334. See *post*, pp. 188, 221, 775 *et seq.*

A statute attempting to confer upon a State board authority to adjudge priorities of claimants to the use of public waters is held not to be unconstitutional as conferring judicial power in *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. 258, 87 Am. St. 918.

The legislature, being otherwise in legal session, is, by the Constitution of Oklahoma, given definite governmen-

tal duties, and has exclusive jurisdiction over matters of impeachment, and the actions of the senate and house of representatives, in the exercise of this jurisdiction, are not subject to review or interference by the courts. *State ex rel. Trapp v. Chambers*, 96 Okla. 78, 220 Pac. 890, 30 A. L. R. 1144. Impeachment under Constitution of Oklahoma defined; effect of impeachment of governor. *State ex rel. Trapp v. Chambers*, 96 Okla. 78, 220 Pac. 890, 30 A. L. R. 1144.

<sup>2</sup> See *post*, p. 180, note.

<sup>3</sup> Where jurisdiction is conferred upon a court by the Constitution, it cannot be deprived thereof by the legislature. *Hedden v. Hand*, 90 N. J. Eq. 583, 107 Atl. 285, 5 A. L. R. 1463.

<sup>4</sup> The inhibition of a Constitution may be either express or implied; that is the Constitution may expressly prohibit any specified act of the legislature, or the Constitution by its inherent terms may of necessity prohibit certain acts of a legislature by reason of the inherent conflict that would arise between the terms of the Constitution and the power claimed in favor of the legislature. *State v. Whisman*, 36 S. D. 260, 154 N. W. 707, L. R. A.



power in the legislature, for all purposes of civil government, is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden. I do not mean that the power must be expressly inhibited, for there are but few positive restraints upon the legislative power contained in the instrument. The first article lays down the ancient limitations which have always been considered essential in a constitutional government, whether monarchical or popular; and there are scattered through the instrument a few other provisions in restraint of legislative authority. But the affirmative prescriptions and the general arrangements of the constitution are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, the erection of the principal courts of justice, create implied limitations upon the law-making authority as strong as though a negative was expressed in each instance; but independently of these restraints, express or implied, every subject within the scope of civil government is liable to be dealt with by the legislature."<sup>1</sup>

"It has never been questioned, so far as I know," says *Redfield*, Ch. J., "that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the political organizations of the American States. We cannot well comprehend how, upon principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several State legislatures, saving only such restrictions as are imposed by the Constitution of the United States, or of the particular State in question."<sup>2</sup>

1917 B, 1. See also *Gemmer v. State*, 163 Ind. 150, 71 N. E. 478, 66 L. R. A. 82; *Lawrence E. Tierney Coal Co. v. Smith*, 180 Ky. 815, 203 S. W. 731, 4 A. L. R. 1540; *State v. Taylor*, 33 N. D. 76, 156 N. W. 561, L. R. A. 1918 B, 156, Ann. Cas. 1918 A, 583.

"The implied restrictions of the Constitution upon legislative power may be as effectual for its condemnation as written words, and such restrictions may be found either in the lan-

guage employed, or in the evident purpose which was in view, and the circumstances and historical events which led to the enactment of the particular provision as a part of the organic law." *Ex parte Lewis*, 45 Tex. Crim. Rep. 1, 73 S. W. 811, 108 Am. St. Rep. 929.

<sup>1</sup> *People v. Draper*, 15 N. Y. 532, 543.

<sup>2</sup> *Thorpe v. Rutland & Burlington Railroad Co.*, 27 Vt. 140, 142. See

also *Adams v. Howe*, 14 Mass. 340, 14 Am. Dec. 216; *People v. Rucker*, 5 Col. 455; *People v. Osborne*, 7 Col. 605, 4 Pac. 1074; *Leggett v. Hunter*, 19 N. Y. 445; *Cochran v. Van Surlay*, 20 Wend. 365; *People v. Morrell*, 21 Wend. 563; *Sears v. Cottrell*, 5 Mich. 251; *Beauchamp v. State*, 6 Blackf. 299; *Mason v. Wait*, 5 Ill. 127; *People v. Supervisors of Orange*, 27 Barb. 575; *Taylor v. Porter*, 4 Hill, 140, per *Bronson*, J.; *State v. Reid*, 1 Ala. 612, 35 Am. Dec. 44; *Andrews v. State*, 3 Heisk. 165; *Knoxville, &c. R. R. Co. v. Hicks*, 9 Bax. 442; *Lewis's Appeal*, 67 Pa. St. 153; *Walker v. Cincinnati*, 21 Ohio St. 14; *People v. Wright*, 70 Ill. 388; *State v. Birmingham Southern R. Co.*, 182 Ala. 475, 62 So. 77, Ann. Cas. 1915 D, 436; *Beach v. Bradstreet*, 85 Conn. 344, 82 Atl. 1030, Ann. Cas. 1913 B, 946; *Van Winkle v. State*, 4 Boyce (Del.), 578, 91 Atl. 385, Ann. Cas. 1916 D, 104; *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. s.) 639; *Idaho Power, etc., Co. v. Blomquist*, 26 Idaho, 222, 141 Pac. 1083, Ann. Cas. 1916 E, 282; *Harder's Fireproof Storage, etc., Co. v. Chicago*, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536; *People v. McCullough*, 254 Ill. 9, 98 N. E. 156, Ann. Cas. 1913 B, 995; *Greenfield v. Russel*, 292 Ill. 392, 127 N. E. 102, 9 A. L. R. 1334; *Jordan v. Evansville*, 163 Ind. 512, 72 N. E. 544, 67 L. R. A. 613, 2 Ann. Cas. 96; *Carr v. State*, 175 Ind. 241, 93 N. E. 1071, 32 L. R. A. (N. s.) 1190; *Schmitt v. F. W. Cook Brewing Co.*, 187 Ind. 623, 120 N. E. 19, 3 A. L. R. 270; *Ratcliff v. Wichita Union Stockyards Co.*, 74 Kan. 1, 86 Pac. 150, 118 Am. St. Rep. 298, 6 L. R. A. (N. s.) 834, 10 Ann. Cas. 1016; *Lawrence E. Tierney Coal Co. v. Smith*, 180 Ky. 815, 203 S. W. 731, 4 A. L. R. 1540; *Bayville Village Corp. v. Boothbay Harbor*, 110 Me. 46, 85 Atl. 300, Ann. Cas. 1914 B, 1135; *Laughlin v. Portland*, 111 Me. 486, 90 Atl. 318, 51 L. R. A. (N. s.) 1143, Ann. Cas. 1916 C, 734; *State v. Mankato*, 117 Minn. 458, 136 N. W. 264, 41 L. R. A. (N. s.) 111; *Williams v. Evans*, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L. R. A. 1918 F., 542;

*Ex parte Berger*, 193 Mo. 16, 90 S. W. 759, 112 Am. St. Rep. 472, 3 L. R. A. (N. s.) 530, 5 Ann. Cas. 383; *State v. Merchants Exchange*, 269 Mo. 346, 190 S. W. 903, Ann. Cas. 1917 E, 871; *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47, 1 Ann. Cas. 66; *Hudspeth v. Swayze*, 85 N. J. L. 592, 85 Atl. 780, Ann. Cas. 1916 A, 102; *Atlantic Coast Electric R. Co. v. Public Utility Com'rs*, 92 N. J. L. 168, 104 Atl. 218, 12 A. L. R. 737; *Wright v. Hart*, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. (N. s.) 338, 3 Ann. Cas. 263; *Saratoga Springs v. Saratoga Gas, E. L. & P. Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. s.) 713, 14 Ann. Cas. 606; *Gautier v. Ditmar*, 204 N. Y. 20, 97 N. E. 464, Ann. Cas. 1913 C, 960; *Jenkins v. State Board of Elections*, 180 N. C. 169, 104 S. E. 346, 14 A. L. R. 1247; *State v. Wetz*, 40 N. D. 299, 168 N. W. 835, 5 A. L. R. 731; *Cleveland v. Clements Bros. Const. Co.*, 67 Ohio St. 197, 65 N. E. 885, 93 Am. St. Rep. 670, 59 L. R. A. 775; *Sanning v. Cincinnati*, 81 Ohio St. 142, 90 N. E. 125, 25 L. R. A. (N. s.) 686; *Hockett v. State Liquor Licensing Board*, 91 Ohio St. 176, 110 N. E. 485, L. R. A. 1917 B, 7; *Stettler v. O'Hara*, 69 Oreg. 519, 139 Pac. 743, L. R. A. 1917 C, 944, Ann. Cas. 1916 A, 217; *Russ v. Com.*, 219 Pa. St. 544, 60 Atl. 169, 105 Am. St. Rep. 825, 1 L. R. A. (N. s.) 409; *Com. v. Herr*, 229 Pa. St. 132, 78 Atl. 68, Ann. Cas. 1912 A, 422; *In re Watson*, 17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321; *State v. Summers*, 33 S. D. 40, 144 N. W. 730, 50 L. R. A. (N. s.) 206, Ann. Cas. 1916 B, 860; *Wheelon v. South Dakota Land Settlement Board*, 43 S. D. 551, 181 N. W. 359, 14 A. L. R. 1145; *Long v. State*, 58 Tex. Crim. 209, 127 S. W. 208, 21 Ann. Cas. 405; *Rio Grande Lumber Co. v. Darke*, 50 Utah, 114, 167 Pac. 241, L. R. A. 1918 A, 1193; *Willis v. Kalmbach*, 109 Va. 475, 64 S. E. 342, 21 L. R. A. (N. s.) 1009; *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917 A, 1244; *State v. Frear*, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633; *Nikta v. Western Union Tel. Co.*, 149 Wis. 106, 135 N. W. 492, Ann. Cas. 1913 C, 863.

["During the process of legislation in any mode," says *Bond, J.*, "the work of the law makers is not subject to judicial arrest or control, nor open to judicial inquiry."<sup>1</sup>]

"I entertain no doubt," says *Comstock, J.*, "that, aside from the special limitations of the constitution, the legislature cannot exercise powers which are in their nature essentially judicial or executive. These are, by the constitution, distributed to other departments of the government. It is only the 'legislative power' which is vested in the senate and assembly. But where the constitution is silent, and there is no clear usurpation of the powers distributed to other departments, I think there would be great difficulty and great danger in attempting to define the limits of this power. Chief Justice *Marshall* said: 'How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.'<sup>2</sup> That very eminent judge felt the difficulty; but the danger was less apparent then than it is now, when theories, alleged to be founded in natural reason or inalienable rights, but subversive of the just and necessary powers of government, attract the belief of considerable classes of men, and when too much reverence for government and law is certainly among the least of the perils to which our institutions are exposed. I am reluctant to enter upon this field of inquiry, satisfied, as I am, that no rule can be laid down in terms which may not contain the germ of great mischief to society, by giving to private opinion and speculation a license to oppose themselves to the just and legitimate powers of government."<sup>3</sup>

Other judicial opinions in great number might be cited in support of the same general doctrine; but as there will be occasion to refer to them elsewhere when the circumstances under which a statute may be declared unconstitutional are considered, we refrain from

That the rule as to the extent of legislative power is substantially the same in Canada, see *Valin v. Langlois*, 3 Can. Sup. Ct. 1; *Mayor, &c. v. The Queen*, 3 Can. Sup. Ct. 505.

The provisions of a State Constitution do not confer any powers upon the legislature, but are mere limitations. The legislature has plenary power in all matters of legislation, except as limited by the Constitution. *Idaho Power, etc., Co. v. Blomquist*, 26 Idaho, 222, 141 Pac. 1083, Ann. Cas. 1916 E, 282; *Schmitt v. F. W. Cook Brewing Co.*, 187 Ind. 623, 120 N. E. 19, 3 A. L. R. 270; *State v. Mankato*, 117

Minn. 458, 136 N. W. 264, 41 L. R. A. (N. S.) 111.

"The only restraints upon the exercise of the legislative prerogative are those expressly or impliedly contained in the Federal and State constitutions, and those immutable principles which lie at the very foundation of society." *Hudspeth v. Swayze*, 85 N. J. L. 592, 89 Atl. 780, Ann. Cas. 1916 A, 102.

<sup>1</sup> *Pitman v. Drabelle*, 267 Mo. 78, 183 S. W. 1055, Ann. Cas. 1918 D, 601.

<sup>2</sup> *Fletcher v. Peck*, 6 Cranch, 87, 136, 3 L. ed. 162, 177.

<sup>3</sup> *Wynehamer v. People*, 13 N. Y. 378, 391.

further references in this place.<sup>1</sup> Nor shall we enter upon a discussion of the question suggested by Chief Justice *Marshall*, as above quoted;<sup>2</sup> since, however interesting it may be as an abstract question, it is made practically unimportant by the careful separation of powers and duties between the several departments of the government which has been made by each of the State constitutions. Had no such separation been made, the disposal of executive and judicial duties must have devolved upon the department vested

<sup>1</sup> See *post*, p. 348, and cases cited in notes.

<sup>2</sup> The creation of offices and the assignment of their compensation is a legislative function. *Glavey v. United States*, 182 U. S. 595, 45 L. ed. 1247, 21 Sup. Ct. Rep. 891; *United States v. Andrews*, 240 U. S. 90, 60 L. ed. 541, 36 Sup. Ct. Rep. 349; *Cochner v. United States*, 248 U. S. 405, 63 L. ed. 328, 39 Sup. Ct. Rep. 137; *Ex parte Lewis*, 45 Tex. Crim. Rep. 1, 73 S. W. 811, 108 Am. St. Rep. 929. "The general assembly has the right to prescribe the mode of appointment of all officers created by it." *State v. Jackson*, 134 La. 599, 64 So. 481, Ann. Cas. 1916 B, 27.

The power to distribute the judicial power, except so far as that has been done by the Constitution, rests with the legislature: *Commonwealth v. Hipple*, 69 Pa. St. 9; *State v. New Brunswick*, 42 N. J. 51; *State v. Brown*, 71 Mo. 454; *Jackson v. Nimmo*, 3 Lea, 608; see *Burke v. St. Paul, M. & C. Ry. Co.*, 35 Minn. 172, 28 N. W. 190; *St. Paul v. Umstetter*, 37 Minn. 15, 33 N. W. 115; but when the Constitution has conferred it upon certain specified courts, this must be understood to embrace the whole judicial power, and the legislature cannot vest any portion of it elsewhere. *Greenough v. Greenough*, 11 Pa. St. 489; *State v. Maynard*, 14 Ill. 420; *Gibson v. Emerson*, 7 Ark. 172; *Chandler v. Nash*, 5 Mich. 409; *Succession of Tanner*, 22 La. Ann. 90; *Gough v. Dorsey*, 27 Wis. 119; *Van Slyke v. Ins. Co.*, 39 Wis. 390, 20 Am. Rep. 50; *Alexander v. Bennett*, 60 N. Y. 204; *People v. Young*, 72 Ill. 411; *In re Cleveland*, 51 N. J. L. 311, 17 Atl. 772; *Risser v. Hoyt*, 53 Mich. 185, 18 N. W. 611; *Shoultz v. McPheeters*, 79 Ind. 373.

And when the Constitution gives the court appellate jurisdiction only, except in certain specified cases, the legislature cannot enlarge the original jurisdiction of the court. *Klein v. Valerius*, 87 Wis. 54, 57 N. W. 1112, 22 L. R. A. 609. Nor can the legislature redistribute the judicial power. *Brown v. Circuit Judge*, 75 Mich. 274, 42 N. W. 827, 5 L. R. A. 226, 13 Am. St. 438; *Watson v. Blackstone*, 98 Va. 618, 38 S. E. 939. Cannot confer the power of the court upon a single judge thereof. *State v. Woodson*, 161 Mo. 444, 61 S. W. 252.

When the Constitution vests the judicial power in the courts and specifically defines and limits both the original and appellate jurisdiction of the court of last resort, the legislature cannot enlarge or restrict this jurisdiction in matters judicial, but may provide by law for the exercise of such jurisdiction. *Thompson v. Redington*, 92 Ohio St. 101, 110 N. E. 652, Ann. Cas. 1918 A, 1161.

Congress may provide that the determination by the treasury department of whether an alien is entitled to land shall be final. *Nishimura Ekiu v. U. S.*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336.

The legislature cannot select persons to assist courts in the performance of their duties and act as a commission of appeal. *State v. Noble*, 118 Ind. 350, 21 N. E. 244; *In re Courts of Appeals*, 9 Col. 623, 21 Pac. 471.

Courts established by the legislature cannot exercise jurisdiction to the exclusion of that conferred by the Constitution on other courts. *Montross v. State*, 61 Miss. 429. See *State v. Butt*, 25 Fla. 258, 5 So. 597. But a general provision in the Constitution for the distribution of the judicial

power, not referring to courts-martial, would not be held to forbid such courts by implication. *People v. Daniell*, 50 N. Y. 274. Nor would it be held to embrace administrative functions of a quasi judicial nature, such as the assessment of property for taxation. *State v. Commissioners of Ormsby County*, 7 Nev. 392, and cases cited. See *Auditor of State v. Atchison, &c. R. R. Co.*, 6 Kan. 500, 7 Am. Rep. 575. But a court may determine whether a proposed local improvement shall be undertaken. *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545.

In the absence of express constitutional provision therefor, the legislature cannot assign to the judicial branch of the government any duties other than those that are properly judicial, to be performed in a judicial manner. *Thompson v. Redington*, 92 Ohio St. 101, 110 N. E. 652, Ann. Cas. 1918 A, 1161.

A judge of a superior court cannot be required or empowered to pass upon and modify or approve a plan for the location of a street railway. *Norwalk Street R. Co.'s appeal*, 69 Conn. 576, 37 Atl. 1080, 39 L. R. A. 794. Nor a court to direct how a telegraph or telephone company may use the streets of a city. *Zanesville v. Zanesville T. & Tel. Co.*, 63 Ohio, 442, 59 N. E. 109; *New York & N. J. Tel. Co. v. Mayor of Bound Brook*, 66 N. J. L. 168, 48 Atl. 1022.

County board cannot determine which rooms in court house shall be occupied by certain judges. *Dahnke v. People*, 168 Ill. 102, 48 N. E. 137, 39 L. R. A. 197. Court during its session has full control over that portion of court house necessary to the convenient transaction of its business. *Vigo County v. Stout*, 136 Ind. 53, 35 N. E. 683, 22 L. R. A. 398, and note; and may order repairs to court house, although it cannot order the erection of additions thereto or the rebuilding thereof. *White County v. Gwin*, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402.

It is not competent to confer upon the courts the power to tax: *Monday v. Rahway*, 43 N. J. L. 338; nor to impose on them administrative duties.

*Houseman v. Kent* Circ. Judge, 58 Mich. 364, 25 N. W. 369. But after thirty-five years of exercise of such power under a statute, it is too late to object. *Locke v. Speed*, 62 Mich. 408, 28 N. W. 917.

The legislature cannot create a "court of visitation" for the control of corporations and endow it with executive, legislative, and judicial powers. *State v. Johnson*, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662. Nor can it constitute a board of State auditors, which is a purely executive board, a court of review to pass upon the rightfulness of a conviction of crime, and in case conviction be found wrongful to allow damages for the imprisonment consequent thereupon. *Allen v. Board of State Auditors*, 122 Mich. 324, 81 N. W. 113, 47 L. R. A. 117, 80 Am. St. 573.

The power to appoint election commissioners not having been expressly conferred on any department, the legislature may impose the duty of appointment on the county court. *People v. Hoffman*, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788. Such appointments are upheld in *In re Citizens of Cincinnati*, 2 Flipp. 228; *Russell v. Cooley*, 69 Ga. 215. But in *Supervisors of Election*, 114 Mass. 247, 19 Am. Rep. 341, a contrary doctrine is laid down. A chief justice cannot be empowered to determine which claimant of an office shall hold it pending a contest. Such power, if executive, cannot be given a judge; if judicial, belongs to a court. *In re Cleveland*, 51 N. J. L. 311, 17 Atl. 772.

The legislature cannot require a court to give its opinions in writing: *Vaughn v. Harp*, 49 Ark. 160, 4 S. W. 751. Nor to write syllabi to its decisions. *In re Griffiths*, 118 Ind. 83, 20 N. E. 513.

It is held in Illinois that the legislature cannot interfere with the power of the courts to regulate the licensing of attorneys. *Re Day*, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519. See also *Re Leach*, 134 Ind. 665, 34 N. E. 641, 21 L. R. A. 701.

The legislature cannot define what shall be considered a contempt of court. *Bradley v. State*, 111 Ga. 168,

with the general authority to make laws;<sup>1</sup> but assuming them to be apportioned already, we are only at liberty to liken the power of the State legislature to that of the Parliament, when it confines its action to an exercise of legislative functions; and such authority as is in its nature either executive or judicial is beyond its constitu-

36 S. E. 630, 50 L. R. A. 691, 78 Am. St. 157; *Hale v. State*, 55 Ohio St. 210, 45 N. E. 199, 36 L. R. A. 254, and note, 60 Am. St. 691. On the other hand, a court has no power to enjoin a legislative body. *State v. Superior Court of Milwaukee Co.*, 105 Wis. 651, 81 N. W. 1046, 48 L. R. A. 819. But see *Roberts v. Louisville*, 92 Ky. 95, 17 S. W. 216, 13 L. R. A. 844, and note. Nor has a court power to determine whether or not a senator of the State legislature whose term has not yet expired, has disqualified himself from further acting as senator. *Covington v. Buffett*, 90 Md. 569, 45 Atl. 204, 47 L. R. A. 622. Nor to establish rules and regulations for the extension of telephone lines. *Michigan Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87, 80 Am. St. 520.

Upon distinction between legislative and judicial powers, see *Re Janvrin*, 174 Mass. 514, 55 N. E. 381, 47 L. R. A. 319.

The judicial power which the Constitution confers upon the courts includes the power to determine the legal sufficiency of evidence to go to the jury, and a statute which prohibits the courts from directing verdicts is void. *Thoe v. Chicago, M. & St. P. R. Co.*, 181 Wis. 456, 195 N. W. 407, 29 A. L. R. 1280. See also *Finkelston v. Chicago, M. & St. P. Co.*, 94 Wis. 270, 68 N. W. 1005; *Chybowski v. Bucyrus Co.*, 127 Wis. 332, 106 N. W. 833, 7 L. R. A. (N. S.) 357. But see *First Nat. Bank v. Strauss*, 50 N. D. 71, 194 N. W. 900; *Chesapeake & O. R. Co. v. Stock*, 104 Va. 97, 51 S. E. 161; *Norfolk & Western R. Co. v. Simmons*, 127 Va. 419, 103 S. E. 609. The legislature has no power to make a conclusive finding of facts, and thereupon direct a municipality to pay a specified claim. *Board of Ed. v. State*, 51 Ohio St. 531, 38 N. E. 614, 25 L. R. A. 770, 46 Am. St. 588. The fact that the legislature, in an act mak-

ing it a criminal offense for any person to engage in any gift enterprise, describes a legitimate private business enterprise, and provides that any person engaged in such business shall be held to be engaged in a gift enterprise within the provisions of the act, will not oust the jurisdiction of the courts to determine the true character of the business so attempted to be prohibited. *State ex rel. Hartigan v. Sperry & H. Co.*, 94 Neb. 785, 144 N. W. 795, 49 L. R. A. (N. S.) 1123.

Where the legislature is authorized to regulate the method of procedure in "Courts below the Supreme Court" it has no power over procedure in the Supreme Court. *Herndon v. Imperial Fire Ins. Co.*, 111 N. C. 384, 16 S. E. 465, 18 L. R. A. 547.

The legislature can direct a court to appoint certain commissioners and confer upon the commissioners so to be appointed the power to apportion among several cities and towns the cost of a system of sewerage without prescribing any further direction for such apportionment than that it shall be just and equitable. *Re Kingman*, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417.

The legislature cannot validate warrants issued under an unconstitutional law. *Felix v. Wallace Co. Com'rs*, 62 Kan. 832, 62 Pac. 667, 84 Am. St. 424.

Congress may provide that inspectors of customs may finally determine whether immigrants are entitled to land. *Nishimura Ekiu v. United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336.

<sup>1</sup> *Calder v. Bull*, 2 Root, 350, and 3 Dall. 386, 1 L. ed. 648; *Ross v. Whitman*, 6 Cal. 361; *Smith v. Judge*, 17 Cal. 547; per *Patterson, J.*, in *Cooper v. Telfair*, 4 Dall. 19, 1 L. ed. 721; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 4 L. ed. 97.

tional powers, with the few exceptions to which we have already referred.

It will be important therefore to consider those cases where legislation has been questioned as encroaching upon judicial authority; and to this end it may be useful, at the outset, to endeavor to define legislative and judicial power respectively, that we may the better be enabled to point out the proper line of distinction when questions arise in their practical application to actual cases.<sup>1</sup>

The legislative power we understand to be the authority, under the Constitution, to make laws, and to alter and repeal them.<sup>2</sup> Laws, in the sense in which the word is here employed, are rules of civil conduct, or statutes, which the legislative will has prescribed. "The laws of a State," observes Mr. Justice *Story*, "are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws."<sup>3</sup> "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes, the law."<sup>4</sup> And it is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a pre-determination of what the law shall be for the regulation of all future cases falling under its provisions.<sup>5</sup> And in another case it is said: "The legislative power extends only to the making of laws, and in

<sup>1</sup> In *In re Appointment of Revisor*, 141 Wis. 592, 598, 124 N. W. 670, 18 Ann. Cas. 1176, the court said: "It is impossible to say at any given place: Here is a line where legislative power ends and judicial power begins; all on one side of this line is legislative and all on the other side is judicial, and no single power can be both." See also *Klein v. Barry*, 182 Wis. 255, 196 N. W. 457.

<sup>2</sup> *State v. Denny*, 118 Ind. 382, 21 N. E. 252, 4 L. R. A. 79; *State v. Denny*, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; *Ellingham v. Dye*, 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915 C, 200; *State v. Armstead*, 103 Miss. 790, 60 So. 778, Ann. Cas. 1915 B, 495; *State v. Whisman*, 36 S. D. 260, 154 N. W. 707, L. R. A. 1917 B, 1.

<sup>3</sup> *Swift v. Tyson*, 16 Pet. 18, 10 L. ed. 865, 871.

<sup>4</sup> Per *Marshall*, Ch. J., in *Wayman v. Southard*, 10 Wheat. 46, 6 L. ed.

253, 263; per *Gibson*, Ch. J., in *Greenough v. Greenough*, 11 Pa. St. 494. See *Governor v. Porter*, 7 Humph. 165; *State v. Gleason*, 12 Fla. 190; *Hawkins v. Governor*, 1 Ark. 570; *Westinghausen v. People*, 44 Mich. 265, 6 N. W. 641.

<sup>5</sup> *Bates v. Kimball*, 2 Chip. 77.

A prospective determination by a court of the validity of school rules, compiled under legislative authority, is not an exercise of judicial power. *In re School Law Manual*, 63 N. H. 574, 4 Atl. 878.

Power to supersede an ordinance upon petition of taxpayers as contrary to law cannot be conferred upon a court. *Shephard v. Wheeling*, 30 W. Va. 479, 4 S. E. 635. Nor to fix the salary of a reporter in advance. *Smith v. Strother*, 68 Cal. 194, 8 Pac. 852. Nor to make upon its own whim a competent witness who otherwise would not be. *Tillman v. Cocke*, 9 Bax. 429.

its exercise it is limited and restrained by the paramount authority of the Federal and State constitutions. It cannot directly reach the property or vested rights of the citizen by providing for their forfeiture or transfer to another, without trial and judgment in the courts; for to do so would be the exercise of a power which belongs to another branch of the government, and is forbidden to the legislative."<sup>1</sup> "That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than any other attribute of government."<sup>2</sup>

On the other hand, to adjudicate upon, and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department.<sup>3</sup>

"No particular definition of judicial power," says *Woodbury, J.*, "is given in the constitution [of New Hampshire], and, considering the general nature of the instrument, none was to be expected. Critical statements of the meanings in which all important words were employed would have swollen into volumes; and when those words possessed a customary signification, a definition of them would have been useless. But 'powers judicial', 'judiciary powers', and 'judicatories' are all phrases used in the constitution; and though not particularly defined, are still so used to designate with clearness that department of government which it was intended should

<sup>1</sup> *Newland v. Marsh*, 19 Ill. 383.

<sup>2</sup> *Ervine's Appeal*, 16 Pa. St. 256, 266. See also *Greenough v. Greenough*, 11 Pa. St. 489; *Dechastellux v. Fairchild*, 15 Pa. St. 18; *Trustees, &c. v. Bailey*, 10 Fla. 238.

<sup>3</sup> *Cincinnati, &c. Railroad Co. v. Commissioners of Clinton Co.*, 1 Ohio St. 77. See also *King v. Dedham Bank*, 15 Mass. 447; *Gordon v. Ingraham*, 1 Grant's Cases, 152; *People v. Supervisors of New York*, 16 N. Y. 424; *Beebe v. State*, 6 Ind. 501; *Greenough v. Greenough*, 11 Pa. St. 489; *Taylor v. Place*, 4 R. I. 324.

The judicial power "is the power to hear and determine those matters which affect the life, liberty, or property of the citizens of the State." *Sapulpa v. Land*, 101 Okla. 22, 223 Pac. 640, 35 A. L. R. 872. What weight a trial court or an appellate court of general jurisdiction shall give to the verdict of a jury is a judicial matter that cannot be controlled by

legislative enactment. *State ex rel. Cartmel v. Ætna Casualty & S. Co.*, 84 Fla. 123, 92 So. 871, 24 A. L. R. 1262. It is also a part of the function of the judiciary to determine whether a proposed constitutional amendment has been in fact adopted under the forms prescribed for such case by the constitution, and the legislative declaration that it has been so adopted is null. *State v. Powell*, 77 Miss. 543, 27 So. 927, 48 L. R. A. 652. But see *Worman v. Hagan*, 78 Md. 152, 27 Atl. 616, 21 L. R. A. 716, to effect the governor's proclamation of adoption is conclusive. It is also a proper function of a court to require proper authorities to prescribe rules and regulations for extension of telephone lines, and to pass upon the validity of such rules when properly brought in question. *Mich. Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87, 80 Am. St. 520.



interpret and administer the laws. On general principles, therefore, those inquiries, deliberations, orders, and decrees, which are peculiar to such a department, must in their nature be judicial acts. Nor can they be both judicial and legislative; because a marked difference exists between the employments of judicial and legislative tribunals. The former decide upon the legality of claims and conduct, and the latter make rules upon which, in connection with the constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases. In fine, the law is *applied* by the one, and *made* by the other. To do the first, therefore, — to compare the claims of parties with the law of the land before established, — is in its nature a judicial act. But to do the last — to pass new rules for the regulation of new controversies — is in its nature a legislative act; and if these rules interfere with the past, or the present, and do not look wholly to the future, they violate the definition of a law as 'a rule of civil conduct';<sup>1</sup>

<sup>1</sup> 1 Bl. Com. 44.

The distinction between legislative and judicial power lies between a rule and a sentence. Shrader, *Ex parte*, 33 Cal. 279. See *Shumway v. Bennett*, 29 Mich. 451; *Supervisors of Election*, 114 Mass. 247. "The legislature may make laws, prescribe rules of action and provide remedies not provided by the Constitution, the judiciary alone can administer the remedy." *In re Boyett*, 136 N. C. 415, 48 S. E. 789, 103 Am. St. Rep. 944, 67 L. R. A. 972, 1 Ann. Cas. 729. "While it is extremely difficult to formulate any definition of judicial power which will be applicable to all cases, it may be said in general that it is authority vested in some court, officer, or person to hear and determine when the rights of persons or property or the propriety of doing an act are the subject-matter of adjudication." *State ex rel. Standard Oil Co. v. Bloisdell*, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913 E, 1089. It is not for a court to discuss the wisdom of legislation. *United States v. Lanza*, 260 U. S. 377, 67 L. ed. 314, 43 Sup. Ct. Rep. 141. Unless there is a clear and palpable abuse of power, a court will not substitute its judgment for legislative discretion. *Allion v. Toledo*, 99 Ohio St. 416, 124 N. E. 237, 6 A. L. R. 426.

"It is a fundamental principle that

every person restrained of his liberty is entitled to have the cause of such restraint inquired into by a judicial officer. The judicial department of the government cannot by any legislation be deprived of this power or relieved of this duty." *In re Boyett*, 136 N. C. 415, 48 S. E. 789, 103 Am. St. Rep. 944, 67 L. R. A. 972, 1 Ann. Cas. 729.

The legislature cannot empower election boards to decide whether one by dueling has forfeited his right to vote or hold office. *Commonwealth v. Jones*, 10 Bush, 725; *Burkett v. McCurty*, 10 Bush, 758. But a board may be empowered to recount votes and make a statement of results. If they have no power to investigate frauds, they do not exercise judicial power. *Andrews v. Carney*, 74 Mich. 278, 41 N. W. 923. Under a constitutional provision allowing the legislature to provide for removal of an election officer for such cause as it deems proper, the power to determine whether the cause exists need not be vested in the courts. *People v. Stuart*, 74 Mich. 411, 41 N. W. 1091. See *Brown v. Duffus*, 66 Iowa, 193, 23 N. W. 396.

"To provide by legislative action additional process relevant to the enforcement of judicial authority is the exertion of a legislative and not

the exercise of a judicial power." *Virginia v. West Virginia*, 246 U. S. 565, 2 L. ed. 883, 38 Sup. Ct. Rep. 400.

It is not an infringement of judicial power to enact that a jury shall assess the punishment in a murder case. *State v. Hockett*, 70 Iowa, 442, 30 N. W. 742. Nor that persons sentenced to jail may be employed on roads by county commissioners, under regulations to be made by them. *Holland v. State*, 23 Fla. 123, 1 So. 521.

But it is an invasion of judicial power to provide that in case of doubt a statute shall be construed so as to save a lien given by it. *Meyer v. Berlandi*, 39 Minn. 438, 40 N. W. 513.

Power to declare what acts shall be a misdemeanor cannot be conferred on commissioners of vine culture. *Ex parte Cox*, 63 Cal. 21.

A county clerk cannot fix the amount of bail. *Gregory v. State*, 94 Ind. 384.

Failure of a railroad commissioner to require a railway company to station a flagman at a given crossing cannot be made conclusive proof that the omission to station such flagman is not negligence. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679.

An administrative board may be empowered to adjudicate upon priorities of water-rights and to make independent investigations in regard thereto and to declare its findings, provided parties interested in such adjudications are allowed by the statute a reasonable opportunity to appeal therefrom to the regular courts. *Farm Investment Company v. Carpenter*, 9 Wyo. 110, 61 Pac. 258, 50 L. R. A. 747.

A ministerial officer may be empowered to investigate land titles, and his findings may be made *prima facie* evidence. *People v. Simon*, 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. 175. For other cases on Torrens Land Registration Acts, see *People v. Chase*, 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105; *State v. Guilbert*, 56 Ohio St. 575, 47 N. E. 551, 38 L. R. A. 519, 60 Am. St. 756; *Tyler v. Court of Registration*, 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

The courts have jurisdiction to pass upon the claims of rival bodies to be the State senate, and to determine which, if either, is the constitutional senate. *Attorney-General v. Rogers*, 56 N. J. L. 480, 28 Atl. 726, 29 Atl. 173, 23 L. R. A. 354.

The legislature cannot declare a forfeiture of a right to act as curators of a college. *State v. Adams*, 44 Mo. 570. Nor can it authorize the governor or any other State officer to pass upon the validity of State grants and correct errors therein; this being judicial. *Hilliard v. Connelly*, 7 Ga. 172. Nor, where a corporate charter provides that it shall not be repealed "unless it shall be made to appear to the legislature that there has been a violation by the company of some of its provisions", can there be a repeal before a judicial inquiry into the violation. *Flint, &c. Plank Road Co. v. Woodhull*, 25 Mich. 99.

A law which provides that the mere filing of an affidavit charging bias and prejudice is sufficient to disqualify a judge without any hearing or determination of whether the affidavit is true or false is unconstitutional as depriving the court of judicial power and vesting the same in the litigants to that extent. *Diehl v. Crump*, 72 Okla. 108, 179 Pac. 4, 5 A. L. R. 1272.

"The question of the custody of minors and their legal restraint has always been recognized as a judicial question to be determined by the courts. *Pomeroy's Equity*, sec. 1304. . . . The legislative branch of the government is denied the power to exercise this judicial function or to confer on a father or other person the right to exercise it." Therefore, an act which attempts to give to a father the absolute right to dispose of the custody of his children by deed or will is invalid. *Ex parte Tillman*, 84 S. C. 552, 66 S. E. 1049, 26 L. R. A. (n. s.) 781.

The question whether a withdrawal by a State of a natural product, a common subject of commercial dealings, from an established current of commerce moving into the territory of another State, is an interference with interstate commerce, is essentially a

because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated.

"It is the province of judicial power, also, to decide private disputes between or concerning persons; but of legislative power to regulate public concerns, and to make laws for the benefit and welfare of the State. Nor does the passage of private statutes conflict with these principles; because such statutes, when lawful, are enacted on petition, or by the consent of all concerned; or else they

judicial question. *Com. of Pennsylvania v. State of West Virginia*, 262 U. S. 553, 67 L. ed. 1117, 43 Sup. Ct. Rep. 658, 32 A. L. R. 300.

Local legislative authorities, and not the courts, are primarily the judges of the necessities of local situations calling for police regulation, and the courts can only interfere when such regulation arbitrarily exceeds a reasonable exercise of authority. *Schmidinger v. Chicago*, 226 U. S. 578, 57 L. ed. 364, 33 Sup. Ct. Rep. 182, Ann. Cas. 1918 B, 284, affirming 243 Ill. 167, 90 N. E. 369, 44 L. R. A. (N. S.) 632, 17 Ann. Cas. 614; *Allion v. Toledo*, 99 Ohio St. 416, 124 N. E. 237, 6 A. L. R. 426.

"The mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change from the status of a private business and its freedom from regulation into one in which the public have come to have an interest are always a subject of judicial inquiry." *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522, 67 L. ed. 1103, 43 Sup. Ct. Rep. 630, 27 A. L. R. 1280. See also *People v. Weller*, 237 N. Y. 316, 143 N. E. 205, 38 A. L. R. 613. But it has been held that a statute authorizing the creation of drainage districts which declares that the drainage of surface waters from agricultural lands shall be considered a public benefit, is not a usurpation of judicial power. *Sisson v. Board of Sup'rs*, 128 Iowa, 442, 104 N. W. 454, 70 L. R. A. 440.

The establishment of a railway passenger rate is the making of a rule for the future, and therefore is an act

legislative, not judicial, in kind. *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67. See also *Interstate Commerce Commission v. Cincinnati, etc., R. Co.*, 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; *Com. ex rel. Attorney-General v. Atlantic Coast Line R. Co.*, 106 Va. 61, 55 S. E. 572, 117 Am. St. Rep. 983, 7 L. R. A. (N. S.) 1086; Concurring opinion of *Keith*, P. in *Winchester, etc., R. Co. v. Com.*, 106 Va. 264, 55 S. E. 692.

A State legislature has the power to obtain information upon any subject upon which it has power to legislate with a view to its enlightenment and guidance, but it cannot conduct a public and judicial investigation of any charges made against any institution or individual under the pretense or cloak of its power to investigate for the purpose of legislation. This is true whether the investigation be for the purpose of instituting prosecutions for the aid and benefit of a grand jury in finding indictments, or for the purpose of intentionally injuring or vindicating any institution or individual. *Greenfield v. Russel*, 292 Ill. 392, 127 N. E. 102, 9 A. L. R. 1334.

A board created by statute purely as an administrative agency to bring into being and administer an insurance fund is not a court, and the fact that it is empowered to classify persons who come under the law and to ascertain facts as to the application of the fund does not vest it with judicial power. *State ex rel. Yaple v. Creamer*, 85 Ohio St. 349, 97 N. E. 602, 39 L. R. A. (N. S.) 694.

forbear to interfere with past transactions and vested rights.”<sup>1</sup> [In a comparatively recent decision of the Supreme Court of the United States Mr. Justice *Holmes* said: “A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.”<sup>2</sup>]

With these definitions and explanations, we shall now proceed to consider some of the cases in which the courts have attempted to draw the line of distinction between the proper functions of the legislative and judicial departments, in cases where it has been claimed that the legislature have exceeded their power by invading the domain of judicial authority.

### *Declaratory Statutes.*

Legislation is either introductory of new rules, or it is declaratory of existing rules. “A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law, or the meaning of another statute, and which declares what it is and ever has been.”<sup>3</sup> Such a statute, therefore, is always in a certain sense retrospective; because it assumes to determine what the law was before it was passed; and as a declaratory statute is important only in those cases where doubts have already arisen, the statute, when passed, may be found to declare the law to be different from what it has already been adjudged to be by the courts. Thus Mr. Fox’s Libel Act declared that, by the law of England, juries were judges of the law in prosecutions for libel; it did not purport to introduce a new rule, but to declare a rule

<sup>1</sup> *Merrill v. Sherburne*, 1 N. H. 199, 203. See *Jones v. Perry*, 10 Yerg. 69; *Taylor v. Porter*, 4 Hill, 140; *Ogden v. Blackledge*, 2 Cranch, 272, 2 L. ed. 276; *Dash v. Van Kleeck*, 7 Johns. 477; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. ed. 542; *Leland v. Wilkinson*, 10 Pet. 294, 9 L. ed. 430; *State v. Hopper*, 71 Mo. 425. A statute creating a commission to review a tax assessment to be appointed by the circuit judge of the county is not invalid as vesting judicial power in the commission in the sense in which that term is used in the Constitution of Wisconsin. The term

as there used has reference alone to judicial power as exercised in the administration of the law in actions and proceedings in courts of law and equity. *State ex rel. Ellis v. Thorne* 112 Wis. 81, 87 N. W. 797, 55 L. R. A. 956.

<sup>2</sup> *Prentiss v. Atlantic Coast Line Co.*, 211 U. S. 210, 53 L. ed. 150, 29 Sup. Ct. Rep. 67. See also *Ross v. Oregon*, 227 U. S. 150, 57 L. ed. 458, 33 Sup. Ct. Rep. 220, Ann. Cas. 1914 C, 224.

<sup>3</sup> *Bouv. Law Dict.* “Statute”; *Austin on Jurisprudence*, Lect. 37.

already and always in force. Yet previous to the passage of this act the courts had repeatedly held that the jury in these cases were only to pass upon the fact of publication and the truth of the innuendoes; and whether the publication was libellous or not was a question of law which addressed itself exclusively to the court. It would appear, therefore, that the legislature declared the law to be what the courts had declared it was not. So in the State of New York, after the courts had held that insurance companies were taxable to a certain extent under an existing statute, the legislature passed another act, declaring that such companies were only taxable at a certain other rate; and it was thereby declared that such was the intention and true construction of the original statute.<sup>1</sup> In these cases it will be perceived that the courts, in the due exercise of their authority as interpreters of the laws, have declared what the rule established by the common law or by statute is, and that the legislature has then interposed, put its own construction upon the existing law, and in effect declared the judicial interpretation to be unfounded and unwarrantable. The courts in these cases have clearly kept within the proper limits of their jurisdiction, and if they have erred, the error has been one of judgment only, and has not extended to usurpation of power. Was the legislature also within the limits of its authority when it passed the declaratory statute?

The decision of this question must depend perhaps upon the purpose which was in the mind of the legislature in passing the declaratory statute; whether the design was to give to the rule now declared a retrospective operation, or, on the other hand, merely to establish a construction of the doubtful law for the determination of cases that may arise in the future. It is always competent to change an existing law by a declaratory statute; and where the statute is only to operate upon future cases, it is no objection to its validity that it assumes the law to have been in the past what it is now declared that it shall be in the future.<sup>2</sup>

<sup>1</sup> *People v. Supervisors of New York*, 16 N. Y. 424.

<sup>2</sup> *Union Iron Co. v. Pierce*, 4 Biss. 327; *Pennsylvania v. Wheeling Co.*, 18 How. 421, 15 L. ed. 435; *In re Coburn*, 165 Cal. 202, 131 Pac. 352; *McCleary v. Babcock*, 169 Ind. 228, 82 N. E. 453; *In re Johnson*, 99 Neb. 275, 155 N. W. 1100, 98 Neb. 799, 154 N. W. 550.

The legislature has the power to declare by a later act the meaning and intention of an earlier one, and in such event the legislative interpretation is

binding in all cases arising after it has been made manifest. *State v. Board of Com'rs*, 83 Kan. 199, 110 Pac. 93.

Declaratory or defining statutes are to be upheld, except with regard to past transactions, as an exercise of legislative power to enact a law for the future. *In re Coburn*, 165 Cal. 202, 131 Pac. 352.

The legislature may extend the provisions of an existing statute to a new subject by an appropriate reference to such statute in the new act. *Wichita v. Missouri, etc., Telephone Co.*, 70

But the legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts.<sup>1</sup>

Kan. 441, 78 Pac. 886; *Griffin v. Gesner*, 78 Kan. 669, 97 Pac. 794; *State v. Board of Com'rs*, 83 Kan. 199, 110 Pac. 92.

<sup>1</sup> *Caddo Parish v. Red River Parish*, 114 La. 370, 38 So. 274; *Weisberg v. Weisberg*, 112 App. Div. 231, 98 N. Y. Supp. 260, 18 N. Y. Ann. Cas. 263; *Macartney v. Shipherd*, 60 Oreg. 133, 117 Pac. 814, Ann. Cas. 1913 D, 1257; *State v. Harden*, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394.

In several different cases the courts of Pennsylvania had decided that a testator's mark to his name, at the foot of a testamentary paper, but without proof that the name was written by his express direction, was not the signature required by the statute, and the legislature, to use the language of Chief Justice *Gibson*, "declared, in order to overrule it, that every last will and testament heretofore made, or hereafter to be made, except such as may have been fully adjudicated prior to the passage of this act, to which the testator's name is subscribed by his direction, or to which the testator has made his mark or cross, shall be deemed and taken to be valid. How this mandate to the courts to establish a particular interpretation of a particular statute can be taken for anything else than an exercise of judicial power in settling a question of interpretation, I know not. The judiciary had certainly recognized a legislative interpretation of a statute before it had itself acted, and consequently before a purchaser could be misled by its judgment; but he might have paid for a title on the unmistakable meaning of plain words; and for the legislature subsequently to distort or pervert it, and to enact that white meant black, or that black meant white, would in the same degree be an exercise of arbi-

trary and unconstitutional power." *Greenough v. Greenough*, 11 Pa. St. 489, 494. The act in this case was held void so far as its operation was retrospective, but valid as to future cases. And see *James v. Rowland*, 42 Md. 462; *Reiser v. Tell Association*, 39 Pa. St. 137.

The fact that the courts had previously given a construction to the law may show more clearly a purpose in the legislature to exercise judicial authority, but it would not be essential to that end. As is well said in *Haley v. Philadelphia*, 68 Pa. St. 45, 47: "It would be monstrous to maintain that where the words and intention of an act were so plain that no court had ever been appealed to for the purpose of declaring their meaning, it was therefore in the power of the legislature, by a retrospective law, to put a construction upon them contrary to the obvious letter and spirit. *Reiser v. William Tell Fund Association*, 39 Pa. St. 137, is an authority in point against such a doctrine. An expository act of assembly is destitute of retroactive force, because it is an act of judicial power, and is in contravention of the ninth section of the ninth article of the Constitution, which declares that no man can be deprived of his property unless 'by the judgment of his peers or the law of the land.'" See 8 Am. Rep. 155, 156.

The constitution of Georgia entitled the head of a family to enter a homestead, and the courts decided that a single person, having no others dependent upon him, could not be regarded the head of a family, though keeping house with servants. Afterwards, the legislature passed an act, declaring that any single person living habitually as housekeeper to himself

As the legislature cannot set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts for the future to adopt a particular construction of a law which the legislature permits to remain in force. "To declare what the law *is*, or *has been* is a judicial power; to declare what the law *shall be*, is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separate from the judicial."<sup>1</sup> If the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and cannot be done by a mandate to the courts, which leaves the law unchanged, but seeks to compel the courts to construe and apply it, not according to the judicial, but according to the legislative judgment.<sup>2</sup> But in any case the substance of the legis-

should be regarded as the head of a family. Held void as an exercise of judicial power. *Calhoun v. McLendon*, 42 Ga. 405.

A legislative act directing the levy and collection of a tax which has already been declared illegal by the judiciary, is void, as an attempted reversal of judicial action. *Mayor, &c. v. Horn*, 26 Md. 194; *Butler v. Supervisors of Saginaw*, 26 Mich. 22. See *Forster v. Forster*, 129 Mass. 559. This doctrine, however, would not prevent the correction of mere errors in taxation by legislation of a retrospective character. See *post*, p. 774.

The words "former jeopardy" had a settled meaning when the Constitution was adopted which by a declaratory statute the legislature cannot change. *Powell v. State*, 17 Tex. App. 345.

On the force and effect of declaratory laws in general, see *Salters v. Tobias*, 3 Paige, 338; *Postmaster-General v. Early*, 12 Wheat. 136, 6 L. ed. 577; *Union Iron Co. v. Pierce*, 4 Biss. 327; *Planters' Bank v. Black*, 19 Miss. 43; *Gough v. Pratt*, 9 Md. 526; *McNichol v. U. S., &c. Agency*, 74 Mo. 457; *Titusville Iron Works v. Keystone Oil Co.*, 122 Pa. St. 627, 15 Atl. 917; *Stebbins v. Com'rs Pueblo Co.*, 2 McCrary, 196.

<sup>1</sup> *Dash v. Van Kleeck*, 7 Johns. 477, 498, per *Thompson, J.*; *Ogden v. Blackledge*, 2 Cranch, 272, 2 L. ed. 276; *Lambertson v. Hogan*, 2 Pa. St. 22; *Seibert v. Linton*, 5 W. Va. 57;

*Arnold v. Kelley*, 5 W. Va. 446; *McDaniel v. Correll*, 19 Ill. 226; *United States v. Salberg*, 287 Fed. 208; *Weisberg v. Weisberg*, 112 App. Div. 231, 98 N. Y. Supp. 260; *State v. Harden*, 62 W. Va. 313, 58 S. E. 715, 60 S. E. 394.

But in Nebraska it has been held that a general statute defining the word "week" as used in the laws of that State was not unconstitutional as an attempt to control judicial decisions. *In re Johnson's Estate*, 99 Neb. 275, 155 N. W. 1100, 98 Neb. 799, 154 N. W. 550, distinguishing *Lincoln Bldg., etc., Asso. v. Graham*, 7 Neb. 173.

Whether a law is general or special in its nature is a question for the courts, and not for the legislature. *Rambo v. Larrabee*, 67 Kan. 634, 73 Pac. 915. The legislature cannot dictate what instructions shall be given by the court to a jury, except by general law. *State v. Hopper*, 71 Mo. 425.

<sup>2</sup> *Governor v. Porter*, 5 Humph. 165; *People v. Supervisors, &c.*, 16 N. Y. 424; *Reiser v. Tell Association*, 39 Pa. St. 137; *O'Conner v. Warner*, 4 W. & S. 223; *Lambertson v. Hogan*, 2 Pa. St. 22.

An act directing that a certain deposition which had previously been taken should be read in evidence on the trial of a certain cause, notwithstanding informalities, is void. *Dupy v. Wickwire*, 1 D. Chip. 237, 6 Am. Dec. 729.

lative action should be regarded rather than the form; and if it appears to be the intention to establish by declaratory statute a rule of conduct for the future, the courts should accept and act upon it, without too nicely inquiring whether the mode by which the new rule is established is or is not the best, most decorous, and suitable that could have been adopted.<sup>1</sup>

If the legislature cannot thus indirectly control the action of the courts, by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials,<sup>2</sup> ordering the discharge of offenders,<sup>3</sup> or directing what particular steps shall be taken in the progress of a judicial inquiry.<sup>4</sup> And as a court must

<sup>1</sup> *In re Coburn*, 165 Cal. 202, 131 Pac. 352.

<sup>2</sup> *Lewis v. Webb*, 3 Me. 326; *Durham v. Lewiston*, 4 Me. 140; *Atkinson v. Dunlap*, 50 Me. 111; *Bates v. Kimball*, 2 Chip. 77; *Staniford v. Barry*, 1 Aik. 314; *Merrill v. Sherburne*, 1 N. H. 199; Opinion of Judges in *Matter of Dorr*, 3 R. I. 299; *Taylor v. Place*, 4 R. I. 324; *De Chastellux v. Fairchild*, 15 Pa. St. 18; *Young v. State Bank*, 4 Ind. 301; *Beebe v. State*, 6 Ind. 501; *Lanier v. Gallatas*, 13 La. Ann. 175; *Mayor, &c. v. Horn*, 26 Md. 194; *Weaver v. Lapsley*, 43 Ala. 224; *Sanders v. Cabaniss*, 43 Ala. 173; *Moser v. White*, 29 Mich. 59; *Sydnor v. Palmer*, 32 Wis. 406; *People v. Frisbie*, 26 Cal. 135; *Lawson v. Jeffries*, 47 Miss. 686, 12 Am. Rep. 342; *Ratliffe v. Anderson*, 31 Gratt. 105, 31 Am. Rep. 716; *State v. Owen*, 286 Ill. 638, 122 N. E. 132, 3 A. L. R. 447; *Thomas v. Portland*, 40 Oreg. 50, 66 Pac. 439; *McCartney v. Shipherd*, 60 Oreg. 133, 117 Pac. 814, Ann. Cas. 1913, D, 1257; *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917 A, 1244. And see *post*, pp. 808 *et seq.* and notes.

The legislature may control remedies, &c., but, when the matter has proceeded to judgment, it has passed beyond legislative control. *Oliver v. McClure*, 28 Ark. 555; *Griffin's Executor v. Cunningham*, 20 Gratt. 31; *Teel v. Yancey*, 23 Gratt. 690; *Hooker v. Hooker*, 18 Miss. 599. The legislature has no power to grant a rehearing of a cause after it has been heard and

determined on the merits. *In re Sibley*, 148 Minn. 347, 182 N. W. 168. It is not competent by legislation to authorize the court of final resort to reopen and rehear cases previously decided. *Dorsey v. Dorsey*, 37 Md. 64, 11 Am. Rep. 528. After an appeal bond was signed by the attorney, the court held bonds so signed bad. A statute validating all prior bonds so signed is void. *Andrews v. Beane*, 15 R. I. 451, 8 Atl. 540. A legislative act cannot turn divorces *nisi* into absolute divorces, of its own force. *Sparhawk v. Sparhawk*, 116 Mass. 315.

<sup>3</sup> In *State v. Fleming*, 7 Humph. 152, a legislative resolve that "no fine, forfeiture, or imprisonment should be imposed or recovered under the act of 1837 [then in force], and that all causes pending in any of the courts for such offence should be dismissed", was held void as an invasion of judicial authority.

<sup>4</sup> Opinions of Judges on the *Dorr Case*, 3 R. I. 299; *State v. Hopper*, 71 Mo. 425.

In the case of *Picquet*, Appellant, 5 Pick. 64, the judge of probate had ordered letters of administration to issue to an applicant therefor, on his giving bond in the penal sum of \$50,000, with sureties within the Commonwealth, for the faithful performance of his duties. He was unable to give the bond, and applied to the legislature for relief. Thereupon a resolve was passed "empowering" the judge of probate to grant the letters of administration, provided the peti-



act as an organized body of judges, and, where differences of opinion arise, they can only decide by majorities, it has been held that it would not be in the power of the legislature to provide that, in certain contingencies, the opinion of the minority of a court, vested with power by the Constitution, should prevail, so that the decision of the court in such cases should be rendered against the judgment of its members.<sup>1</sup>

tioner should give bond with his brother, a resident of Paris, France, as surety, and "that such bond should be in lieu of any and all bond or bonds by any law or statute in this Commonwealth now in force required", &c. The judge of probate refused to grant the letters on the terms specified in this resolve, and the Supreme Court, while holding that it was not compulsory upon him, also declared their opinion that, if it were so, it would be inoperative and void.

In *Bradford v. Brooks*, 2 Aik. 284, it was decided that the legislature had no power to revive a commission for proving claims against an estate after it had once expired. See also *Bagg's Appeal*, 43 Pa. St. 512; *Trustees v. Bailey*, 10 Fla. 238.

In *Burt v. Williams*, 24 Ark. 91, it was held that the granting of continuances of pending cases was the exercise of judicial authority, and a legislative act assuming to do this was void. And where, by the general law, the courts have no authority to grant a divorce for a given cause, the legislature cannot confer the authority in a particular case. *Simmonds v. Simmonds*, 103 Mass. 572, 4 Am. Rep. 576. And see *post*, pp. 208, note, 810, and note.

To take away by statute a statutory right of appeal is not an exercise of judicial authority. *Ex parte McCordle*, 7 Wall. 506, 19 L. ed. 264; *Gwin v. United States*, 184 U. S. 669, 46 L. ed. 741, 22 Sup. Ct. Rep. 526; *Lake Erie, etc., R. Co. v. Watkins*, 157 Ind. 600, 62 N. E. 443; *McDowell v. Fuller*, 169 Mich. 332, 135 N. W. 265; *Moberly v. Roth*, 23 Okla. 856, 102 Pac. 182. And it has been held that a statute allowing an appeal in a particular case was valid. *Prout v. Berry*, 2 Gill, 147; *State v. Northern Central*

*R. R. Co.*, 18 Md. 193. A retroactive statute, giving the right of appeal in cases in which it had previously been lost by lapse of time, was sustained in *Page v. Mathews's Adm'r*, 40 Ala. 547. But in *Carleton v. Goodwin's Ex'r*, 41 Ala. 153, an act the effect of which would have been to revive discontinued appeals, was held void as an exercise of judicial authority. And in *Hill v. Sunderland*, 3 Vt. 507, And *Burch v. Newberry*, 10 N. Y. 374, it was held that the legislature had no power to grant to parties a right to appeal after it was gone under the general law.

<sup>1</sup> In *Clapp v. Ely*, 27 N. J. L. 622, it was held that a statute which provided that no judgment of the Supreme Court should be reversed by the Court of Errors and Appeals, unless a majority of those members of the court who were competent to sit on the hearing and decision should concur in the reversal, was unconstitutional. Its effect would be, if the court were not full, to make the opinion of the minority in favor of affirmance control that of the majority in favor of reversal, unless the latter were a majority of the whole court. Such a provision in the constitution might be proper and unexceptionable; but if the constitution has created a court of appeals, without any restriction of this character, the ruling of this case is that the legislature cannot impose it. The court was nearly equally divided, standing seven to six. But the decision of a majority of a court is binding as though unanimous. *Feige v. Mich. Cent. R. R. Co.*, 62 Mich. 1, 28 N. W. 685.

A statute authorizing an unofficial person to sit in the place of a judge who is disqualified was held void in *Van Slyke v. Insurance Co.*, 39 Wis. 390, 20 Am. Rep. 50.

Nor is it in the power of the legislature to bind individuals by a recital of facts in a statute, to be used as evidence against the parties interested. A recital of facts in the preamble of a statute may perhaps be evidence, where it relates to matters of a public nature, as that riots or disorders exist in a certain part of the country;<sup>1</sup> but where the facts concern the rights of individuals, the legislature cannot adjudicate upon them. As private statutes are generally obtained on the application of some party interested, and are put in form to suit his wishes, perhaps their exclusion from being made evidence against any other party would result from other general principles; but it is clear that the recital could have no force, except as a judicial finding of facts; and that such finding is not within the legislative province.<sup>2</sup>

We come now to a class of cases in regard to which there has been serious contrariety of opinion; springing from the fact, perhaps, that the purpose sought to be accomplished by the statutes is generally effected by judicial proceedings, so that if the statutes are not a direct invasion of judicial authority, they at least cover ground which the courts usually occupy under general laws conferring the jurisdiction upon them. We refer to

*Statutes empowering Guardians and other Trustees to  
sell Lands.*

Whenever it becomes necessary or proper to sell the estate of a decedent for the payment of debts, or of a lunatic or other incompetent person for the same purpose, or for future support, or of a minor to provide the means for his education and nurture, or for the most profitable investment of the proceeds, or of tenants in common to effectuate a partition between them, it will probably be found in every State that some court is vested with jurisdiction to make the necessary order, if the facts after a hearing of the parties in interest seem to render it important. The case is eminently one for judicial investigation. There are facts to be inquired into, in regard to which it is always possible that disputes may arise; the party in interest is often incompetent to act on his own behalf, and his interest is carefully to be inquired into and guarded; and as the

That judicial power cannot be delegated, see *Cohen v. Hoff*, 3 Brev. 500. Therefore a commission of appeals created by statute cannot decide causes in place of the constitutional Supreme Court. *State v. Noble*, 118 Ind. 350, 21 N. E. 244.

<sup>1</sup> *Rex v. Sutton*, 4 M. & S. 532.

<sup>2</sup> *Elmendorf v. Carmichael*, 3 Litt. 475, 14 Am. Dec. 86; *Parmelee v. Thompson*, 7 Hill, 77; *Lothrop v. Steadman*, 42 Conn. 583, 592.

proceeding will usually be *ex parte*, there is more than the ordinary opportunity for fraud upon the party interested, as well as upon the authority which grants permission. It is highly and peculiarly proper, therefore, that by general laws judicial inquiry should be provided for these cases, and that such laws should require notice to all proper parties, and afford an opportunity for the presentation of any facts which might bear upon the propriety of granting the applications.

But it will sometimes be found that the general laws provided for these cases are not applicable to some which arise ; or, if applicable, that they do not accomplish fully all that in some cases seems desirable ; and in these cases, and perhaps also in some others without similar excuse, it has not been unusual for legislative authority to intervene, and by special statute to grant the permission which, under the general law, would be granted by the courts. The power to pass such statutes has often been disputed, and it may be well to see upon what basis of authority, as well as of reason, it rests.

If in fact the inquiry which precedes the grant of authority is in its nature judicial, it would seem clear that such statutes must be ineffectual and void. But if judicial inquiry is not essential, and the legislature may confer the power of sale in such a case upon an *ex parte* presentation of evidence, or upon the representations of the parties without any proof whatever, then we must consider the general laws to be passed, not because the cases fall necessarily within the province of judicial action, but because the courts can more conveniently consider, and more properly, safely, and inexpensively pass upon such cases, than the legislative body to which the power primarily belongs.<sup>1</sup>

The rule upon this subject which appears to be deducible from the authorities, is this : If the party standing in position of trustee applies for permission to convert by a sale the real property into personal, in order to effectuate the purposes of the trust, and to accomplish objects in the interest of the *cestui que trust* not otherwise attainable, there is nothing in the granting of permission which is in its nature judicial. To grant permission is merely to enlarge the sphere of the fiduciary authority, the better to accomplish the

<sup>1</sup> There are constitutional provisions in Kentucky, Virginia, Missouri, Oregon, Nevada, Indiana, Maryland, New Jersey, Arkansas, Florida, Illinois, Wisconsin, Texas, West Virginia, Michigan, and Colorado, forbidding special laws licensing the sale of the

lands of minors and other persons under legal disability. Perhaps the general provision in some other constitutions, forbidding special laws in cases where a general law could be made applicable, might also be held to exclude such special authorization.

purpose for which the trusteeship exists; and while it would be entirely proper to make the questions which might arise assume a judicial form, by referring them to some proper court for consideration and decision, there is no usurpation of power if the legislature shall, by direct action, grant the permission.

In the case of *Rice v. Parkman*,<sup>1</sup> certain minors having become entitled to real estate by descent from their mother, the legislature passed a special statute empowering their father as guardian for them, and, after giving bond to the judge of probate, to sell and convey the lands, and put the proceeds at interest on good security for the benefit of the minor owners. A sale was made accordingly; but the children, after coming of age, brought suit against the party claiming under the sale, insisting that the special statute was void. There was in force at the time this special statute was passed, a general statute, under which license might have been granted by the courts; but it was held that this general law did not deprive the legislature of that full and complete control over such cases which it would have possessed had no such statute existed. "If," say the court, "the power by which the resolve authorizing the sale in this case was passed were of a judicial nature, it would be very clear that it could not have been exercised by the legislature without violating an express provision of the constitution. But it does not seem to us to be of this description of power; for it was not a case of controversy between party and party, nor is there any decree or judgment affecting the title to property. The only object of the authority granted by the legislature was to transmute real into personal estate, for purposes beneficial to all who were interested therein. This is a power frequently exercised by the legislature of this State, since the adoption of the constitution, and by the legislatures of the province and of the colony, while under the sovereignty of Great Britain, analogous to the power exercised by the British Parliament on similar subjects time out of mind. Indeed it seems absolutely necessary for the interest of those who, by the general rules of law, are incapacitated from disposing of their property, that a power should exist somewhere of converting lands into money. For otherwise many minors might suffer, although having property; it not being in a condition to yield an income. This power must rest in the legislature in this Commonwealth;

<sup>1</sup> 16 Mass. 326. See the criticism of this case in *Jones v. Perry*, 10 Yerg. 59, 30 Am. Dec. 430. That case is out of harmony with the current of authority on the subject here considered. In California it has been

held that where a minor has a guardian, it is not competent for the legislature to empower another to sell his lands. *Lincoln v. Alexander*, 52 Cal. 482, 28 Am. Rep. 639.

that body being alone competent to act as the general guardian and protector of those who are disabled to act for themselves.

"It was undoubtedly wise to delegate this authority to other bodies, whose sessions are regular and constant, and whose structure may enable them more easily to understand the merits of the particular application brought before them. But it does not follow that, because the power has been delegated by the legislature to courts of law, it is judicial in its character. For aught we see, the same authority might have been given to the selectmen of each town, or to the clerks or registers of the counties, it being a mere ministerial act, certainly requiring discretion, and sometimes knowledge of law, for its due exercise, but still partaking in no degree of the characteristics of judicial power. It is doubtless included in the general authority granted by the people to the legislature by the constitution. For full power and authority is given from time to time to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions, and instructions (so as the same be not repugnant or contrary to the constitution), as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects thereof. No one imagines that, under this general authority, the legislature could deprive a citizen of his estate, or impair any valuable contract in which he might be interested. But there seems to be no reason to doubt that, upon his application, or the application of those who properly represent him, if disabled from acting himself, a beneficial change of his estate, or a sale of it for purposes necessary and convenient for the lawful owner, is a just and proper subject for the exercise of that authority. It is, in fact, protecting him in his property, which the legislature is bound to do, and enabling him to derive subsistence, comfort, and education from property which might otherwise be wholly useless during that period of life when it might be most beneficially employed.

"If this be not true, then the general laws under which so many estates of minors, persons *non compos mentis*, and others, have been sold and converted into money, are unauthorized by the constitution, and void. For the courts derive their authority from the legislature, and, it not being of a judicial nature, if the legislature had it not, they could not communicate it to any other body. Thus, if there were no power to relieve those from actual distress who had unproductive property, and were disabled from conveying it themselves, it would seem that one of the most essential objects of government — that of providing for the welfare of the citizens — would be lost. But the argument which has most weight on the part of the

defendants is, that the legislature has exercised its power over this subject in the only constitutional way, by establishing a general provision; and that, having done this, their authority has ceased, they having no right to interfere in particular cases. And if the question were one of expediency only, we should perhaps be convinced by the argument, that it would be better for all such applications to be made to the courts empowered to sustain them. But as a question of right, we think the argument fails. The constituent, when he has delegated an authority without an interest, may do the act himself which he has authorized another to do; and especially when that constituent is the legislature, and is not prohibited by the constitution from exercising the authority. Indeed, the whole authority might be revoked, and the legislature resume the burden of the business to itself, if in its wisdom it should determine that the common welfare required it. It is not legislation which must be by general acts and rules, but the use of a parental or tutorial power, for purposes of kindness, without interfering with or prejudice to the rights of any but those who apply for specific relief. The title of strangers is not in any degree affected by such an interposition.”<sup>1</sup>

A similar statute was sustained by the Court for the Correction of Errors in New York. “It is clearly,” says the Chancellor, “within the powers of the legislature, as *parens patriæ*, to prescribe such rules and regulations as it may deem proper for the superin-

<sup>1</sup> In *Shumway v. Bennett*, 29 Mich. 451, the distinction between judicial and administrative power is pointed out, and it is held that the question of incorporating territory as a village cannot be made a judicial question. A like decision is made in *State v. Simons*, 32 Minn. 540, 21 N. W. 750, and by Chancellor *Cooper*, in *Ex parte Burns*, 1 Tenn. Ch. R. 83, though it is said in that case that the organization of corporations which are created by legislative authority may be referred to the courts. See, on the same subject, *State v. Armstrong*, 3 Sneed, 634; *Galesburg v. Hawkinson*, 75 Ill. 152. Compare *Burlington v. Leebrick*, 43 Iowa, 252, and *Wahoo v. Dickinson*, 23 Neb. 426, 36 N. W. 813, where it is held the question of extending, after hearing, the limits of a municipality may be decided by a court. That the courts cannot be clothed with legislative authority, see *State v. Young*, 29 Minn. 474, 9 N. W. 737. Compare *Ex parte*

*Mato*, 19 Tex. App. 112. For the distinction between political and judicial power, see further, *Dickey v. Reed*, 78 Ill. 261; *Commonwealth v. Jones*, 10 Bush, 725. And see *post*, pp. 204 *et seq.*, and notes.

In *Hegarty's Appeal*, 75 Pa. St. 503, the power of a legislature to authorize a trustee to sell the lands of parties who were *sui juris*, and might act on their own behalf, was denied, and the case was distinguished from *Norris v. Clymer*, 2 Pa. St. 277, and others which had followed it.

The foreclosure of a mortgage on private property cannot be accomplished by legislative enactment. *Ashuelot R. R. Co. v. Elliott*, 58 N. H. 451.

Power to try city officers by impeachment may rest in a city council, the judgment extending only to removal and disqualification to hold any corporate office. *State v. Judges*, 35 La. Ann. 1075.

tendence, disposition, and management of the property and effects of infants, lunatics, and other persons who are incapable of managing their own affairs. But even that power cannot constitutionally be so far extended as to transfer the beneficial use of the property to another person, except in those cases where it can legally be presumed the owner of the property would himself have given the use of his property to the other, if he had been in a situation to act for himself, as in the case of a provision out of the estate of an infant or lunatic for the support of an indigent parent or other near relative.<sup>1</sup>

<sup>1</sup> *Cochran v. Van Surley*, 20 Wend. 365, 373. See the same case in the Supreme Court, *sub nom.* *Clarke v. Van Surley*, 15 Wend. 436. See also *Suydam v. Williamson*, 24 How. 427, 16 L. ed. 742; *Williamson v. Suydam*, 6 Wall. 723, 18 L. ed. 967; *Heirs of Holman v. Bank of Norfolk*, 12 Ala. 369; *Florentine v. Barton*, 2 Wall. 210, 17 L. ed. 783.

In *Hoyt v. Sprague*, 103 U. S. 613, 26 L. ed. 585, it was held competent, by special statute, to provide for the investment of the estate of minors in a manufacturing corporation, and that, after the investment was accordingly made, no account could be demanded on their behalf, except of the stock and its dividends. But the legislature cannot empower the guardian of infants to mortgage their lands to pay demands which are not obligations against them or their estate. *Burke v. Mechanics' Savings Bank*, 12 R. I. 513.

In *Brevoort v. Grace*, 53 N. Y. 245, the power of the legislature to authorize the sale of lands of infants by special statute was held to extend to the future contingent interests of those not in being, but not to the interests of non-consenting adults, competent to act on their own behalf. In *Opinions of the Judges*, 4 N. H. 565, 572, the validity of such a special statute, under the constitution of New Hampshire, was denied. The judges say: "The objection to the exercise of such a power by the legislature is, that it is in its nature both legislative and judicial. It is the province of the legislature to prescribe the rule of law, but to apply it to particular cases is the business of the courts of law. And

the thirty-eighth article in the Bill of Rights declares that 'in the government of this State the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.' The exercise of such a power by the legislature can never be necessary. By the existing laws, judges of probate have very extensive jurisdiction to license the sale of the real estate of minors by their guardians. If the jurisdiction of the judges of probate be not sufficiently extensive to reach all proper cases, it may be a good reason why that jurisdiction should be extended, but can hardly be deemed a sufficient reason for the particular interposition of the legislature in an individual case. If there be a defect in the laws, they should be amended. Under our institutions all men are viewed as equal, entitled to enjoy equal privileges, and to be governed by equal laws. If it be fit and proper that license should be given to one guardian, under particular circumstances, to sell the estate of his ward, it is fit and proper that all other guardians should, under similar circumstances, have the same license. This is the very genius and spirit of our institutions. And we are of opinion that an act of the legislature to authorize the sale of the land of a particular minor by his guardian cannot be easily reconciled with the spirit of the article in the Bill of Rights which we have just cited. It is true that the

The same ruling has often been made in analogous cases. In Ohio, a special act of the legislature authorizing commissioners to make sale of lands held in fee tail, by devisees under a will, in order to cut off the entailment and effect a partition between them, — the statute being applied for by the mother of the devisees and the executor of the will, and on behalf of the devisees, — was held not obnoxious to constitutional objection, and to be sustainable on immemorial legislative usage, and on the same ground which would support general laws for the same purpose.<sup>1</sup> In a case in the Supreme Court of the United States where an executrix who had proved a will in New Hampshire made sale of lands without authority in Rhode Island, for the purpose of satisfying debts against the estate, a subsequent act of the Rhode Island legislature, confirming the sale, was held not an encroachment upon the judicial power. The land, it was said, descended to the heirs subject to a lien for the payment of debts, and there is nothing in the nature of the act of authorizing a sale to satisfy the lien, which requires that it should be performed by a judicial tribunal, or that it should be performed by a delegate rather than by the legislature itself. It is remedial in its nature, to give effect to existing rights.<sup>2</sup> The case showed the actual existence of debts, and indeed a judicial

grant of such a license by the legislature to the guardian is intended as a privilege and a benefit to the ward. But by the law of the land no minor is capable of assenting to a sale of his real estate in such a manner as to bind himself. And no guardian is permitted by the same law to determine when the estate of his ward ought and when it ought not to be sold. In the contemplation of the law, the one has no sufficient discretion to judge of the propriety and expediency of a sale of his estate, and the other is not to be intrusted with the power of judging. Such being the general law of the land, it is presumed that the legislature would be unwilling to rest the justification of an act authorizing the sale of a minor's estate upon any assent which the guardian or the minor could give in the proceeding. The question then is, as it seems to us: Can a ward be deprived of his inheritance without his consent by an act of the legislature which is intended to apply to no other individual? The fifteenth article in the Bill of Rights declares that no sub-

ject shall be deprived of his property but by the judgment of his peers or the law of the land. Can an act of the legislature, intended to authorize one man to sell the land of another without his consent be 'the law of the land' within the meaning of the constitution? Can it be the law of the land in a free country? If the question proposed to us can be resolved into these questions, as it appears to us it may, we feel entirely confident that the representatives of the people of this State will agree with us in the opinion we feel ourselves bound to express on the question submitted to us, that the legislature cannot authorize a guardian of minors, by a special act or resolve, to make a valid conveyance of the real estate of his wards." See also *Jones v. Perry*, 10 Yerg. 59, 30 Am. Dec. 430; *Lincoln v. Alexander*, 52 Cal. 482, 28 Am. Rep. 639.

<sup>1</sup> *Carroll v. Lessee of Olmstead*, 16 Ohio, 251.

<sup>2</sup> *Wilkinson v. Leland*, 2 Pet. 627, 660; 7 L. ed. 542, 554. Compare *Breevort v. Grace*, 53 N. Y. 245.



license for the sale of lands to satisfy them had been granted in New Hampshire before the sale was made. The decision was afterwards followed in a carefully considered case in the same court.<sup>1</sup> In each of these cases it is assumed that the legislature does not by the special statute determine the existence or amount of the debts, and disputes concerning them would be determinable in the usual modes. Many other decisions have been made to the same effect.<sup>2</sup>

This species of legislation may perhaps be properly called prerogative remedial legislation. It hears and determines no rights; it deprives no one of his property. It simply authorizes one's real estate to be turned into personal, on the application of the person representing his interest, and under such circumstances that the consent of the owner, if capable of giving it, would be presumed. It is in the nature of the grant of a privilege to one person, which at the same time affects injuriously the rights of no other.<sup>3</sup>

But a different case is presented when the legislature assumes to authorize a person who does not occupy a fiduciary relation to

<sup>1</sup> *Watkins v. Holman's Lessee*, 16 Pet. 25, 60, 10 L. ed. 873, 887. See also *Florentine v. Barton*, 2 Wall. 210, 17 L. ed. 783; *Doe v. Douglass*, 8 Blackf. 10.

<sup>2</sup> *Thurston v. Thurston*, 6 R. I. 296, 302; *Williamson v. Williamson*, 11 Miss. 715; *McComb v. Gilkey*, 29 Miss. 146; *Boon v. Bowers*, 30 Miss. 246; *Stewart v. Griffith*, 33 Mo. 13; *Estep v. Hutchman*, 14 S. & R. 435; *Snowhill v. Snowhill*, 17 N. J. Eq. 30; *Dorsey v. Gilbert*, 11 G. & J. 87; *Norris v. Clymer*, 2 Pa. St. 277; *Sergeant v. Kuhn*, 2 Pa. St. 393; *Kerr v. Kitchen*, 17 Pa. St. 433; *Coleman v. Carr*, 1 Miss. 258; *Davison v. Johnston*, 7 Met. 388; *Towle v. Forney*, 14 N. Y. 423; *Leggett v. Hunter*, 19 N. Y. 445; *Brevoort v. Grace*, 53 N. Y. 245; *Gannett v. Leonard*, 47 Mo. 205; *Kibby v. Chetwood's Adm'rs*, 4 T. B. Monr. 91; *Shehan's Heirs v. Barnett's Heirs*, 6 T. B. Monr. 594; *Davis v. State Bank*, 7 Ind. 316; *Richardson v. Monson*, 23 Conn. 94; *Ward v. New England, &c. Co.*, 1 Cliff. 565; *Sohier v. Massachusetta, &c. Hospital*, 3 Cush. 483; *Lobrano v. Nelligan*, 9 Wall. 295, 19 L. ed. 694. *Contra*, *Brenham v. Story*, 39 Cal. 179.

In *Moore v. Maxwell*, 18 Ark. 469, a special statute authorizing the ad-

ministrator of one who held the mere naked legal title to convey to the owner of the equitable title was held valid. To the same effect is *Reformed P. D. Church v. Mott*, 7 Paige, 77, 32 Am. Dec. 613. A special act allowing the widow to sell lands of the deceased husband, subject to the approval of the probate judge, is valid. *Bruce v. Bradshaw*, 69 Ala. 360. In *Stanley v. Colt*, 5 Wall. 119, 18 L. ed. 502, an act permitting the sale of real estate which had been devised to charitable uses was sustained, — no diversion of the gift being made. A more doubtful case is that of *Linsley v. Hubbard*, 44 Conn. 109, 26 Am. Rep. 431, in which it was held competent, on petition of tenant for life, to order a sale of lands for the benefit of all concerned, though against remonstrance of owners of the reversion.

<sup>3</sup> It would be equally competent for the legislature to authorize a person under legal disability — e.g. an infant — to convey his estate, as to authorize it to be conveyed by guardian. *McComb v. Gilkey*, 29 Miss. 146. See in this connection, *Louisville, N. O. & T. R. Co. v. Blythe*, 69 Miss. 939, 11 So. 111, 16 L. R. A. 251, and note on constitutionality of private statutes to authorize disposal of property.

the owner, to make sale of real estate, to satisfy demands which he asserts, but which are not judicially determined, or for any other purpose not connected with the convenience or necessity of the owner himself. An act of the legislature of Illinois undertook to empower a party who had applied for it to make sale of the lands pertaining to the estate of a deceased person, in order to raise a certain specified sum of money which the legislature assumed to be due to him and another person, for moneys by them advanced and liabilities incurred on behalf of the estate, and to apply the same to the extinguishment of their claims. Now it is evident that this act was in the nature of a judicial decree, passed on the application of parties adverse in interest to the estate, and in effect adjudging a certain amount to be due them, and ordering lands to be sold for its satisfaction. As was well said by the Supreme Court of Illinois, in adjudging the act void: "If this is not the exercise of a power of inquiry into, and a determination of, facts between debtor and creditor, and that, too, *ex parte* and summary in its character, we are at a loss to understand the meaning of terms; nay, that it is adjudging and directing the application of one person's property to another, on a claim of indebtedness, without notice to, or hearing of, the parties whose estate is divested by the act. That the exercise of such power is in its nature clearly judicial, we think too apparent to need argument to illustrate its truth. It is so self-evident from the facts disclosed that it proves itself."<sup>1</sup>

<sup>1</sup> Lane v. Dorman, 4 Ill. 238, 242, 36 Am. Dec. 543.

In Dubois v. McLean, 4 McLean, 486, Judge Pope assumes that the case of Lane v. Dorman decides that a special act, authorizing an executor to sell lands of the testator to pay debts against his estate, would be unconstitutional. We do not so understand that decision. On the contrary, another case in the same volume, Edwards v. Pope, p. 465, fully sustains the cases before decided, distinguishing them from Lane v. Dorman. But that indeed is also done in the principal case, where the court, after referring to similar cases in Kentucky, say: "These cases are clearly distinguished from the case at bar. The acts were for the benefit of all the creditors of the estates, without distinction; and in one case, in addition, for the purpose of perfecting titles contracted to be made by the intestate. The claims of

the creditors of the intestate were to be established by judicial or other satisfactory legal proceedings, and, in truth, in the last case cited, the commissioners were nothing more than special administrators. The legislative department, in passing these acts, investigated nothing, nor did an act which could be deemed a judicial inquiry. It neither examined proof, nor determined the nature or extent of claims; it merely authorized the application of the real estate to the payment of debts generally, discriminating in favor of no one creditor, and giving no one a preference over another. Not so in the case before us; the amount is investigated and ascertained, and the sale is directed for the benefit of two persons exclusively. The proceeds are to be applied to the payment of such claims and none other, for liabilities said to be incurred, but not liquidated or satis-

A case in harmony with the one last referred to was decided by the Supreme Court of Michigan. Under the act of Congress "for the relief of citizens of towns upon the lands of the United States, under certain circumstances", approved May 23, 1844, and which provided that the trust under said act should be conducted "under such rules and regulations as may be prescribed by the legislative authority of the State", &c., the legislature passed an act authorizing the trustee to give deeds to a person named therein, and those claiming under him; thus undertaking to dispose of the whole trust to the person thus named and his grantees, and authorizing no one else to be considered or to receive any relief. This was very plainly an attempted adjudication upon the rights of the parties concerned; it did not establish regulations for the administration of the trust, but it adjudged the trust property to certain claimants exclusively, in disregard of any rights which might exist in others; and it was therefore declared to be void.<sup>1</sup> And it has also been held that,

fied; and those, too, created after the death of the intestate." See also *Mason v. Wait*, 5 Ill. 127, 134; *Davenport v. Young*, 16 Ill. 548; *Rozier v. Fagan*, 46 Ill. 404. The case of *Estep v. Hutchman*, 14 S. & R. 435, would seem to be more open to question on this point than any of the others before cited. It was the case of a special statute, authorizing the guardian of infant heirs to convey their lands in satisfaction of a contract made by their ancestor; and the statute was sustained. Compare this with *Jones v. Perry*, 10 Yerg. 59, where an act authorizing a guardian to sell lands to pay the ancestor's debts was held void.

<sup>1</sup> *Cash*, Appellant, 6 Mich. 193.

The case of *Powers v. Bergen*, 6 N. Y. 358, is perhaps to be referred to another principle than that of encroachment upon judicial authority. That was a case where the legislature, by special act, had undertaken to authorize the sale of property, not for the purpose of satisfying liens upon it, or of meeting or in any way providing for the necessities or wants of the owners, but solely, after paying expenses, for the investment of the proceeds. It appears from that case that the executors under the will of the former owner held the lands in trust for a daughter of the testator during her natural life, with a vested remain-

der in fee in her two children. The special act assumed to empower them to sell and convey the complete fee, and apply the proceeds, *first*, to the payment of their commissions, costs, and expenses; *second*, to the discharge of assessments, liens, charges, and incumbrances on the land, of which, however, none were shown to exist; and *third* to invest the proceeds and pay over the income, after deducting taxes and charges, to the daughter during her life, and after her decease to convey, assign, or pay over the same to the persons who would be entitled under the will. The court regarded this as an unauthorized interference with private property upon no necessity, and altogether void, as depriving the owners of their property contrary to the "law of the land." At the same time the authority of those cases, where it has been held that the legislature, acting as the guardian and protector of those who are disabled to act for themselves by reason of infancy, lunacy, or other like cause, may constitutionally pass either general or private laws, under which an effectual disposition of their property might be made, was not questioned. The court cite, with apparent approval, the cases, among others, of *Rice v. Parkman*, 16 Mass. 326; *Cochran v. Van Surlay*, 20 Wend. 365; and *Wilkinson*

whether a corporation has been guilty of abuse of authority under its charter, so as justly to subject it to forfeiture,<sup>1</sup> and whether a widow is entitled to dower in a specified parcel of land,<sup>2</sup> are judicial questions which cannot be decided by the legislature. In these cases there are necessarily adverse parties; the questions that would arise are essentially judicial, and over them the courts possess jurisdiction at the common law; and it is presumable that legislative acts of this character must have been adopted carelessly, and without a due consideration of the proper boundaries which mark the separation of legislative from judicial duties.<sup>3</sup> As well

*v. Leland*, 2 Pet. 627, 7 L. ed. 542. The case of *Ervine's Appeal*, 16 Pa. St. 256, was similar, in the principles involved, to *Powers v. Bergen*, and was decided in the same way. See also *Kneass's Appeal*, 31 Pa. St. 87; *Maxwell v. Goetschius*, 40 N. J. 383, 29 Am. Rep. 242, and compare with *Kerr v. Kitchen*, 17 Pa. St. 433; *Martin's Appeal*, 23 Pa. St. 433; *Hegarty's Appeal*, 75 Pa. St. 503; *Tharp v. Fleming*, 1 Houston, 580.

There is no constitutional objection to a statute which transfers the mere legal title of a trustee to the beneficiary. *Reformed P. D. Church v. Mott*, 7 Paige, 77, 32 Am. Dec. 613.

<sup>1</sup> *State v. Noyes*, 47 Me. 189; *Campbell v. Union Bank*, 6 How. (Miss.) 661; *Canal Co. v. Railroad Co.*, 4 G. & J. 1, 22; *Regents of University v. Williams*, 9 G. & J. 365. See also *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 112 Pac. 454; *Western States L. Ins. Co. v. Lockwood*, 166 Cal. 185, 135 Pac. 496; *Nicolai v. Maryland Agricultural, etc., Asso.*, 96 Md. 323, 53 Atl. 965; *Klamath Lumber Co. v. Bamber*, 74 Oreg. 287, 142 Pac. 359, 145 Pac. 650; *Canadian Country Club v. Johnson*, (Tex. Civ. App.) 176 S. W. 835; *Mill-saps v. Johnson*, Tex. Civ. App. 961 S. W. 202; *Elliott's Knob Iron, etc., Co. v. State Corporation Commission*, 123 Va. 63, 96 S. E. 353; *State v. Howell*, 67 Wash. 377, 121 Pac. 861.

In *Miners' Bank of Dubuque v. United States*, 1 Morris, 482, a clause in a charter authorizing the legislature to repeal it for any abuse or misuser of corporate privileges was held to refer the question of abuse to the legis-

lative judgment. In *Erie & North East R. R. Co. v. Casey*, 26 Pa. St. 287, on the other hand, it was held that the legislature could not conclude the corporation by its repealing act, but that the question of abuse of corporate authority would be one of fact to be passed upon, if denied, by a jury, so that the act would be valid or void as the jury should find. Compare *Flint & Fentonville P. R. Co. v. Woodhull*, 25 Mich. 99, 12 Am. Rep. 233, in which it was held that the reservation of a power to repeal a charter for violation of its provisions necessarily presented a judicial question, and the repeal must be preceded by a proper judicial finding.

In *Carey v. Giles*, 9 Ga. 253, the appointment by the legislature of a receiver for an insolvent bank was sustained; and in *Hindman v. Piper*, 50 Mo. 292, a legislative appointment of a trustee was also sustained in a peculiar case.

In *Lothrop v. Steadman*, 42 Conn. 583, the power of the legislature as an administrative measure to appoint a trustee to take charge of and manage the affairs of a corporation whose charter had been repealed, was affirmed. For a similar principle see *Albertson v. Landon*, 42 Conn. 209. And Congress has power to declare the forfeiture of a land grant for breach of condition subsequent. *Atl. & Pac. R. Co. v. Mingus*, 165 U. S. 413, 41 L. ed. 770, 17 Sup. Ct. Rep. 348.

<sup>2</sup> *Edwards v. Pope*, 4 Ill. 465.

<sup>3</sup> The unjust and dangerous character of legislation of this description is well stated by the Supreme Court of Pennsylvania: "When, in the exer-

might the legislature proceed to declare that one man is indebted to another in a sum specified, and establish by enactment a conclusive demand against him.<sup>1</sup>

We have elsewhere referred to a number of cases where statutes have been held unobjectionable which validated legal proceedings, notwithstanding irregularities apparent in them.<sup>2</sup> These statutes may as properly be made applicable to judicial as to ministerial proceedings; and although, when they refer to such proceedings, they may at first seem like an interference with judicial authority, yet if they are only in aid of judicial proceedings, and tend to their support by precluding parties from taking advantage of errors which do not affect their substantial rights, they cannot be obnoxious to the charge of usurping judicial power. The legislature does, or may, prescribe the rules under which the judicial power is exercised by the courts; and in doing so it may dispense with any of those formalities which are not essential to the jurisdiction of the court; and whatever it may dispense with by statute anterior to the proceedings, we believe it may also dispense with by statute after the proceedings have been taken, if the court has failed to observe any of those formalities. But it would not be competent for the legislature to authorize a court to proceed and adjudicate upon the rights of parties, without giving them an opportunity to be heard before it; and, for the same reason, it would be incompetent for it, by retrospective

cise of proper legislative powers, general laws are enacted which bear, or may bear, on the whole community, if they are unjust and against the spirit of the Constitution, the whole community will be interested to procure their repeal by a voice potential. And that is the great security for just and fair legislation. But when individuals are selected from the mass, and laws are enacted affecting their property, without summons or notice, at the instigation of an interested party, who is to stand up for them, thus isolated from the mass, in injury and injustice, or where are they to seek relief from such acts of despotic power? They have no refuge but in the courts, the only secure place for determining conflicting rights by due course of law. But if the judiciary give way, and in the language of the Chief Justice in *Greenough v. Greenough*, in 11 Pa. St. 489, 'confesses itself too weak to stand against the antagonism of the legislature and the bar', one independent

co-ordinate branch of the government will become the subservient handmaid of another, and a quiet, insidious revolution be effected in the administration of the government, whilst its form on paper remains the same." *Ervine's Appeal*, 16 Pa. St. 256, 268.

<sup>1</sup> A statute is void which undertakes to make railroad companies liable for the expense of coroners' inquests, and of the burial of persons dying on the cars, or killed by collision or other accident occurring to the cars, irrespective of any question of negligence. *Ohio & M. R. R. Co. v. Lackey*, 78 Ill. 55, 20 Am. Rep. 259. But a railroad may be made absolutely liable for loss from fires caused by sparks from its locomotives, regardless of the question of negligence. *Matthews v. St. Louis & S. F. R. Co.*, 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161, and note. See this case affirmed in 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243.

<sup>2</sup> See *post*, pp. 773-793.

legislation, to make valid any proceedings which had been had in the courts, but which were void for want of jurisdiction over the parties. Such a legislative enactment would be doubly objectionable: *first*, as an exercise of judicial power, since, the proceedings in court being void, it would be the statute alone which would constitute an adjudication upon the rights of the parties; and *second*, because, in all judicial proceedings, notice to parties and an opportunity to defend are essential, — both of which they would be deprived of in such a case.<sup>1</sup> And for like reasons a statute validating proceedings had before an intruder into a judicial office, before whom no one is authorized or required to appear, and who could have jurisdiction neither of the parties nor of the subject-matter, would also be void.<sup>2</sup>

<sup>1</sup> In *McDaniel v. Correll*, 19 Ill. 226, it appeared that a statute had been passed to make valid certain legal proceedings by which an alleged will was adjudged void, and which were had against non-resident defendants, over whom the courts had obtained no jurisdiction. The court say: "If it was competent for the legislature to make a void proceeding valid, then it has been done in this case. Upon this question we cannot for a moment doubt or hesitate. They can no more impart a binding efficacy to a void proceeding, than they can take one man's property from him and give it to another. Indeed, to do the one is to accomplish the other. By the decree in this case the will in question was declared void, and, consequently, if effect be given to the decree, the legacies given to those absent defendants by the will are taken from them and given to others, according to our statute of descents. Until the passage of the act in question, they were not bound by the verdict of the jury in this case, and it could not form the basis of a valid decree. Had the decree been rendered before the passage of the act, it would have been as competent to make that valid as it was to validate the antecedent proceedings upon which alone the decree could rest. The want of jurisdiction over the defendants was as fatal to the one as it could be to the other. If we assume the act to be valid, then the legacies which before belonged to the legatees have now

ceased to be theirs, and this result has been brought about by the legislative act alone. The effect of the act upon them is precisely the same as if it had declared in direct terms that the legacies bequeathed by this will to these defendants should not go to them, but should descend to the heirs-at-law of the testator, according to our law of descents. This it will not be pretended that they could do directly, and they had no more authority to do it indirectly, by making proceedings binding upon them which were void in law." See, to the same effect, *Richards v. Rote*, 68 Pa. St. 248; *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656; *Lane v. Nelson*, 79 Pa. St. 407; *Shonk v. Brown*, 61 Pa. St. 320; *Spragg v. Shriver*, 25 Pa. St. 282; *Israel v. Arthur*, 7 Col. 5.

<sup>2</sup> In *Denny v. Mattoon*, 2 Allen, 361, a judge in insolvency had made certain orders in a case pending in another jurisdiction, and which the courts subsequently declared to be void. The legislature then passed an act declaring that they "are hereby confirmed, and the same shall be taken and deemed good and valid in law, to all intents and purposes whatsoever." On the question of the validity of this act the court says: "The precise question is, whether it can be held to operate so as to confer a jurisdiction over parties and proceedings which it has been judicially determined did not exist, and give validity to acts and processes which have been adjudged

void. The statement of this question seems to us to suggest the obvious and decisive objection to any construction of the statute which would lead to such a conclusion. It would be a direct exercise by the legislature of a power in its nature clearly judicial, from the use of which it is expressly prohibited by the thirtieth article of the Declaration of Rights. The line which marks and separates judicial from legislative duties and functions is often indistinct and uncertain, and it is sometimes difficult to decide within which of the two classes a particular subject falls. All statutes of a declaratory nature, which are designed to interpret or give a meaning to previous enactments, or to confirm the rights of parties either under their own contracts or growing out of the proceedings of courts or public bodies, which lack legal validity, involve in a certain sense the exercise of a judicial power. They operate upon subjects which might properly come within the cognizance of the courts and form the basis of judicial consideration and judgment. But they may, nevertheless, be supported as being within the legitimate sphere of legislative action, on the ground that they do not declare or determine, but only confirm rights; that they give effect to the acts of parties according to their intent; that they furnish new and more efficacious remedies, or create a more beneficial interest or tenure, or, by supplying defects and curing informalities in the proceedings of courts, or of public officers acting within the scope of their authority, they give effect to acts to which there was the express or implied assent of the parties interested. Statutes which are intended to accomplish such purposes do not necessarily invade the province, or directly interfere with the action of judicial tribunals. But if we adopt the broadest and most comprehensive view of the power of the legislature, we must place some limit beyond which the authority of the legislature cannot go without trenching on the clear and well-defined boundaries of judicial power." "Although it may be difficult, if not impossible, to lay down any general rule

which may serve to determine, in all cases, whether the limits of constitutional restraint are overstepped by the exercise by one branch of the government of powers exclusively delegated to another, it certainly is practicable to apply to each case as it arises some test by which to ascertain whether this fundamental principle is violated. If, for example, the practical operation of a statute is to determine adversary suits pending between party and party, by substituting in place of the well-settled rules of law the arbitrary will of the legislature, and thereby controlling the action of the tribunal before which the suits are pending, no one can doubt that it would be an unauthorized act of legislation, because it directly infringes on the peculiar and appropriate functions of the judiciary. It is the exclusive province of courts of justice to apply established principles to cases within their jurisdiction, and to enforce their decisions by rendering judgments and executing them by suitable process. The legislature have no power to interfere with this jurisdiction in such manner as to change the decision of cases pending before courts, or to impair or set aside their judgments, or to take cases out of the settled course of judicial proceeding. It is on this principle that it has been held that the legislature have no power to grant a new trial or direct a rehearing of a cause which has been once judicially settled. The right to a review, or to try anew facts which have been determined by a verdict or decree, depends on fixed and well-settled principles, which it is the duty of the court to apply in the exercise of a sound judgment and discretion. These cannot be regulated or governed by legislative action. *Taylor v. Place*, 4 R. I. 324, 337; *Lewis v. Webb*, 3 Me. 326; *De Chastellux v. Fairchild*, 15 Pa. St. 18. *A fortiori*, an act of the legislature cannot set aside or amend final judgments or decrees." The court further consider the general subject at length, and adjudge the particular enactment under consideration void, both as an exercise of judicial authority, and also because, in declaring valid the void

*Legislative Divorces.*

There is another class of cases in which it would seem that action ought to be referred exclusively to the judicial tribunals, but in respect to which the prevailing doctrine seems to be that the legislature has complete control unless specially restrained by the State constitution.<sup>1</sup> The granting of divorces from the bonds of matrimony was not confided to the courts in England,<sup>2</sup> and from the earliest days the Colonial and State legislatures in this country have assumed to possess the same power over the subject which was possessed by the Parliament, and from time to time they have passed special laws declaring a dissolution of the bonds of matrimony in special cases.<sup>3</sup> Now it is clear that "the question of divorce involves investigations which are properly of a judicial nature, and the jurisdiction over divorces ought to be confined exclusively to the judicial tribunals, under the limitations to be prescribed by law",<sup>4</sup> and so strong is the general conviction of this fact, that the people in framing their constitutions, in a majority of the States, have positively forbidden any such special laws.<sup>5</sup>

proceedings in insolvency against the debtor, under which assignees had been appointed, it took away from the debtor his property, "not by due process of law or the law of the land, but by an arbitrary exercise of legislative will." See, further, *Griffin's Executor v. Cunningham*, 20 Gratt. 109; *State v. Doherty*, 60 Me. 504.

In proceedings by tenants for life, the estate in remainder was ordered to be sold; there was at the time no authority for ordering such a sale. It was held to be void, and incapable of confirmation. *Maxwell v. Goetschius*, 40 N. J. L. 383, 29 Am. Rep. 242.

<sup>1</sup> *Barrington v. Barrington*, 206 Ala. 192, 89 So. 512, 17 A. L. R. 789; *Worthington v. District Ct.*, 37 Nev. 212, 142 Pac. 230, L. R. A. 1916 A, 696, Ann. Cas. 1916 E, 1097; *Cooke v. Cooke*, 164 N. C. 272, 80 S. E. 178, 49 L. R. A. (N. S.) 1034; *Kenner v. Kenner*, 139 Tenn. 211, 201 S. W. 779, L. R. A. 1918 E, 587; *State v. Duket*, 90 Wis. 272, 63 N. E. 83, 48 Am. St. Rep. 928, 31 L. R. A. 515.

<sup>2</sup> *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723; *Wright v. Wright*, 2 Md. 429, 56 Am. Dec. 723; *Jones v. Jones*, 12 Pa. St. 350, 51 Am. Dec. 611.

<sup>3</sup> *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723.

<sup>4</sup> 2 Kent, 106. See *Levins v. Sleator*, 2 Greene (Iowa), 607.

<sup>5</sup> The following are constitutional provisions: *Alabama*: The legislature shall not pass a special, private, or local law in any of the following cases: (1) Granting a divorce. *Arkansas*: The General Assembly shall not have power to pass any bill of divorce, but may prescribe by law the manner in which such cases may be investigated in the courts of justice, and divorces granted. *California*: No divorce shall be granted by the legislature. The provision is the same or similar in *Iowa*, *Indiana*, *Maryland*, *Michigan*, *Minnesota*, *Nevada*, *Nebraska*, *Oregon*, *New Jersey*, *Texas*, and *Wisconsin*. *Florida*: Divorces from the bonds of matrimony shall not be allowed but by the judgment of a court, as shall be prescribed by law. *Georgia*: The Superior Court shall have exclusive jurisdiction in all cases of divorce, both total and partial. *Illinois*: The General Assembly shall not pass . . . special laws . . . for granting divorces. *Kansas*: And power to grant divorces is vested in the District Courts subject to regulations



Of the judicial decisions on the subject of legislative power over divorces there seem to be three classes of cases. The doctrine of the first class seems to be this: The granting of a divorce may be either a legislative or a judicial act, according as the legislature shall refer its consideration to the courts, or reserve it to itself.

by law. *Kentucky*: The General Assembly shall have no power to grant divorces, . . . but by general laws shall confer such powers on the courts of justice. *Louisiana*: The General Assembly shall not pass any local or special law on the following specified objects: . . . Granting divorces. *Massachusetts*: All cause of marriage, divorce, and alimony . . . shall be heard and determined by the Governor and Council, until the legislature shall by law make other provision. *Mississippi*: Divorces from the bonds of matrimony shall not be granted but in cases provided for by law, and by suit in chancery. *Missouri*: The General Assembly shall not pass any local or special law . . . granting divorces. In *Colorado* the provision is the same. *New Hampshire*: All causes of marriage, divorce, and alimony . . . shall be heard and tried by the Superior Court, until the legislature shall by law make other provision. *New York*: . . . nor shall any divorce be granted otherwise than by due judicial proceedings. *North Carolina*: The General Assembly shall have power to pass general laws regulating divorce and alimony, but shall not have power to grant a divorce or secure alimony in any particular case. *Ohio*: The General Assembly shall grant no divorce nor exercise any judicial power, not herein expressly conferred. *Pennsylvania*: The legislature shall not have power to enact laws annulling the contract of marriage in any case where by law the courts of this Commonwealth are, or hereafter may be, empowered to decree a divorce. *Tennessee*: The legislature shall have no power to grant divorces, but may authorize the courts of justice to grant them for such causes as may be specified by law; but such laws shall be general and uniform in their operation throughout the State. *Virginia*: The legislature shall confer on the courts the power to grant

divorces, . . . but shall not by special legislation grant relief in such cases. *West Virginia*: The Circuit Courts shall have power, under such general regulations as may be prescribed by law, to grant divorces, . . . but relief shall not be granted by special legislation in such cases.

Under the Constitution of Michigan, it was held that, as the legislature was prohibited from granting divorces, they could pass no special act authorizing the courts to divorce for a cause which was not a legal cause for divorce under the general laws. *Teft v. Teft*, 3 Mich. 67. See also *Clark v. Clark*, 10 N. H. 380; *Simonds v. Simonds*, 103 Mass. 572, 4 Am. Rep. 576.

The case of *White v. White*, 105 Mass. 325, was peculiar. A woman procured a divorce from her husband, and by the law then in force he was prohibited from marrying again except upon leave procured from the court. He did marry again, however, and the legislature passed a special act to affirm this marriage. In pursuance of a requirement of the constitution, jurisdiction of all cases of marriage and divorce had previously been vested by law in the courts. Held, that this took from the legislature all power to act upon the subject in special cases, and the attempt to validate the marriage was consequently ineffectual. That the legislature possesses authority to validate marriages and to give legitimacy to the children of invalid marriages, where the constitution has not taken it away, see *Andrews v. Page*, 3 Heisk. 653; *post*, pp. 777, 779.

Constitutional prohibition of legislative divorces does not make invalid a statute providing that a sentence to life imprisonment shall operate as absolute divorce. *State v. Duket*, 90 Wis. 272, 63 N. W. 83, 31 L. R. A. 515, 48 Am. St. 928; and see note hereto in L. R. A. upon effect of sentence upon marriage relation.

The legislature has the same full control over the *status* of husband and wife which it possesses over the other domestic relations, and may permit or prohibit it, according to its own views of what is for the interest of the parties or the good of the public. In dissolving the relation, it proceeds upon such reasons as to it seem sufficient; and if inquiry is made into the facts of the past, it is no more than is needful when any change of the law is contemplated, with a view to the establishment of more salutary rules for the future. The inquiry, therefore, is not judicial in its nature, and it is not essential that there be any particular finding of misconduct or unfitness in the parties. As in other cases of legislative action, the reasons or the motives of the legislature cannot be inquired into; the relation which the law permitted before is now forbidden, and the parties are absolved from the obligations growing out of that relation which continued so long as the relation existed, but which necessarily ceased with its termination. Marriage is not a contract, but a *status*; the parties cannot have vested rights of property in a domestic relation; therefore the legislative act does not come under condemnation as depriving parties of rights contrary to the law of the land, but, as in other cases within the scope of the legislative authority, the legislative will must be regarded as sufficient reason for the rule which it promulgates.<sup>1</sup>

<sup>1</sup> The leading case on this subject is *Starr v. Pease*, 8 Conn. 541. On the question whether a divorce is necessarily a judicial act, the court say "A further objection is urged against this act; viz., that by the new constitution of 1818, there is an entire separation of the legislative and judicial departments, and that the legislature can now pass no act or resolution not clearly warranted by that constitution; that the constitution is a grant of power, and not a limitation of powers already possessed; and, in short, that there is no reserved power in the legislature since the adoption of this constitution. Precisely the opposite of this is true. From the settlement of the State there have been certain fundamental rules by which power has been exercised. These rules were embodied in an instrument called by some a constitution, by others a charter. All agree that it was the first constitution ever made in Connecticut, and made, too, by the people themselves. It gave very extensive

powers to the legislature, and left too much (for it left everything almost) to their will. The constitution of 1818 proposed to, and in fact did, limit that will. It adopted certain general principles by a preamble called a Declaration of Rights; provided for the election and appointment of certain organs of the government, such as the legislative, executive, and judicial departments; and imposed upon them certain restraints. It found the State sovereign and independent, with a legislative power capable of making all laws necessary for the good of the people, not forbidden by the Constitution of the United States, nor opposed to the sound maxims of legislation; and it left them in the same condition, except so far as limitations were provided. There is now and has been a law in force on the subject of divorces. The law was passed one hundred and thirty years ago. It provides for divorces *a vinculo matrimonii* in four cases; viz., adultery, fraudulent contract, wilful desertion, and seven

The second class of cases to which we have alluded hold that divorce is a judicial act in those cases upon which the general laws confer on the courts power to adjudicate; and that consequently in those cases the legislature cannot pass special laws, but its full control over the relation of marriage will leave it at liberty to grant divorces in other cases, for such causes as shall appear to its wisdom to justify them.<sup>1</sup>

A third class of cases deny altogether the authority of these special legislative enactments, and declare the act of divorce to be in its nature judicial, and not properly within the province of the legislative power.<sup>2</sup> The most of these decisions, however, lay more

years' absence unheard of. The law has remained in substance the same as it was when enacted in 1667. During all this period the legislature has interfered like the Parliament of Great Britain, and passed special acts of divorce *a vinculo matrimonii*; and at almost every session since the Constitution of the United States went into operation, now forty-two years, and for the thirteen years of the existence of the Constitution of Connecticut, such acts have been, in multiplied cases, passed and sanctioned by the constituted authorities of our State. We are not at liberty to inquire into the wisdom of our existing law on this subject; nor into the expediency of such frequent interference by the legislature. We can only inquire into the constitutionality of the act under consideration. The power is not prohibited either by the Constitution of the United States or by that of this State. In view of the appalling consequences of declaring the general law of the State or the repeated acts of our legislature unconstitutional and void, consequences easily conceived, but not easily expressed, — such as bastardizing the issue and subjecting the parties to punishment for adultery, — the court should come to the result only on a solemn conviction that their oaths of office and these constitutions imperiously demand it. Feeling myself no such conviction, I cannot pronounce the act void." Per *Daggett*, J.; *Hosmer*, Ch. J., and *Bissell*, J., concurring. *Peters*, J., dissented. Upon the same subject see *Crane v. Meginnis*, 1 G. & J. 463; *Wright v. Wright*,

2 Md. 429; *Gaines v. Gaines*, 9 B. Monr. 295; *Cabell v. Cabell*, 1 Met. (Ky.) 319; *Dickson v. Dickson*, 1 Yerg. 110; *Melizet's Appeal*, 17 Pa. St. 449; *Cronise v. Cronise*, 54 Pa. St. 255; *Adams v. Palmer*, 51 Me. 480; *Townsend v. Griffin*, 4 Harr. 440; *Noel v. Ewing*, 9 Ind. 37; and the examination of the whole subject by Mr. Bishop, in his work on Marriage and Divorce.

A territorial legislature having power covering all rightful subjects of legislation could grant a divorce. *Maynard v. Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723.

<sup>1</sup> *Levins v. Sleator*, 2 Greene (Iowa), 604; *Opinions of Judges*, 16 Me. 479; *Adams v. Palmer*, 51 Me. 480. See also *Townsend v. Griffin*, 4 Harr. 440.

In a well-reasoned case in Kentucky, it was held that a legislative divorce obtained on the application of one of the parties while suit for divorce was pending in a court of competent jurisdiction would not affect the rights to property of the other, growing out of the relation. *Gaines v. Gaines*, 9 B. Monr. 295.

A statute permitting divorces for offences committed before its passage is not an *ex post facto* law in the constitutional sense. *Jones v. Jones*, 2 Overton, 2, 5 Am. Dec. 645.

<sup>2</sup> *Brigham v. Miller*, 17 Ohio, 445; *Clark v. Clark*, 10 N. H. 380; *Ponder v. Graham*, 4 Fla. 23; *State v. Fry*, 4 Mo. 120; *Bryson v. Campbell*, 12 Mo. 498; *Bryson v. Bryson*, 17 Mo. 590; *Same v. Same*, 44 Mo. 232. See also *Jones v. Jones*, 12 Pa. St. 350, 354.

Under the Constitution of Massa-

or less stress upon clauses in the constitutions other than those which in general terms separate the legislative and judicial functions, and some of them would perhaps have been differently decided but for those other clauses. But it is safe to say that the general sentiment in the legal profession is against the rightfulness of special legislative divorces; and it is believed that, if the question could originally have been considered by the courts, unembarrassed by any considerations of long acquiescence, and of the serious consequences which must result from affirming their unlawfulness, after so many had been granted and new relations formed, it is highly probable that these enactments would have been held to be usurpations of judicial authority, and we should have been spared the necessity for the special constitutional provisions which have since been introduced. Fortunately these provisions render the question now discussed of little practical importance; at the same time that they refer the decision upon applications for divorce to those tribunals which must proceed upon inquiry, and cannot condemn without a hearing.<sup>1</sup>

The force of a legislative divorce must in any case be confined to a dissolution of the relation; it can only be justified on the ground that it merely lays down a rule of conduct for the parties to observe towards each other for the future. It cannot inquire into the past, with a view to punish the parties for their offences against the marriage relation, except so far as the divorce itself can be regarded as a punishment. It cannot order the payment of alimony, for that would be a judgment;<sup>2</sup> it cannot adjudge upon

chusetts, the power of the legislature to grant divorces is denied. *Sparhawk v. Sparhawk*, 116 Mass. 315. See clause in constitution, *ante*, p. 208, note 2.

Where a court is given appellate jurisdiction in *all* cases, it is not competent by statute to forbid its reversing a decree of divorce. *Tierney v. Tierney*, 1 Wash. Ter. 568. See *Nichols v. Griffin*, 1 Wash. Ter. 374.

<sup>1</sup> If marriage is a matter of right, then it would seem that any particular marriage that parties might lawfully form they must have a lawful right to continue in, unless by misbehavior they subject themselves to a forfeiture of the right. And if the legislature can annul the relation in one case, without any finding that a breach of the marriage contract has been committed, then it would seem that they might annul it in every case, and even pro-

hibit all parties from entering into the same relation in the future. The recognition of a full and complete control of the relation in the legislature, to be exercised at its will, leads inevitably to this conclusion; so that, under the "rightful powers of legislation" which our constitutions confer upon the legislative department, a relation essential to organized civil society might be abrogated entirely. Single legislative divorces are but single steps towards this barbarism which the application of the same principle to every individual case, by a general law, would necessarily bring upon us. See what is said by the Supreme Court of Missouri in *Bryson v. Bryson*, 17 Mo. 590, 594.

<sup>2</sup> *Crane v. Meginnis*, 1 G. & J. 463; *Potter's Dwaris on Statutes*, 486; *post*, p. 856, note.

conflicting claims to property between the parties, but it must leave all questions of this character to the courts. Those rights of property which depend upon the continued existence of the relation will be terminated by the dissolution, but only as in any other case rights in the future may be incidentally affected by a change in the law.<sup>1</sup>

*Legislative Encroachments upon Executive Power.*

If it is difficult to point out the precise boundary which separates legislative from judicial duties, it is still more difficult to discriminate, in particular cases, between what is properly legislative and what is properly executive duty. The authority that makes the laws has large discretion in determining the means through which they shall be executed ;<sup>2</sup> and the performance of many duties which they may provide for by law they may refer either to the chief executive of the State, or, at their option, to any other executive or ministerial officer, or even to a person specially named for the duty.<sup>3</sup> What can be definitely said on this subject is this: That

<sup>1</sup> *Starr v. Pease*, 8 Conn. 541.

<sup>2</sup> In *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. S.) 639, the court said: "The governmental powers that are divided into the legislative, executive, and judicial departments, and the exercise of which is forbidden to persons not properly belonging to the particular department, are those so defined by the Constitution, or such as are inherent or so recognized by immemorial governmental usage, and which involve the exercise of primary and independent will, discretion, and judgment, subject not to the control of another department, but only to the limitations imposed by the State and Federal Constitutions. The powers of all the departments are exercised by their proper officials through or by the aid of administrative officers. The Constitution provides for and authorizes the legislature to provide for administrative officers who lawfully perform functions and duties and exercise more or less authority under the direction of officers who have real governmental powers, and who may properly belong to different departments of the government. This clearly indicates that all official duties, authority, and functions prescribed or

contemplated by law are not necessarily governmental powers within the meaning of the constitutional provisions separating the powers of government into departments. The purpose of the Constitution is to secure efficient government by the harmonious co-operation of the separate, independent departments. . . . The exercise of some authority, discretion, or judgment may be incident or necessary to the performance of administrative or ministerial duties; but such authority, discretion, or judgment is subject to judicial review, and is not among the powers of government that the Constitution separates into departments."

The power accorded the legislature by the Constitution for the purpose of regulating intrastate transportation by common carriers is not confined to making rules and regulations. The legislature has authority to do or cause to be done everything in any manner and by any means requisite to the complete and effectual exercise of the power possessed that is not an undoubted violation of some other provision of the Constitution. *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. S.) 639.

<sup>3</sup> This is affirmed in the case of *Bridges v. Shallcross*, 6 W. Va. 562.

The Constitution of that State provides that the governor shall nominate, and by and with the advice and consent of the Senate appoint, all officers whose offices are established by the Constitution or shall be created by law, and whose appointment or election is not otherwise provided for, and that no such officer shall be appointed or elected by the legislature. The court decided that this did not preclude the legislature from creating a board of public works of which the State officers should be *ex officio* the members.

The power to appoint to office is not inherent in the executive department unless conferred by the Constitution or the legislature, but the creation of officers, the delegation and regulation of powers and duties of officers and prescribing the manner of their appointment or election are legislative functions, which are restrained only by the Constitution. *People v. McCullough*, 254 Ill. 9, 98 N. E. 156, Ann. Cas. 1913 B, 995. See also *Mayor, etc., of Americus v. Perry*, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230.

"The general doctrine is that, in the absence of constitutional limitations, the legislature may prescribe how and by whom offices shall be filled. . . . The main consideration in the selection of officers and agents is the public welfare, and the State, like any other principal, may select its agents, may determine for itself who can best accomplish its purpose, and whose appointment will best subserve the public good. When the Constitution prescribes a method, or imposes a limitation, the legislature is to that extent guided and controlled in choosing its officers." *Goodrich v. Mitchell*, 68 Kan. 765, 75 Pac. 1034, 104 Am. St. Rep. 429, 64 L. R. A. 945, 1 Ann. Cas. 288.

The legislature may regulate appointment to statutory offices: *People v. Osborne*, 7 Col. 605. "Where an office is created by statute, it is wholly within the power of the legislature creating it. The length of term and mode of appointment may be altered at pleasure, and the office may be abolished altogether. *People v. Loeffler*, 175 Ill. 585, 51 N. E. 785; *People*

*v. Olson*, 245 Ill. 288, 92 N. E. 157." *People ex rel. Hayne v. McCormick*, 261 Ill. 413, 103 N. E. 1053, Ann. Cas. 1915 A, 338.

The general assembly has authority to provide for the appointment of a number of officers to discharge a given duty, and provide that vacancies in such number may be filled by those remaining in office, thus creating a self-perpetuating body. *Mayor, etc., of Americus v. Perry*, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230.

The Legislature may provide a board of civil service commissioners to prescribe qualifications of all officers not provided for by the constitution: *Opinion of Justices*, 138 Mass. 601. For other cases upon merit system in civil service, see *People v. Kipley*, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; *Chittenden v. Wurster*, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809; *Re Keymer*, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447; *Opinion of Justices*, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58; *Newcomb v. Indianapolis*, 141 Ind. 451, 40 N. E. 919, 28 L. R. A. 732; *Rogers v. Buffalo*, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579; *Neumeyer v. Krakel*, 110 Ky. 624, 62 S. W. 518; *People v. Mosher*, 163 N. Y. 32, 57 N. E. 88, 79 Am. St. 552; *People v. Roberts*, 148 N. Y. 360, 42 N. E. 1082, 31 L. R. A. 399; *People v. Capp*, 61 Colo. 396, 158 Pac. 143; *People v. McCullough*, 254 Ill. 9, 98 N. E. 156, Ann. Cas. 1913 B, 995; *Goodrich v. Mitchell*, 68 Kan. 765, 75 Pac. 1034, 104 Am. St. Rep. 429, 1 Ann. Cas. 288, 64 L. R. A. 945; *Ransom v. Boston*, 192 Mass. 299, 78 N. E. 481, 7 Ann. Cas. 733; *Hale v. Worstell*, 185 N. Y. 247, 77 N. E. 1177, 113 Am. St. Rep. 895; *Slavin v. McGuire*, 205 N. Y. 84, 98 N. E. 405, Ann. Cas. 1913 C, 881; *Barthelmess v. Cukor*, 231 N. Y. 435, 132 N. E. 140, 16 A. L. R. 1404; *Jenkins v. Gronen*, 98 Wash. 128, 167 Pac. 916, L. R. A. 1918 A, 839; *State v. Frear*, 146 Wis. 302, 131 N. W. 832, 34 L. R. A. (N. S.) 480.

The legislature may appoint a State board, if Constitution does not expressly empower the governor to do so. *People v. Freeman*, 80 Cal. 233, 22 Pac. 173. See *Hovey v. State*, 119 Ind.

such powers as are specially conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot require or authorize to be performed by any other officer or authority; and from those duties which the constitution requires of him he cannot be excused by law.<sup>1</sup> But other powers or duties the

386, 21 N. E. 890; *Biggs v. McBride*, 17 Oreg. 640, 21 Pac. 878; *State v. Covington*, 29 Ohio St. 102.

The power of appointment to a particular office may be vested in the State geologist. *State v. Hyde*, 129 Ind. 296, 28 N. E. 186, 13 L. R. A. 79.

Appointment of police officers cannot be intrusted to a bipartisan board, elected half by one party in city council and half by another. *Rathbone v. Wirth*, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408. But a provision that not more than two of the three members of a civil service commission shall be of the same political party is valid. *Rogers v. Buffalo*, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579.

<sup>1</sup> *Attorney-General v. Brown*, 1 Wis. 513. "Whatever power or duty is expressly given to, or imposed upon, the executive department, is altogether free from the interference of the other branches of the government. Especially is this the case where the subject is committed to the discretion of the chief executive officer, either by the constitution or by the laws. So long as the power is vested in him, it is to be by him exercised, and no other branch of the government can control its exercise."

An act of the legislature assuming to make an appropriation of public money for the purpose of conducting an investigation by a committee of its own members, as to the measures necessary to be taken for the protection of certain property rights of the State, is void as an attempt to confer executive power on members of the legislative department in violation of the Constitution. *Stockman v. Leddy*, 55 Colo. 24, 129 Pac. 220, Ann. Cas. 1916 B, 1052.

Where the Constitution does not prohibit the exercise of the appointing power by the legislature, and makes provision in certain contingencies for the election of certain officers by it,

the legislature may, if it is not otherwise provided, exercise the appointing power. *Cox v. State*, 72 Ark. 98, 78 S. W. 756, 105 Am. St. Rep. 17.

Under the Constitution of Ohio, which forbids the exercise of any appointing power by the legislature, except as therein authorized, it was held that the legislature could not, by law, constitute certain designated persons a State board, with power to appoint commissioners of the State House, and directors of the penitentiary, and to remove such directors for cause. *State v. Kennon*, 7 Ohio St. 546.

By the Indiana Constitution all officers whose appointment is not otherwise provided for, shall be chosen in such manner as shall be prescribed by law. The power to ordain the "manner" does not give the legislature power to appoint. *State v. Denny*, 118 Ind. 382, 21 N. E. 252, 274, 4 L. R. A. 79; *Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93. And see *Davis v. State*, 7 Md. 151; *O'Connor v. Fond du Lac*, 109 Wis. 253, 85 N. W. 327; also cases referred to in preceding note.

The governor's power of appointment cannot be indirectly taken away; as by abolishing the office or offices and creating another and attaching to it the duties of the office or offices abolished. *Johnson v. State*, 59 N. J. L. 535, 37 Atl. 949, 38 L. R. A. 373, 39 Atl. 646. As to what are public officers, see *State v. Stanley*, 66 N. C. 59, 8 Am. Rep. 488.

An appointment to office was said, in *Taylor v. Commonwealth*, 3 J. J. Marsh. 401, to be intrinsically an executive act. In a certain sense this is doubtless so, but it would not follow that the legislature could exercise no appointing power, or could confer none on others than the chief executive of the State. Where the constitution contains no negative words to limit

the legislative authority in this regard, the legislature in enacting a law must decide for itself what are the suitable, convenient, or necessary agencies for its execution, and the authority of the executive must be limited to taking care that the law is executed by such agencies. See *Baltimore v. State*, 15 Md. 376; *State v. Henderson*, 4 Wyo. 535, 35 Pac. 517, 22 L. R. A. 751; *Fox v. McDonald*, 101 Ala. 51, 13 So. 416, 21 L. R. A. 529, 46 Am. St. 98; *State v. George*, 22 Oreg. 142, 29 Pac. 356, 16 L. R. A. 737, 29 Am. St. 586.

The assignment, conformably to Federal statute, of a judge of one Federal district and circuit to perform duty in another district of another circuit does not usurp the power of appointment and confirmation vested by the Federal Constitution in the President and Senate. *Lamar v. United States*, 241 U. S. 103, 60 L. ed. 912, 36 Sup. Ct. Rep. 535.

That power to appoint City Commissioners may be given to circuit judges. See *Terre Haute v. Evansville and T. H. Ry. Co.*, 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189; and see note 16 L. R. A. 737 on the constitutional power of courts or judges to appoint officers.

In Minnesota it has been held that a statute requiring the judges of the district court of a county to appoint the members of the board of control of the county, is unconstitutional, because it imposes upon the judiciary duties and functions which are not judicial and which belong to another department of the government. *State ex rel. Young v. Brill*, 100 Minn. 499, 111 N. W. 294, 639, 10 Ann. Cas. 425. See also *State ex rel. Thompson v. Nebel*, 82 Neb. 267, 117 N. W. 723, 19 L. R. A. (N. S.) 578.

With regard to requirements of merit in appointees and competitive examinations for the ascertainment thereof, see *People v. Kipley*, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775; *Chittenden v. Wurster*, 152 N. Y. 345, 46 N. E. 857, 37 L. R. A. 809; *Re Keymer*, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447; *Opinion of Justices*, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58; *People v. Roberts*, 148 N. Y.

360, 42 N. E. 1082, 31 L. R. A. 399; *Newcomb v. Indianapolis*, 141 Ind. 451, 40 N. E. 919, 28 L. R. A. 732; *Rogers v. Buffalo*, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579; *Neumeyer v. Krakel*, 110 Ky. 624, 62 S. W. 518; *People v. Mosher*, 163 N. Y. 32, 57 N. E. 88, 79 Am. St. 552; *People v. Steward*, 249 Ill. 311, 94 N. E. 511, 33 L. R. A. (N. S.) 259, Ann. Cas. 1912 A, 135; *People v. McCullough*, 254 Ill. 9, 98 N. E. 156, Ann. Cas. 1913 B, 995; *Barthelmess v. Cukor*, 231 N. Y. 435, 132 N. E. 140, 16 A. L. R. 1404; *State v. Frear*, 146 Wis. 291, 131 N. W. 832, 34 L. R. A. (N. S.) 480.

The mayor of a city may be empowered to appoint the principal executive officers thereof. *Datz v. Cleveland*, 52 N. J. L. 188, 19 Atl. 17, 7 L. R. A. 431. For other cases on appointing power, see *State v. Boucher*, 3 N. D. 389, 56 N. W. 142, 21 L. R. A. 539.

Where an office is not mentioned in the Constitution, but is a creature of statute, the legislature may abolish it, or may lengthen its term. *State ex rel. Hensley v. Plasters*, 74 Neb. 652, 105 N. W. 1092, 3 L. R. A. (N. S.) 887, 13 Ann. Cas. 154.

A statute authorizing the governor to remove a public officer for neglect of duty or misconduct in office, giving him a copy of the charges against him and an opportunity of being publicly heard in his own defense, does not violate the constitutional provision dividing the power of government into the legislative, executive and judicial departments, and declaring that "no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others." *McGran v. Gaul*, 96 N. J. L. 165, 112 Atl. 603.

Where the governor has power to remove an officer for neglect of duty, he is the sole judge whether the duty has been neglected. *State v. Doherty*, 25 La. Ann. 119, 13 Am. Rep. 131; *State v. Johnson*, 30 Fla. 433, 11 So. 845, 18 L. R. A. 410; and see *Trainor v. Wayne Co. Auditors*, 89 Mich. 162, 50 N. W. 809, 15 L. R. A. 95, and note on power of summary removal. The



courts cannot review his action if it is taken after a hearing: *State v. Hawkins*, 44 Ohio St. 98, 5 N. E. 228; but he must afford an opportunity for defence. *Dullam v. Willson*, 53 Mich. 392, 19 N. W. 112; *State v. Johnson*, 30 Fla. 433, 11 So. 845, 18 L. R. A. 410; *State v. Smith*, 35 Neb. 13, 52 N. W. 700, 16 L. R. A. 791; *Biggs v. McBride*, 17 Oreg. 640, 21 Pac. 878, 5 L. R. A. 115; *Ekern v. McGovern*, 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 796. *Contra*, unless the right is expressly secured to the officer. *Donahue v. Will Co.*, 100 Ill. 94, and cases cited.

For a case of removal for gross carelessness in declaring the result of a vote upon a constitutional amendment, see *Attorney-General v. Jochim*, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699, 41 Am. St. 606.

Provision for impeachment or removal does not prevent virtual removal by legislature through statute abolishing the office and creating another with same duties and powers. *State v. Hyde*, 129 Ind. 296, 28 N. E. 186, 13 L. R. A. 79. Power of removal cannot be conferred on court. *Gordon v. Moores*, 61 Neb. 345, 85 N. W. 298.

If the governor has power to appoint with the consent of Senate, and to remove, he may remove without such consent. *Lane v. Com.*, 103 Pa. St. 481; *Harman v. Harwood*, 58 Md. 1. See, as to discretionary powers, *ante*, pp. 101-104, notes.

The pardoning power is neither naturally nor necessarily an executive power. It is a power of government inherent in the people, who by constitutional provision may vest it in whole or in part in any official they choose. *Jamison v. Flanner*, 116 Kan. 624, 228 Pac. 82. See also *State v. Dunning*, 9 Ind. 20. But where the power is given to the governor by the Constitution in unrestricted terms, it cannot be taken away; nor can a like power be given by the legislature to any other officer or authority. *In re Conditional Discharge of Convicts*, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658; *State ex rel. Hallanan v. Thompson*, 80 W. Va. 698, 93 S. E. 810.

"The vestiture of the power to grant

reprieves and pardons in the chief executive is exclusive of all other departments of the State, and the legislature cannot, directly or indirectly, take it from his control, and vest it in others, or authorize or require it to be exercised by any other officer or authority. It is a power and duty intrusted to his judgment and discretion, which cannot be interfered with, and of which he cannot be relieved." *Fite v. State*, 114 Tenn. 646, 88 S. W. 941, 1 L. R. A. (N. S.) 520, 4 Ann. Cas. 1108.

In Indiana the Supreme Court cannot be invested with power to grant reprieves. *Butler v. State*, 97 Ind. 373. But the Supreme Court of the United States has held that the practice of granting remissions of pecuniary penalties and forfeitures, by Federal officers other than the President, sanctioned by statute and acquiescence for nearly a century, as a valid exercise of authority, and no invasion of the power of pardon granted by the Constitution to the President, is too firmly established to be questioned. *The Laura*, 114 U. S. 411, 29 L. ed. 147, 5 Sup. Ct. Rep. 881.

A statute which authorizes a court or justice of the peace to release a fine or jail sentence, imposed as a punishment for an offense, violates the constitutional provision limiting the power to remit fines and penalties and grant reprieves and pardons, after conviction, to the governor; but if the statute does no more than authorize suspension, for good cause, of so much only of the judgment of conviction as requires the prisoner to work on the public roads, it does not violate such constitutional provision. *State ex rel. Hallanan v. Thompson*, 80 W. Va. 698, 93 S. E. 810.

A statute providing that on an investigation into a certain crime, no person shall be excused from testifying on the ground that his evidence might subject him to prosecution or tend to incriminate him, but that such person when so examined shall be altogether pardoned of any and all participation in the crime, does not violate the constitutional provision conferring on the Governor the power

executive cannot exercise or assume except by legislative authority, and the power which in its discretion it confers it may also in its discretion withhold, or confide to other hands.<sup>1</sup> Whether in those cases where power is given by the constitution to the governor, the legislature have the same authority to make rules for the exercise

to grant pardons after conviction. *State v. Bowman*, 145 N. C. 452, 59 S. E. 74, 122 Am. St. Rep. 464.

The executive, it has been decided, has power to pardon for contempt of court. *State v. Sauvinet*, 24 La. Ann. 119, 13 Am. Rep. 115; *Sharp v. State*, 102 Tenn. 9, 49 S. W. 752, 43 L. R. A. 788, 73 Am. St. 851; *State v. Magee Publishing Co.*, 29 N. M. 455, 224 Pac. 1028, 38 A. L. R. 142.

Under the Federal Constitution the power of the President to pardon extends to criminal contempts of court. *Ex parte Grossman*, 267 U. S. 87, 69 L. ed. 377, 45 Sup. Ct. Rep. 332, 38 A. L. R. 131. See also *State v. Magee Publishing Co.*, 29 N. M. 455, 224 Pac. 1028, 38 A. L. R. 142. The President's power to pardon does not extend to the restoration of property which has been judicially forfeited. *Knote v. United States*, 10 Ct. of Cl. 397, and 95 U. S. 149, 24 L. ed. 442; *Osborn v. United States*, 91 U. S. 474, 23 L. ed. 388.

A general power to pardon may be exercised before as well as after conviction. *Lapeyre v. United States*, 17 Wall. 191, 21 L. ed. 606; *Dominick v. Bowdoin*, 44 Ga. 357; *Grubb v. Bullock*, 44 Ga. 379; *Terr. v. Richardson*, 9 Okla. 579, 60 Pac. 244, 49 L. R. A. 440. The pardon may be granted by general proclamation. *Carlisle v. United States*, 16 Wall. 147, 21 L. ed. 426; *Lapeyre v. United States*, 17 Wall. 191, 21 L. ed. 606. The delivery of a pardon to the prison warden, makes it operative. *Ex parte Powell*, 73 Ala. 517.

One receiving a full pardon from the President cannot afterwards be required by law to establish loyalty as a condition to the assertion of legal rights. *Carlisle v. United States*, 16 Wall. 147, 21 L. ed. 426. Nor be prosecuted in a civil action for the same acts for which he is pardoned. *United States v. McKee*, 4 Dill. 128.

Pardon removes all disabilities resulting from conviction, and may be granted after sentence executed. *State v. Foley*, 15 Nev. 64, 37 Am. Rep. 458; *Edwards v. Com.*, 78 Va. 39; *State v. Dodson*, 16 S. C. 453; *State v. Martin*, 59 Ohio, 812, 52 N. E. 188, 43 L. R. A. 94, 69 Am. St. 762. But a mere executive order to discharge from custody is not such a pardon. *State v. Kirschner*, 23 Mo. App. 349. It does not release from the obligation to pay costs of the prosecution. *In re Boyd*, 34 Kan. 570, 9 Pac. 240; *Smith v. State*, 6 Lea, 637.

Upon invalidity of legislative pardon, see *Singleton v. State*, 38 Fla. 297, 21 So. 21, 34 L. R. A. 251, 56 Am. St. 177, and note thereto in L. R. A.

<sup>1</sup> "In deciding this question [as to the authority of the governor], recurrence must be had to the constitution. That furnishes the only rule by which the court can be governed. That is the charter of the governor's authority. All the powers delegated to him by or in accordance with that instrument, he is entitled to exercise, and no others. The constitution is a limitation upon the powers of the legislative department of the government, but it is to be regarded as a grant of powers to the other departments. Neither the executive nor the judiciary, therefore, can exercise any authority or power except such as is clearly granted by the constitution." *Field v. People*, 3 Ill. 79, 80.

Where an office is created by statute it may be filled by election or by appointment just as the legislature may prescribe. *Townley v. Hartsfield*, 113 Ark. 253, 168 S. W. 140, Ann. Cas. 1916 C, 643.

It is competent for the legislature to provide a summary procedure for the removal of public officers whose removal is not provided for in the Constitution. *Rankin v. Jauman*, 4

of the power that they have to make rules to govern the proceedings in the courts, may perhaps be a question.<sup>1</sup> It would seem that this must depend generally upon the nature of the power, and upon the question whether the constitution, in conferring it, has furnished a sufficient rule for its exercise. Where complete power to pardon is conferred upon the executive, it may be doubted if the legislature can impose restrictions under the name of rules or regulations<sup>2</sup>

Idaho, 53, 36 Pac. 502; *People ex rel. Clay v. Stuart*, 74 Mich. 411, 41 N. W. 1091, 16 Am. St. Rep. 644; *State ex rel. Timothy v. Howse*, 134 Tenn. 67, 183 S. W. 510, L. R. A. 1916 D, 1090, Ann. Cas. 1917 C, 1125.

<sup>1</sup> In *Morgan v. Buffington*, 21 Mo. 549, it was held that the State auditor was not obliged to accept as conclusive the certificate from the Speaker of the House as to the sum due a member of the House for attendance upon it, but that he might lawfully inquire whether the amount had been actually earned by attendance or not. The legislative rule, therefore, cannot go to the extent of compelling an executive officer to do something else than his duty, under any pretence of regulation.

<sup>2</sup> Where the pardoning power is vested exclusively in the governor any law which restricts the power is unconstitutional. *Ex parte Ridley*, 3 Okla. Crim. Rep. 350, 106 Pac. 549, 26 L. R. A. (N. S.) 110; *In re Conditional Discharge of Convicts*, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658. But provision may be made by legislation which shall render the exercise of the power convenient and efficient. *Ex parte Horine*, 11 Okla. Crim. Rep. 517, 148 Pac. 825, L. R. A. 1915 F, 548.

Whether the legislature can constitutionally remit a fine, when the pardoning power is vested in the governor by the constitution, has been made a question; and the cases of *Haley v. Clarke*, 26 Ala. 439, and *People v. Bircham*, 12 Cal. 50, are opposed to each other upon the point. If the fine is payable to the State, perhaps the legislature should be considered as having the same right to discharge it that they would have to release any other debtor to the State from his obligation.

It has been decided that to give parties who have been convicted and fined the benefit of the insolvent laws is not an exercise of the pardoning power. *Ex parte Scott*, 19 Ohio St. 581. And where the constitution provided that "In all criminal and penal cases, except those of treason and impeachment, [the governor] shall have power to grant pardons after conviction, and remit fines and forfeitures", &c., it was held that this did not preclude the legislature from passing an act of pardon and amnesty for parties liable to prosecution, but not yet convicted. *State v. Nichols*, 26 Ark. 74, 7 Am. Rep. 600.

The decided weight of authority supports the rule that a statute authorizing the courts to suspend sentences does not violate the constitutional provision that the governor shall have power to grant reprieves and pardons and to remit fines and forfeitures. *Barrett v. State*, 18 Ala. App. 246, 90 So. 13; *In re Giannini*, 18 Cal. App. 166, 122 Pac. 831; *Martin v. People*, 69 Colo. 60, 168 Pac. 1171; *People v. Stickle*, 156 Mich. 557, 121 N. W. 497; *Ex parte Bates*, 20 N. M. 542, 151 Pac. 698, L. R. A. 1916 A, 1285; *People ex rel. Sullivan v. Flynn*, 55 Misc. (N. Y.) 639, 106 N. Y. Supp. 925; *People v. Goodrich*, 149 N. Y. Supp. 406; *In re Hart*, 29 N. D. 38, 149 N. W. 568, L. R. A. 1915 C, 1169; *State v. Teal*, 108 S. C. 455, 95 S. E. 69; *Baker v. State*, 70 Tex. Crim. Rep. 618, 158 S. W. 998; *Cook v. State*, 73 Tex. Crim. Rep. 548, 165 S. W. 573; *King v. State*, 72 Tex. Crim. Rep. 394, 162 S. W. 890; *Richardson v. Com.*, 131 Va. 802, 109 S. E. 460; *State v. Mallahan*, 65 Wash. 287, 118 Pac. 42; *State ex rel. Tingstad v. Starwich*, 119 Wash. 561, 206 Pac. 29, 26 A. L. R. 393. See also *Belden v.*

[unless the constitution expressly authorizes it to do so;<sup>1</sup>] but where the governor is made commander-in-chief of the military forces of

Hugo, 88 Conn. 500, 91 Atl. 369. Compare *People v. Brown*, 54 Mich. 15, 19 N. W. 571. But in a few jurisdictions such a statute is held to be unconstitutional. *Ex parte Shalor*, 33 Nev. 361, 111 Pac. 291; *State ex rel. Summerfield v. Moran*, 43 Nev. 150, 182 Pac. 927; *State ex rel. Payne v. Anderson*, 43 S. D. 630, 181 N. W. 839; *State ex rel. Hallanan v. Thompson*, 80 W. Va. 698, 93 S. E. 810. Sentence may be suspended after conviction, and such suspension may be withdrawn at any time. *People v. Monroe Co. Ct.*, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856.

In Oklahoma it has been held that under a constitutional provision conferring the pardoning power upon the governor, the governor has exclusive power to parole a convict, with such restrictions and limitations as he may deem proper. *Ex parte Ridley*, 3 Okla. Crim. Rep. 350, 106 Pac. 549, 26 L. R. A. (N. S.) 110. And in Michigan a statute authorizing sentence of a prisoner for an indefinite term not less than the minimum prescribed by law nor greater than the maximum with authority to the board of prison control to release on parol after expiration of minimum period and to recommit upon violation of parol has been held void as infringing upon governor's pardoning power. *People v. Cummings*, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285, and note. But in Ohio an act allowing a prisoner to go on parol, but in legal control of prison managers and subject to recall, has been held valid. *State v. Peters*, 43 Ohio St. 629, 4 N. E. 81.

A law giving to prisoners certain deductions from their term of imprisonment for good behavior is not unconstitutional as an infringement of the prerogative of the governor to pardon. *Ex parte Ridley*, 3 Okla. Crim. Rep. 350, 106 Pac. 549, 26 L. R. A. (N. S.) 110. An act providing for credits on sentences of convicts, where such credits are specifically defined, and where the provisions of the statute operate alone upon sentences of con-

victs who have been imprisoned subsequent to the passage of the statute, is not an invasion of the constitutional prerogative of the governor. But where the matter of credits is left to the arbitrary discretion of a board of workhouse commissioners it is an unconstitutional delegation of legislative authority. *Fite v. State*, 114 Tenn. 646, 88 S. W. 941, 1 L. R. A. (N. S.) 520, 4 Ann. Cas. 1108.

Where board of pardons has only advisory power, the governor's pardoning power is in nowise infringed. *Rich v. Chamberlain*, 104 Mich. 436, 62 N. W. 584, 27 L. R. A. 573.

The power to reprieve is not included in the power to pardon. *Ex parte Howard*, 17 N. H. 545. *Contra*, *Ex parte Fleming*, 60 Miss. 910. In Kansas it has been held that the power to pardon includes the power to grant commutations of sentences, to grant pardons and commutations with or without conditions, and to remit fines and forfeitures. *Jamison v. Flanner*, 116 Kan. 624, 228 Pac. 82.

An act approved by the governor vacating a conviction operates as a pardon. *People v. Stewart*, 1 Idaho, 546. Pardons may be made conditional, and forfeited if the condition is not observed. *State v. Smith*, 1 Bailey, 283; *Lee v. Murphy*, 22 Gratt. 789; *Re Ruhl*, 5 Sawyer, 186; *Kennedy's Case*, 135 Mass. 48; *Ex parte Marks*, 64 Cal. 29, 28 Pac. 109. The governor may annex to a pardon or parole any condition precedent or subsequent, provided it be not illegal, immoral, or impossible to be performed. *Ex parte Horine*, 11 Okla. Crim. Rep. 517, 148 Pac. 825, L. R. A. 1915 F, 548. But a pardon obtained by fraud is held conclusive, though afterward declared null by the governor. *Knapp v. Thomas*, 39 Ohio St. 377.

A pardon does not relieve from forfeiture of bail bond. *Dale v. Commonwealth*, 101 Ky. 612, 42 S. W. 93, 38 L. R. A. 808.

<sup>1</sup>Several of the State constitutions have provided that the power to par-

the State, it is obvious that his authority must be exercised under such proper rules as the legislature may prescribe, because the military forces are themselves under the control of the legislature, and military law is prescribed by that department. There would be this clear limitation upon the power of the legislature to prescribe rules for the executive department; that they must not be such as, under pretence of regulation, divest the executive of, or preclude his exercising, any of his constitutional prerogatives or powers. Those matters which the constitution specifically confides to him the legislature cannot directly or indirectly take from his control. And on the other hand the legislature cannot confer upon him judicial authority; such as the authority to set aside the registration of voters in a municipality;<sup>1</sup> or clothe him with any authority, not executive in its nature, which the legislature itself, under the constitution, is restricted from exercising.<sup>2</sup>

It may be proper to say here, that the executive, in the proper discharge of his duties under the constitution, is as independent of the courts as he is of the legislature.<sup>3</sup>

don shall be exercised under such regulations as shall be prescribed by law. There are provisions more or less broad to this purport in those of Kansas, Florida, Alabama, Arkansas, Texas, Mississippi, Oregon, Indiana, Iowa, and Virginia.

Where the constitution provides that "the pardoning power shall be vested in the governor, under regulations and restrictions prescribed by law", the legislature may make such regulations and restrictions upon the pardoning power of the governor as it deems best; and a pardon or commutation of sentence issued by the governor without compliance with the regulations and restrictions prescribed is void. *Jamison v. Flanner*, 116 Kan. 624, 228 Pac. 82.

In *State v. Dunning*, 9 Ind. 20, an act of the legislature requiring the applicant for the remission of a fine or forfeiture to forward to the governor, with his application, the opinion of certain county officers as to the propriety of the remission, was sustained as an act within the power conferred by the constitution upon the legislature to prescribe regulations in these cases. And see *Branham v. Lange*, 16 Ind. 497.

<sup>1</sup> *State v. Staten*, 6 Cold. 233.

<sup>2</sup> *Smith v. Norment*, 5 Yerg. 271.

<sup>3</sup> An executive officer cannot be enjoined from acting. *Smith v. Myers*, 109 Ind. 1; *Bates v. Taylor*, 87 Tenn. 319. See *Lacy v. Martin*, 39 Kan. 703, 18 Pac. 957; *Kilpatrick v. Smith*, 77 Va. 347. But as to the rule in Minnesota, see *post*, 224 note.

"When the governor, in pursuance of his executive authority, recognizes an act as legal, and is proceeding to execute its provisions, the courts cannot directly interfere with the discharge of his duties under it, merely because it is alleged that such act is unconstitutional." *Frost v. Thomas*, 26 Colo. 222, 56 Pac. 899, 77 Am. St. Rep. 259. As to mere error of judgment on the part of the governor in the exercise of his lawful authority, his acts are not reviewable by the court. Within his jurisdiction, both he and those who act by his direction are immune from judicial remedies. *Ekern v. McGovern*, 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 796. As to the jurisdiction of the courts to issue the writ of certiorari to review the action of the governor, see *State ex rel. Rawlinson v. Ansel*, 76 S. C. 395, 57 S. E. 185. 11 Ann. Cas. 613.

the rule that the governor cannot be compelled by mandamus to perform even a ministerial duty involving no discretion whatever; and this rule prevails in some states where other officers may be compelled to perform such duties.<sup>1</sup> But a strong minority opinion sanctions the doctrine that the governor may be compelled by mandamus to perform purely ministerial duties.<sup>2</sup>

Ann. Cas. 613; *Simmons v. State Military Board*, 99 Va. 390, 39 S. E. 125.

In *State ex rel. Rawlinson v. Ansel*, 76 S. C. 395, 57 S. E. 185, 11 Ann. Cas. 613, the court says: "All the authorities agree that, in the exercise of a discretionary official act, an executive officer cannot be restrained, coerced or controlled by the judicial department. But as applied to members of the executive department, other than the chief executive, jurisdiction is generally asserted by the courts to compel the performance of an official duty imposed by law, which is plainly ministerial and involves no discretion."

There are many cases holding that the governor cannot be compelled to perform any political or executive duty in relation to which he has a discretion. *State v. Henderson*, 199 Ala. 244, 74 So. 344, L. R. A. 1917 F, 770; *Arizona Insane Asylum v. Wolfly*, 3 Ariz. 132, 22 Pac. 383, 38 L. R. A. 188; *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 432; *Greenwood Cemetery Land Co. v. Routt*, 11 Colo. 156, 28 Pac. 1125, 31 Am. St. Rep. 284, 15 L. R. A. 369; *Traynor v. Beckham*, 116 Ky. 13, 74 S. W. 1105, 76 S. W. 844, 3 Ann. Cas. 388; *Miles v. Bradford*, 22 Md. 170, 85 Am. Dec. 643; *Rice v. Governor*, 207 Mass. 577, 93 N. E. 821, 32 L. R. A. (N. S.) 355; *People v. Governor*, 29 Mich. 320, 18 Am. Rep. 89; *Cooke v. Iverson*, 108 Minn. 388, 122 N. W. 251, 52 L. R. A. (N. S.) 415; *Pacific R. Co. v. Governor*, 23 Mo. 353, 66 Am. Dec. 673; *State v. Rickards*, 16 Mont. 145, 40 Pac. 210, 50 Am. St. Rep. 476, 28 L. R. A. 298; *State v. Boyd*, 36 Neb. 181, 54 N. W. 252, 19 L. R. A. 227; *People v. Morton*, 156 N. Y. 136, 50 N. E. 791, 66 Am. St. Rep. 547, 41 L. R. A. 231; *Mauran v. Smith*, 8

R. I. 192, 5 Am. Rep. 564; *State ex rel. Rawlinson v. Ansel*, 76 S. C. 395, 57 S. E. 185, 11 Ann. Cas. 613; *Jonesboro, etc., Turnpike Co. v. Brown*, 8 Baxt. (Tenn.) 490, 35 Am. Rep. 713; *State v. Brooks*, 14 Wyo. 393, 84 Pac. 488, 6 L. R. A. (N. S.) 750, 7 Ann. Cas. 1108.

<sup>1</sup> *Hawkins v. Governor*, 1 Ark. 570, 33 Am. Dec. 346; *People v. Bissell*, 19 Ill. 229, 68 Am. Dec. 591; *People v. Dunne*, 258 Ill. 441, 101 N. E. 560, 45 L. R. A. (N. S.) 500; *Hovey v. State*, 127 Ind. 588, 27 N. E. 175, 22 Am. St. Rep. 663, 11 L. R. A. 763; *State v. Wormouth*, 22 La. Ann. 1, 2 Am. Rep. 712; *State v. Wormouth*, 24 La. Ann. 351, 13 Am. Rep. 126; *In re Dennett*, 32 Me. 508, 54 Am. Dec. 602; *Rice v. Governor*, 207 Mass. 577, 93 N. E. 821, 32 L. R. A. (N. S.) 355; *People v. Governor*, 29 Mich. 320, 18 Am. Rep. 89; *Vicksburg, etc., R. Co. v. Lowry*, 61 Miss. 102, 48 Am. Rep. 76; *State v. Stone*, 120 Mo. 428, 25 S. W. 376, 41 Am. St. Rep. 705, 23 L. R. A. 194; *People v. Morton*, 156 N. Y. 236, 50 N. E. 791, 66 Am. St. Rep. 547, 41 L. R. A. 231; *People v. Best*, 187 N. Y. 1, 79 N. E. 890, 116 Am. St. Rep. 589, 10 Ann. Cas. 58; *Mauran v. Smith*, 8 R. I. 192, 5 Am. Rep. 564; *Jonesboro, etc., Turnpike Co. v. Brown*, 8 Baxt. (Tenn.) 490, 35 Am. Rep. 713; *Bates v. Taylor, Governor*, 87 Tenn. 319, 11 S. W. 266, 3 L. R. A. 316.

<sup>2</sup> *State v. Henderson*, 199 Ala. 244, 74 So. 344, L. R. A. 1917 F, 770; *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 432; *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 156, 28 Pac. 1125, 31 Am. St. Rep. 284, 15 L. R. A. 369; *Traynor v. Beckham*, 116 Ky. 13, 74 S. W. 1105, 76 S. W. 844, 3 Ann. Cas. 388; *Warfield v. Vandiver*, 101 Md. 78, 60 Atl. 538, 4 Ann. Cas. 692; *State v. Elder*, 31 Neb.

[Though the authorities are not in universal agreement as to whether the writ of mandamus will lie to compel the performance of executive duties,<sup>1</sup> they agree in holding that where the duty sought to be enforced is not merely ministerial, but one involving discretion, it cannot be enforced by the writ.<sup>2</sup> The weight of authority supports

In Maryland, the proclamation of the governor that a proposed amendment to the Constitution has been duly adopted is not subject to review by any other officer or department. *Worman v. Hagan*, 78 Md. 152, 27 Atl. 616, 21 L. R. A. 716. In *Hartnft's Appeal*, 85 Pa. St. 433, 27 Am. Rep. 667, it was decided that the governor was not subject to the subpoena of the grand jury.

If in the removal of a sheriff the governor was acting in a quasi judicial capacity, a court may examine the proceedings to the extent of ascertaining whether he acted within his jurisdiction. *State ex rel. Rodd v. Verage*, 177 Wis. 295, 187 N. W. 830, 23 A. L. R. 491. For effect of clause denying governor power to remove officers for partisan reasons, see *People v. Martin*, 19 Col. 565, 36 Pac. 543, 24 L. R. A. 201.

A court will not inquire into the motives which prompted a pardoning official to issue a pardon, for to do so would be to usurp the pardoning power; but it will inquire into the authority of the pardoning official to issue the pardon, and as to whether fraud was practised upon such official, and it will interpret and construe the pardon. *Jamison v. Flanner*, 116 Kan. 624, 228 Pac. 82, 35 A. L. R. 973. That court will not interfere with the exercise of discretion on the part of a railroad commission where such discretion is authorized by law, see *Louisville & N. R. Co. v. Commonwealth*, 104 Ky. 226, 46 S. W. 707, 47 S. W. 598, 48 S. W. 416, 43 L. R. A. 541, 549, 550.

<sup>1</sup> In the following cases the power has either been expressly affirmed, or it has been exercised without being questioned. *State v. Moffitt*, 5 Ohio, 358; *State v. Governor*, 5 Ohio St. 529; *Coltin v. Ellis*, 7 Jones (N. C.), 545; *Magruder v. Governor*, 25 Md. 173; *Groome v. Gwinn*, 43 Md. 572; Ten-

nessee, &c. *R. R. Co. v. Moore*, 36 Ala. 371; *Middleton v. Lowe*, 30 Cal. 596; *Harpending v. Haight*, 39 Cal. 189, 2 Am. Rep. 433; *Chumasero v. Potts*, 2 Mont. 244; *Martin v. Ingham*, 38 Kan. 641, 17 Pac. 162; *Clement v. Graham*, 78 Vt. 290, 63 Atl. 146, Ann. Cas. 1913 E, 1208. See *Hatch v. Stoneman*, 66 Cal. 632, 6 Pac. 734. In the following cases the power has been denied: *Hawkins v. Governor*, 1 Ark. 570; *Low v. Towns*, 8 Ga. 360; *State v. Kirkwood*, 14 Iowa, 162; *Dennett, Petitioner*, 32 Me. 510; *People v. Bissell*, 19 Ill. 229; *People v. Yates*, 40 Ill. 126; *People v. Cullom*, 100 Ill. 472; *State v. Governor*, 25 N. J. 331; *Mauran v. Smith*, 8 R. I. 192; *State v. Warmoth*, 22 La. Ann. 1, 2 Am. Rep. 712; *Same v. Same*, 24 La. Ann. 351, 13 Am. Rep. 126; *People v. Governor*, 29 Mich. 320, 18 Am. Rep. 89; *State v. Governor*, 39 Mo. 388; *Vicksburg & M. R. R. Co. v. Lowry*, 61 Miss. 102; *Bates v. Taylor*, 3 Pick. (Tenn.) 319, 11 S. W. 266; *People v. Morton*, 156 N. Y. 136, 50 N. E. 791, 66 Am. St. 547; *State ex rel. Robb v. Stone*, 120 Mo. 428, 25 S. W. 376, 23 L. R. A. 194, 41 Am. St. Rep. 705.

<sup>2</sup> *United States v. Seaman*, 17 How. 225, 15 L. ed. 226; *United States v. Windon*, 137 U. S. 636, 34 L. ed. 811, 11 Sup. Ct. Rep. 197; *United States v. Blaine*, 139 U. S. 306, 35 L. ed. 183, 11 Sup. Ct. Rep. 607; *United States v. Lamont*, 155 U. S. 303, 39 L. ed. 160, 15 Sup. Ct. Rep. 97; *United States v. Hitchcock*, 190 U. S. 316, 47 L. ed. 1074, 23 Sup. Ct. Rep. 698; *American Casualty Ins., etc., Co. v. Fyler*, 60 Conn. 448, 22 Atl. 494, 25 Am. St. Rep. 337; *Payne v. United States*, 20 App. Cas. (D. C.) 581; *State v. Wormouth*, 23 La. Ann. 76; *State v. Board of Liquidation*, 33 La. Ann. 124; *People v. State Prison*, 44 Mich. 187; *State ex rel. Rawlinson v. Ansel*, 76 S. C. 395, 57 S. E. 185, 11

When, however, a judicial question arises the judicial department is not bound to desist from dealing therewith merely because the alleged wrongdoer is the governor or a person acting by his direction.<sup>1]</sup>

*Delegating Legislative Powers.*

One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.<sup>2</sup>

169, 47 N. W. 710, 10 L. R. A. 796; *State v. Boyd*, 36 Neb. 181, 54 N. W. 252, 19 L. R. A. 227; *State v. Brooks*, 14 Wyo. 393, 84 Pac. 488, 6 L. R. A. (N. S.) 750, 7 Ann. Cas. 1108.

In Minnesota it has been held that courts cannot, by injunction, mandamus, or other process, control or direct the head of the executive department of the State in the discharge of any executive duty involving the exercise of his discretion; but that where duties purely ministerial in character are conferred upon the chief executive, or any member of the executive department, and he refuses to act, or where he assumes to act in violation of the Constitution and laws of the State, he may be compelled to act or restrained from acting, as the case may be, at the suit of one who is injured thereby in his person or his property, for which he has no other adequate remedy. *Chamberlain v. Sibley*, 4 Minn. 309; *Cooke v. Iverson*, 108 Minn. 388, 122 N. W. 251, 52 L. R. A. (N. S.) 415, explaining or qualifying *Rice v. Austin*, 19 Minn. 103, 18 Am. Rep. 330; *State ex rel. County Treasurer v. Dike*, 20 Minn. 363; *Western R. Co. v. De Graff*, 27 Minn. 1, 6 N. W. 341; *State v. Whit-*

*comb*, 28 Minn. 50, 8 N. W. 902, and *State v. Braden*, 40 Minn. 174, 41 N. W. 817. See also *Hayne v. Metropolitan Trust Co.*, 67 Minn. 245, 69 N. W. 916; *Higgins v. Berg*, 74 Minn. 11, 76 N. W. 788, 42 L. R. A. 245; *Davidson v. Hanson*, 87 Minn. 211, 91 N. W. 1124, 92 N. W. 93; *State v. Hanson*, 93 Minn. 178, 100 N. W. 1124, 102 N. W. 209.

<sup>1</sup> *Ekern v. McGovern*, 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 796.

The doctrine that a court will not reach the governor of the State, in the performance of his duties, or any one acting under his direction and by his authority in respect to any matters, applies only to acts within the scope of executive authority; outside thereof the principle of equality before the law renders him and his agents liable to judicial remedies the same as any other person, except in so far as the dignity of the place should, and does, protect him and them to some extent from coercive interference by judicial mandate. *Ekern v. McGovern*, 154 Wis. 157, 142 N. W. 595, 46 L. R. A. (N. S.) 796.

<sup>2</sup> "These are the bounds which the trust that is put in them by the society, and the law of God and nature, have



set to the legislative power of every Commonwealth, in all forms of government:—

"*First.* They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.

"*Secondly.* These laws also ought to be designed for no other end ultimately but the good of the people.

"*Thirdly.* They must not raise taxes on the property of the people without the consent of the people, given by themselves or their deputies. And this properly concerns only such governments where the legislative is always in being, or at least where the people have not reserved any part of the legislative to deputies, to be from time to time chosen by themselves.

"*Fourthly.* The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have." Locke on Civil Government, § 142.

That legislative power cannot be delegated, see *Thorne v. Cramer*, 15 Barb. 112; *Bradley v. Baxter*, 15 Barb. 122; *Barto v. Himrod*, 8 N. Y. 483; *People v. Stout*, 23 Barb. 349; *Rice v. Foster*, 4 Harr. 479; *Santo v. State*, 2 Iowa, 165; *Geebrick v. State*, 5 Iowa, 491; *State v. Beneke*, 9 Iowa, 203; *State v. Weir*, 33 Iowa, 134, 11 Am. Rep. 115; *People v. Collins*, 3 Mich. 343; *Railroad Company v. Commissioners of Clinton County*, 1 Ohio St. 77; *Parker v. Commonwealth*, 6 Pa. St. 507; *Commonwealth v. McWilliams*, 11 Pa. St. 61; *Maize v. State*, 4 Ind. 342; *Meshmeier v. State*, 11 Ind. 482; *State v. Parker*, 26 Vt. 357; *State v. Swisher*, 17 Tex. 441; *State v. Copeland*, 3 R. I. 33; *State v. Wilcox*, 45 Mo. 458; *Commonwealth v. Locke*, 72 Pa. St. 491; *Ex parte Wall*, 48 Cal. 279; *Willis v. Owen*, 43 Tex. 41; *Farnsworth Co. v. Lisbon*, 62 Me. 451; *Brewer Brick Co. v. Brewer*, 62 Me. 62; *State v. Hudson Co. Com'rs*, 37 N. J. 12; *Auditor v. Holland*, 14 Bush, 147; *State v. Simons*, 32 Minn. 540, 21 N. W. 750; *Planer v. Standard Oil Co.*, 284 Fed. 34; *Barrow v. Bradley*,

190 Ky. 480, 227 S. W. 1016; *Wyeth v. Cambridge*, 200 Mass. 474, 86 N. E. 925, 23 L. R. A. (N. S.) 147, 128 Am. St. Rep. 439; *Boston v. Chelsea*, 212 Mass. 127, 98 N. E. 620; *Merchants Exchange v. Knott*, 212 Mo. 616, 111 S. W. 565; *Nalley v. Home Ins. Co.*, 250 Mo. 452, 157 S. W. 769, Ann. Cas. 1915 A, 283; *State v. Dudley*, 182 N. C. 822, 109 S. E. 63; *State v. Wetz*, 40 N. D. 299, 168 N. W. 835, 5 A. L. R. 731; *State v. Briggs*, 45 Oreg. 366, 77 Pac. 750, 78 Pac. 361, 2 Ann. Cas. 424; *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 137 N. W. 20, 43 L. R. A. (N. S.) 339; *State ex rel. Smith v. Outagamie County Board*, 175 Wis. 253, 185 N. W. 184; *State v. Lyons*, 183 Wis. 107, 197 N. W. 578; *People v. Brady*, 271 Ill. 100, 110 N. E. 864, Ann. Cas. 1917 C, 1093; *Board of Administration v. Miles*, 278 Ill. 174, 115 N. E. 841; *People ex rel. Gamber v. Sholem*, 294 Ill. 204, 128 N. E. 377; *State v. Keener*, 78 Kan. 649, 97 Pac. 860, 19 L. R. A. (N. S.) 615; *Schaae v. Dolley*, 85 Kan. 598, 118 Pac. 80, 37 L. R. A. (N. S.) 877, Ann. Cas. 1913 A, 254; *Barrow v. Bradley*, 190 Ky. 480, 227 S. W. 1016; *Com. v. Beaver Dam Coal Co.*, 194 Ky. 34, 237 S. W. 1086, 27 A. L. R. 920; *State v. Butler*, 105 Me. 91, 73 Atl. 560, 24 L. R. A. (N. S.) 744, 18 Ann. Cas. 484; *State v. Gauthier*, 121 Me. 522, 118 Atl. 380, 26 A. L. R. 652; *In re Opinion of the Justices*, 239 Mass. 606, 133 N. E. 453; *State v. Bates*, 96 Minn. 110, 104 N. W. 709, 113 Am. St. Rep. 612; *Williams v. Evans*, 139 Minn. 32, 165 N. W. 495, L. R. A. 1918 F, 542; *State v. Normand*, 76 N. H. 541, 85 Atl. 899, Ann. Cas. 1913 E, 996; *Hudspeth v. Swayze*, 85 N. J. L. 592, 89 Atl. 780, Ann. Cas. 1916 A, 102; *Insurance Co. of North America v. Welch*, 49 Okla. 620, 154 Pac. 48, Ann. Cas. 1918 E, 471; *Ex parte Mode*, 77 Tex. Crim. Rep. 432, 180 S. W. 708, Ann. Cas. 1918 E, 845; *Sabre v. Rutland R. Co.*, 86 Vt. 347, 85 Atl. 693, Ann. Cas. 1915 C, 1269; *Sutherland v. Miller*, 79 W. Va. 796, 91 S. E. 993, L. R. A. 1917 D, 1040. In general as to delegation of legislative power, see Am. Bar Assoc. Journ. Vol. 9, p. 177.

Upon the legislature the people

have impliedly conferred authority to determine the exigencies or emergencies that warrant the exercise of police power to promote the general welfare of the citizens of the State; and it cannot redelegate to any one the ultimate right to determine when, to what extent, and under what circumstances the power may properly be exercised in any given case. *Sutherland v. Miller*, 79 W. Va. 796, 91 S. E. 993, L. R. A. 1917 D, 1040. The legislature has no power to delegate to an administrative board or officer its exclusive power of determining what acts or omissions on the part of an individual are unlawful. *Ex parte Peppers*, 189 Cal. 682, 209 Pac. 896.

An act of Congress authorizing maritime injuries within each State to be governed by the workmen's compensation act of the State is an unconstitutional delegation of legislative power. *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 64 L. ed. 834, 40 Sup. Ct. Rep. 438. See also *Washington v. Dawson & Co.*, 264 U. S. 219, 68 L. ed. 646, 44 Sup. Ct. Rep. 302; *Robins Dry Dock, etc., Co. v. Dahl*, 266 U. S. 449, 69 L. ed. 372, 45 Sup. Ct. Rep. 157.

Power of classification of towns and cities cannot be delegated. *Jernigan v. Madisonville*, 102 Ky. 313, 43 S. W. 448, 39 L. R. A. 214. Nor power of taxation except as constitution expressly authorizes. *State v. Des Moines*, 103 Iowa, 76, 72 N. W. 639, 39 L. R. A. 285.

The legislature cannot delegate to an official the final authority to determine what shall be done to make factories and workshops sanitary. *Schaezlein v. Cabaniss*, 135 Cal. 466, 67 Pac. 755, 87 Am. St. 122; or the extent of a taking for waterworks. *Stearns v. Barre*, 73 Vt. 281, 50 Atl. 1086, 87 Am. St. 721.

Statute imposing a penalty upon any carrier charging more than a reasonable rate without prescribing any means of determining what is such rate is void. *Louisville & N. R. Co. v. Commonwealth*, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. 457.

Court cannot be empowered to pass

upon propriety of incorporation of lands into a village. *Re Application of North Milwaukee*, 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 638.

Insurance commissioner cannot be empowered to determine the form of standard insurance contract for the State. *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112; *Anderson v. Manchester Fire As. Co.*, 59 Minn. 182, 63 N. W. 241, 28 L. R. A. 609; *O'Neil v. American Fire Ins. Co.*, 166 Pa. 72, 30 Atl. 945, 26 L. R. A. 715, 45 Am. St. 650.

Law authorizing release from imprisonment for drunkenness upon entry of recognizance that convict will take the "Jag Cure", and final discharge upon exhibition of certificate of attendance and compliance with rules of the institution is void. *Senate of Happy Home Club v. Alpena Co.*, 99 Mich. 117, 57 N. W. 1101, 23 L. R. A. 144.

Where the legislature is directed to regulate the salaries of county clerks in proportion to duties performed, and a statute fixes their salaries, the legislature cannot authorize county boards to allow the clerks deputies. *Dougherty v. Austin*, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161, and note on delegation of legislative powers.

Municipality cannot be authorized to modify the jurisdiction of courts. *Vesta Mills v. Charleston*, 60 S. C. 1, 38 S. E. 226. Right of initiative and referendum cannot be conferred on people of a municipality in respect even of municipal affairs. *Elliott v. Detroit*, 121 Mich. 611, 84 N. W. 820.

For a statute held to be unconstitutional in that it delegated a legislative function to the Court of Claims, see *Williamsburg Sav. Bank v. State*, 211 N. Y. Supp. 420. An act conferring upon the Secretary of State unlimited power to employ agents and incur expense, is unconstitutional. *State ex rel. Fargo v. Wetz*, 40 N. D. 299, 168 N. W. 835, 5 A. L. R. 731.

The terms and conditions upon which corporations may be created, the powers and capital stock they may have, the purposes for which they may increase their capital stock, and the

It is not always essential that a legislative act should be a completed statute which must in any event take effect as law, at the time it leaves the hands of the legislative department. A statute may be *conditional*, and its taking effect may be made to depend upon some subsequent event.<sup>1</sup> Affirmative legislation may in

conditions and limitations thereof are exclusively matters for legislative action, which cannot be delegated. *State v. Great Northern R. Co.*, 100 Minn. 445, 111 N. W. 289, 10 L. R. A. (N. S.) 250.

A State statute which attempts to make the substantive law of the State in certain particulars change automatically so as to conform to new enactments from time to time made by Congress and new regulations issued pursuant to their authority by subsidiary executive or administrative officers of the United States, is an unconstitutional delegation of legislative power. *In re Opinion of Justices*, 239 Mass. 606, 133 N. E. 453.

A Maine statute which adopted as part of the State law the definition of "intoxicating liquor" contained in a Federal statute (Volstead Act) not then enacted, was held unconstitutional in that it undertook to delegate general legislative power. *State v. Gauthier*, 121 Me. 522, 118 Atl. 380, 26 A. L. R. 652. But in Pennsylvania a substantially similar statute was held not to be an unconstitutional delegation of legislative power. *Com. v. Alderman*, 275 Pa. St. 483, 119 Atl. 551.

For other cases denying right to delegate legislative power, see *Bradshaw v. Lankford*, 73 Md. 428, 21 Atl. 66, 11 L. R. A. 582, 25 Am. St. 602; *Owensboro & N. R. Co. v. Todd*, 91 Ky. 175, 15 S. W. 56, 11 L. R. A. 285; *Arms v. Ayer*, 192 Ill. 601, 61 N. E. 851, 85 Am. St. 357.

<sup>1</sup> *Brig Aurora v. United States*, 7 Cranch, 382, 3 L. ed. 378; *Bull v. Read*, 13 Gratt. 78; *State v. Parker*, 26 Vt. 357; *Peck v. Weddell*, 17 Ohio St. 271; *State v. Kirkley*, 29 Md. 85; *Walton v. Greenwood*, 60 Me. 356; *Baltimore v. Clunet*, 23 Md. 449; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *Chicago v. Washingto-*

*nian Home*, 289 Ill. 206, 124 N. E. 416, 6 A. L. R. 1584; *McPherson v. State*, 174 Ind. 60, 90 N. E. 610, 31 L. R. A. (N. S.) 188; *Booth v. State*, 179 Ind. 405, 100 N. E. 563, L. R. A. 1915 B, 420, Ann. Cas. 1915 D, 987; *Com. v. Beaver Dam Coal Co.*, 194 Ky. 34, 237 S. W. 1086, 27 A. L. R. 920; *Opinions of the Justices*, 160 Mass. 586, 36 N. E. 488, 23 L. R. A. 113; *Elwell v. Comstock*, 99 Minn. 261, 109 N. W. 113, 698, 7 L. R. A. (N. S.) 621, 9 Ann. Cas. 270; *Hudspeth v. Swayze*, 85 N. J. L. 592, 89 Atl. 780, Ann. Cas. 1916 A, 102; *People v. Kennedy*, 207 N. Y. 533, 101 N. E. 442, Ann. Cas. 1914 C, 616; *State v. Crawford*, 36 N. D. 385, 162 N. W. 710, Ann. Cas. 1917 E, 955; *Ex parte Mode*, 77 Tex. Crim. Rep. 432, 180 S. W. 708, Ann. Cas. 1918 E, 845; *Minneapolis, etc., R. Co. v. Railroad Commission*, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821; *State v. Frear*, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633; *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 137 N. W. 20, 43 L. R. A. (N. S.) 339, Ann. Cas. 1913 C, 774; *State ex rel. Board of Regents of Normal Schools v. Zimmerman*, 183 Wis. 132, 197 N. W. 823.

"The division of governmental powers into executive, legislative, and judicial while of great importance in the creation or organization of a State and from the viewpoint of institutional law and otherwise, is not an exact classification. No such exact delimitation of governmental powers is possible. In the process of enacting a law there is frequently necessary the preliminary determination of a fact or group of facts by the legislature; and it is well settled that the legislature may declare the general rule of law to be in force and take effect upon the subsequent establishment of the facts necessary to make it operative, or to call for its application." *Minneapolis, etc., R. Co. v. Railroad Com-*

some cases be adopted, of which the parties interested are at liberty to avail themselves or not at their option. A private act of incorporation cannot be forced upon the incorporators; they may refuse the franchise if they so choose.<sup>1</sup> In these cases the legislative act is regarded as complete when it has passed through the constitutional formalities necessary to perfected legislation, notwithstanding its actually going into operation as law may depend upon its subsequent acceptance.

[The maxim that power conferred upon the legislature to make laws cannot be delegated to any other authority does not preclude the legislature from delegating any power not legislative which it may itself rightfully exercise.<sup>2</sup> It may confer an authority

mission, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821. See also *Monroe v. Withycombe*, 84 Oreg. 328, 165 Pac. 231.

"Where an act is clothed with all the forms of law, and is complete in and of itself, it may be provided that it shall become operative only upon some certain act or event, or, in like manner, that its operation shall be suspended; and the fact of such act or event, in either case, may be made to depend upon the ascertainment of it by some other department, body, or officer, which is essentially an administrative act." *Dowling v. Lancashire Fire Ins. Co.*, 92 Wis. 63, 65 N. W. 738. See also *Arms v. Ayer*, 192 Ill. 601, 61 N. E. 851, 85 Am. St. Rep. 357.

It is not a delegation of legislative power to make the repeal of a charter depend upon the failure of the corporation to make up a deficiency which is to be ascertained and determined by a tribunal provided by the repealing act. *Lothrop v. Stedman*, 42 Conn. 583. See *Crease v. Babcock*, 23 Pick. 334, 344. Nor to refer the question of extending municipal boundaries to a court where issues may be formed and disputed facts tried. *Burlington v. Leebrick*, 43 Iowa, 252; *Wahoo v. Dickinson*, 23 Neb. 426, 36 N. W. 813. But a court cannot be authorized to create a municipal corporation upon petition of a majority of the inhabitants of the territory to be incorporated. *Terr. v. Stewart*, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106.

It is competent to make an act take

effect on condition that those applying for it shall erect a station at a place named. *State v. New Haven, &c. Co.*, 43 Conn. 351.

An act taxing corporations of another State doing business within the State as its corporations are taxed in such other State is not an abandonment of legislative functions. The law is complete; its operation, contingent. *Home Ins. Co. v. Swigert*, 104 Ill. 653; *Phoenix Ins. Co. v. Welch*, 29 Kan. 672. *Contra*, *Clark v. Mobile*, 67 Ala. 217.

Statute may require railroad to construct cattle-guards when demand therefor is made by owners of lands through which railroad runs. *Birmingham M. R. Co. v. Parsons*, 100 Ala. 662, 13 So. 602, 27 L. R. A. 263, 46 Am. St. 92.

<sup>1</sup> Angell and Ames on Corp. § 81.

But in Kentucky it has been held that a statute providing that certain classes of employers shall provide washrooms for their employees after a certain per cent of the employees decide by a vote to notify the employer to erect a washroom, violates a constitutional provision that "no law . . . shall be enacted to take effect upon the approval of any other authority than the General Assembly." *Com. v. Beaver Dam Coal Co.*, 194 Ky. 34, 237 S. W. 1086, 27 A. L. R. 920.

<sup>2</sup> *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436; *Parke v. Bradley*, 204 Ala. 455, 86

in relation to the execution of a law which may involve discretion, but such authority must be exercised under and in pursuance of the law.<sup>1</sup> The legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an

So. 28; *Bailey v. Van Pelt*, 78 Fla. 337, 353, 82 So. 789; *Hunter v. Colfax Consol. Coal Co.*, 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917 D, 15, Ann. Cas. 1917 E, 803; *Hurst v. Warner*, 102 Mich. 238, 60 N. W. 440, 47 Am. St. Rep. 525, 26 L. R. A. 484; *State ex rel. Chicago, etc., R. Co. v. Public Service Commission*, 94 Wash. 274, 162 Pac. 523; *Minneapolis, etc., R. Co., v. Wisconsin R. Commission*, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821; *State ex rel. Smith v. Outagamie County Board*, 175 Wis. 253, 185 N. W. 184.

<sup>1</sup> *Field v. Clark*, 143 U. S. 649, 693, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *Cosmos Exploration Co. v. Great Eagle Oil Co.*, 190 U. S. 301, 309, 47 L. ed. 1064, 1070, 23 Sup. Ct. Rep. 692, 24 Sup. Ct. Rep. 860; *Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 53 L. ed. 1013, 29 Sup. Ct. Rep. 671; *Brushaber v. Union Pacific R. Co.*, 240 U. S. 1, 60 L. ed. 493, 36 Sup. Ct. Rep. 236, L. R. A. 1917 D, 414, Ann. Cas. 1917 B, 713; *Schaezlein v. Cabaniss*, 135 Cal. 466, 67 Pac. 755, 87 Am. St. Rep. 122, 56 L. R. A. 733; *Hewitt v. State Board of Medical Examiners*, 148 Cal. 590, 84 Pac. 39, 113 Am. St. Rep. 315, 3 L. R. A. (N. S.) 896, 7 Ann. Cas. 750; *Arms v. Ayer*, 192 Ill. 601, 61 N. E. 851, 85 Am. St. Rep. 357, 58 L. R. A. 277; *Klafter v. State Board of Examiners of Architects*, 259 Ill. 15, 102 N. E. 193, 46 L. R. A. (N. S.) 532, Ann. Cas. 1914 B, 1221; *Chicago v. Washingtonian Home*, 289 Ill. 206, 124 N. E. 416, 6 A. L. R. 1584; *People ex rel. Gamber v. Sholem*, 294 Ill. 204, 128 N. E. 377; *Walker v. Towle*, 156 Ind. 639, 59 N. E. 20, 53 L. R. A. 749; *Arnett v. State*, 168 Ind. 180, 80 N. E. 153, 8 L. R. A. (N. S.) 1192; *Hubbell v. Higgins*, 148 Iowa, 36, 126 N. W.

914, Ann. Cas. 1912 B, 822; *Hunter v. Colfax Consol. Coal Co.*, 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917 D, 15, Ann. Cas. 1917 E, 803; *Welch v. Swasey*, 193 Mass. 364, 79 N. E. 745, 118 Am. St. Rep. 523, 23 L. R. A. (N. S.) 1160; *State v. Great Northern R. Co.* 100 Minn. 445, 111 N. W. 289, 10 L. R. A. (N. S.) 250; *Williams v. Evans*, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L. R. A. 1918 F, 542; *People v. Klinck Packing Co.*, 214 N. Y. 121, 108 N. E. 278; *People v. Beakes Dairy Co.*, 222 N. Y. 416, 119 N. E. 115, 3 A. L. R. 1260; *Merkle v. Paschkes*, 123 App. Div. 203, 204 N. Y. Supp. 102; *State ex rel. Linde v. Taylor*, 33 N. D. 76, 156 N. W. 561, L. R. A. 1918 B, 156, Ann. Cas. 1918 A, 583; *Cincinnati, etc., R. Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88; *Winslow v. Fleischer*, 112 Ore. 23, 228 Pac. 101, 34 A. L. R. 826; *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112; *Bay City First Nat. Bank v. Fellows*, 244 U. S. 416, 61 L. ed. 1233, 37 Sup. Ct. Rep. 734, L. R. A. 1918 C, 283, Ann. Cas. 1918 D, 1169; *Kansas City Southern R. Co. v. United States*, 293 Fed. 8.

"The legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose. This principle of the law is peculiarly applicable to regulations under the police power, since the complex and ever-changing conditions that attend and affect such matters make it impracticable for the legislature to

administrative officer or body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution.<sup>1</sup>

prescribe all necessary rules and regulations." *Bailey v. Van Pelt*, 78 Fla. 337, 82 So. 789.

"The legislature may, without violating any rule or principle of the Constitution, confer upon an administrative board or officer a large measure of discretion, provided the exercise thereof is guided and controlled by rules prescribed therefor." *People v. Monterey Fish Products Co.*, 195 Cal. 548, 234 Pac. 398, 38 A. L. R. 1186.

A court may be authorized to direct in what manner its writs shall be served and what notice shall be given. *State v. Adams Express Co.*, 66 Minn. 271, 68 N. W. 1085, 38 L. R. A. 225.

A statute authorizing a particular officer to pass upon the question of character, to determine the granting of license is not a delegation of legislative power. Delegation of power to determine who are within the operation of the law is not a delegation of legislative power. *State v. Thompson*, 160 Mo. 333, 60 S. W. 1077, 83 Am. St. 468, 54 L. R. A. 950. So statutory delegation of power to incorporate medical societies to appoint medical examiners to examine and pass upon the fitness of applicants for license to practice medicine is not invalid. *Scholle v. State*, 90 Md. 729, 46 Atl. 326, 50 L. R. A. 411. See also *People v. Witte*, 315 Ill. 282, 146 N. E. 178, 37 A. L. R. 672. But it has been held that the legislature is without power to delegate authority to any person or board to grant or refuse a license at his or its discretion, arbitrarily or capriciously, according to the state of mind of such officer or the persons composing such board. *Welch v. Maryland Casualty Co.*, 47 Okla. 293, 147 Pac. 1046, L. R. A. 1915 E, 708.

An Ohio statute committing to a certain officer the duty of issuing a license to one desiring to act as an engineer if "found trustworthy and

competent" was declared invalid because, as the court said, no standard was furnished by the general assembly as to qualification, and no specification as to wherein the applicant should be trustworthy and competent, but all was left to the opinion, finding, and caprice of the examiner. *Harmon v. State*, 66 Ohio St. 249, 64 N. E. 117, 53 L. R. A. 618.

<sup>1</sup> *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356; *United States v. Grimaud*, 220 U. S. 506, 55 L. ed. 563, 31 Sup. Ct. Rep. 480; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436; *Mutual Film Corporation v. Industrial Commission*, 236 U. S. 230, 59 L. ed. 552, 35 Sup. Ct. Rep. 387; *Mutual Film Corporation v. Hodges*, 236 U. S. 248, 59 L. ed. 561, 35 Sup. Ct. Rep. 393; *Sears v. Federal Trade Commission*, 169 C. C. A. 323, 258 Fed. 307, 6 A. L. R. 358; *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. S.) 639; *Arnett v. State*, 168 Ind. 180, 80 N. E. 153, 8 L. R. A. (N. S.) 1192; *Schaaake v. Dolley*, 85 Kan. 598, 118 Pac. 80, 37 L. R. A. (N. S.) 877, Ann. Cas. 1913 A, 254; *People v. Brazee*, 183 Mich. 259, 149 N. W. 1053, L. R. A. 1916 E, 1146; *Rock v. Carney*, 216 Mich. 280, 185 N. W. 798, 22 A. L. R. 1178; *Elwell v. Comstock*, 99 Minn. 261, 109 N. W. 113, 698, 7 L. R. A. (N. S.) 621, 9 Ann. Cas. 270; *Williams v. Evans*, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L. R. A. 1918 F, 542; *Saratoga Springs v. Saratoga Gas, etc., Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713, 14 Ann. Cas. 606; *Insurance Co. of North America v. Welch*, 49 Okla. 620, 154 Pac. 48, Ann. Cas.

Boards and commissions now play an important part in the administration of our laws. The great social and industrial evolution of the past century, and the many demands made upon our legislatures by the increasing complexity of human activities, have made essential the creation of these administrative bodies and the delegation to them of certain powers. Though legislative power cannot be delegated to boards and commissions,<sup>1</sup> the legislature may delegate to them administrative functions in carrying out the

1918 E, 471; *State v. Briggs*, 45 Oreg. 366, 77 Pac. 750, 78 Pac. 361, 2 Ann. Cas. 424; *State ex rel. Board of Regents of Normal Schools v. Zimmerman*, 183 Wis. 132, 197 N. W. 823.

"It has been well said that to deny to the legislature the right to delegate the power to determine some fact or state of things upon which the enforcement of an enactment depends would stop the wheels of government and bring about confusion, if not paralysis, in the conduct of the public business." *Union Bridge Co. v. United States*, 204 U. S. 364, 383, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *Schaake v. Dolley*, 85 Kan. 598, 118 Pac. 80, 37 L. R. A. (N. S.) 877, Ann. Cas. 1913 A, 254. Said an eminent judge: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation." *Agnew, J.*, in *Locke's Appeal*, 72 Pa. St. 491, 498. This language was quoted with approval in the following cases: *Field v. Clark*, 143 U. S. 649, 694, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *United States v. Grimaud*, 220 U. S. 506, 520, 55 L. ed. 563, 31 Sup. Ct. Rep. 480, 484; *Bailey v. Van Pelt*, 78 Fla. 337, 82 So. 789, 794; *Winslow v. Fleischner*, 101 Oreg. 23, 228 Pac. 101, 34 A. L. R. 826; *Dowling v. Lancashire Ins. Co.*, 92 Wis. 63, 65 N. W. 738. See also *Welch v.*

*Swasey*, 214 U. S. 91, 53 L. ed. 923, 29 Sup. Ct. Rep. 567; *Williams v. Evans*, 139 Minn. 32, 165 N. W. 495, L. R. A. 1918 F, 542; *Merchants Exchange v. Knott*, 212 Mo. 616, 111 S. W. 565; *Eubank v. Richmond*, 110 Va. 749, 753, 67 S. E. 376; *State ex rel. Chicago, etc., R. Co. v. Public Service Commission*, 94 Wash. 274, 162 Pac. 523.

<sup>1</sup> *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 214, 56 L. ed. 729, 32 Sup. Ct. Rep. 436; *State v. Billot*, 154 La. 402, 97 So. 589; *Merchants Exchange v. Knott*, 212 Mo. 616, 111 S. W. 565; *State v. Orange*, 60 N. J. L. 111, 36 Atl. 707; *People v. Klinck Packing Co.*, 214 N. Y. 121, 108 N. E. 278, affirming 164 App. Div. 97, 149 N. Y. Supp. 504; *Winslow v. Fleischner*, 112 Oreg. 23, 228 Pac. 101, 34 A. L. R. 826; *Klein v. Barry*, 182 Wis. 255, 196 N. W. 457; *State v. Lyons*, 183 Wis. 107, 197 N. W. 578.

The legislature cannot delegate authority to an administrative board to change a general law for all the people of the commonwealth, where it has no local or special reason for seeking the aid of such a board. *Wyeth v. Board of Health*, 200 Mass. 474, 86 N. E. 925, 23 L. R. A. (N. S.) 147, 128 Am. St. Rep. 439. Board of health cannot be authorized to make general rules concerning compulsory vaccination. *State v. Burdge*, 95 Wis. 390, 70 N. W. 347, 37 L. R. A. 157, 60 Am. St. 123. The legislature cannot delegate the power to fix penalties to a Board of Harbor Commissioners. *Board of Harbor Commissioners v. Excelsior Redwood Co.*, 88 Cal. 491, 26 Pac. 375.

purposes of a statute and various governmental powers for the more efficient administration of the laws.<sup>1</sup>

"The suspension of a statute is a legislative act, unless based upon some condition, contingency, exigency, or state of facts,

<sup>1</sup> *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 56 L. ed. 729, 32 Sup. Ct. Rep. 436; *Bay City First Nat. Bank v. Fellows*, 244 U. S. 416, 61 L. ed. 1233, 37 Sup. Ct. Rep. 734, L. R. A. 1918 C, 283, Ann. Cas. 1918 D, 1169; *Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307; *Liberty Highway Co. v. Michigan Public Utilities Commission*, 294 Fed. 703; *Parke v. Bradley*, 204 Ala. 455, 86 So. 28; *Haddad v. State*, 23 Ariz. 105, 201 Pac. 847; *Clen-daniel v. Conrad*, 3 Boyce (Del.) 549, 83 Atl. 1036, Ann. Cas. 1915 B, 968; *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. S.) 639; *People v. Roth*, 249 Ill. 532, 94 N. E. 953, Ann. Cas. 1912 A, 100; *People ex rel. First Nat. Bank v. Brady*, 271 Ill. 100, 110 N. E. 864, Ann. Cas. 1917 C, 1093; *Durand v. Dyson*, 271 Ill. 382, 111 N. E. 143, Ann. Cas. 1917 D, 84; *Chicago, etc., R. Co., v. Cavanaugh*, 278 Ill. 609, 116 N. E. 128; *Public Service Co. v. Recktenwald*, 290 Ill. 314, 125 N. E. 271, 8 A. L. R. 466; *In re McGee*, 105 Kan. 574, 185 Pac. 14, 8 A. L. R. 831; *State Racing Commission v. Latonia Agricultural Ass'n*, 136 Ky. 173, 123 S. W. 681, 25 L. R. A. (N. S.) 905; *Louisville, etc., R. Co. v. Lyons*, 155 Ky. 396, 159 S. W. 971, 48 L. R. A. (N. S.) 667; *State Board of Charities & Corrections v. Hays*, 190 Ky. 147, 227 S. W. 282; *State v. Board of Trustees*, 117 La. 1071, 42 So. 506, 8 Ann. Cas. 945; *Railroad Commissioners v. Portland, etc., R. Co.*, 63 Me. 269, 18 Am. Rep. 208; *McKenny v. Farnsworth*, 121 Me. 450, 118 Atl. 237; *Com. v. Sisson*, 189 Mass. 247, 75 N. E. 619, 109 Am. St. Rep. 630, 1 L. R. A. (N. S.) 752; *Rock v. Carney*, 216 Mich. 280, 185 N. W. 798, 22 A. L. R. 1178; *Elwell v. Comstock*, 99 Minn. 261, 109 N. W. 113, 698, 7 L. R. A. (N. S.) 621, 9 Ann. Cas. 270; *State ex rel. Dybdal v. State Securities Commission*, 145 Minn. 221, 176 N. W. 759; *Ex parte*

*Fritz*, 86 Miss. 210, 38 So. 722, 109 Am. St. Rep. 700; *Bailey v. Wilson*, 128 Miss. 49, 90 So. 362; *State ex rel. Southwestern Bell Telephone Co. v. Public Service Commission (Mo.)*, 233 S. W. 425; *Public Service Commission v. St. Louis-San Francisco R. Co.*, 301 Mo. 157, 256 S. W. 226; *State v. Normand*, 76 N. H. 541, 85 Atl. 899, Ann. Cas. 1913 E, 996; *Saratoga Springs v. Saratoga Gas, etc., Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713; *People v. Klinck Packing Co.*, 214 N. Y. 121, 108 N. E. 278; *People v. Beakes Dairy Co.*, 222 N. Y. 416, 119 N. E. 115, 3 A. L. R. 1260; *Watkinson v. Hotel Pennsylvania*, 195 App. Div. 624, 187 N. Y. Supp. 278; *In re McAneny*, 198 App. Div. 205, 190 N. Y. Supp. 92; *State v. Dudley*, 182 N. C. 822, 109 S. E. 63; *Hopper v. Oklahoma County*, 43 Okla. 288, 143 Pac. 4, L. R. A. 1915 B, 875; *Portland Fish Co. v. Benson*, 56 Oreg. 147, 108 Pac. 122; *Stettler v. O'Hara*, 69 Oreg. 519, 139 Pac. 743, L. R. A. 1917 C, 944, Ann. Cas. 1916 A, 217; *State v. Gates*, 104 Oreg. 112, 206 Pac. 863; *Woods v. State*, 130 Tenn. 100, 169 S. W. 558, L. R. A. 1915 F, 531; *State v. Eldridge*, 71 Vt. 374, 45 Atl. 753; *Sabre v. Rutland R. Co.*, 86 Vt. 347, 85 Atl. 693, Ann. Cas. 1915 C, 1269; *State ex rel. Criswell v. Board of Trustees*, 93 Wash. 468, 161 Pac. 361; *State v. Frear*, 146 Wis. 291, 131 N. W. 832, 34 L. R. A. (N. S.) 480; *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489; *State v. Johnson*, 170 Wis. 218, 175 N. W. 589, 7 A. L. R. 1617; *City of Milwaukee v. Railroad Commission*, 182 Wis. 498, 196 N. W. 853; *State v. Lyons*, 183 Wis. 107, 197 N. W. 578. "Our whole system of legislative supervision through the railroad commissioners acting as a State police over railroads is founded upon the theory that the public duties devolved upon railroad corporations by their charter are ministerial, and therefore liable to



be thus enforced." *Railroad Commissioners v. Portland, &c. R. R. Co.*, 63 Me. 269, 18 Am. Rep. 208.

"It is generally established at this time that the legislature may enact a law which is complete in itself, having for its aim the accomplishment of some general public purpose, and may, in order to secure the just and equitable operation of the law thus enacted, delegate the power within definite and valid limitations to make necessary investigations, determine preliminary facts, and prescribe suitable rules and regulations intended to accomplish the operation and enforcement of the law in accordance with the express legislative will. A familiar illustration of the exercise of this power is where the legislature enacts a law prescribing that rates for services by railroads and other common carriers shall be reasonable, and creates a board or commission with power to investigate and fix rates for such services, subject to review by the courts. The reasoning of the opinions is usually based upon the extensive and complex character of the business, involving a multitude of detail, and requiring expert knowledge to intelligently conduct the numerous separate investigations and the necessity for frequent changes and adjustments in the rates and services, which would render it impossible for the legislature to acquire the necessary information and to fix just and reasonable rates applicable to the varying conditions and circumstances. Direct legislative control has been tried and abandoned because found impossible, for the reason that the business of the common carrier has grown and extended and become such a large and indispensable factor in our complicated social and economic life that the cumbersome methods of direct action is no longer adequate or possible." *Insurance Co. of North America v. Welch*, 49 Okla. 620, 154 Pac. 48, Ann. Cas. 1918 E, 471. See also *Georgia R. R. etc., Co. v. Smith*, 70, Ga. 694.

In *Saratoga Springs v. Saratoga Gas, etc., Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. n. s. 713, there was involved the constitutionality of a statute creating a commission to regu-

late the price to be charged for service by gas and electric light companies. After an elaborate review of authorities, it was held that fixing the maximum rates of carriers and public service corporations was a proper exercise of the police power of the State vested in the Legislature, but that this power was not so inherently or exclusively legislative that the legislature might not, in the exercise of its plenary powers and in the absence of any express limitation by the Federal or State Constitution, delegate to and confer upon other branches of the State government the duty not only of executing a law enacted for the purpose of regulating rates, but of determining its application to particular cases and the formulating of rules for its exercise. Full recognition, however, was given of the principle that conceding that the legislature might commit to an administrative board the power to fix a tariff of rates the statute must prescribe some standard by which action of the board should be governed, and it was held that this essential qualification was observed in the statute in question by providing that the rates to be fixed by the board must be "within the limits prescribed by law" which required that they must be "reasonable" and not arbitrary, and that this was a sufficient standard. See also *Idaho Power & Light Co. v. Blomquist*, 26 Idaho, 222, 141 Pac. 1083, Ann. Cas. 1916 E, 282; *State Public Utilities Commission v. Chicago, etc., R. Co.*, 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917 C, 50; *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913 D, 78; *Minneapolis, etc., R. Co. v. Railroad Commission*, 136 Wis. 146, 116 N. W. 905, 17 L. R. A. (N. S.) 821.

In creating an administrative board to apply to the details of rate schedules the regulatory police power of the State, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. If the board is required as a condition precedent to an order, to make a finding of facts, the validity of

the order must rest upon the needed finding. *Wichita R., etc., Co. v. Public Utilities Commission*, 260 U. S. 48, 67 L. ed. 124, 43 Sup. Ct. Rep. 51.

An act conferring powers on a public service commission is valid against the objection that it is a delegation of legislative functions, where the power to be exercised by the commission consists simply in the ascertainment of facts on which the general rule of the legislature and of the Constitution that reasonable rates shall be adopted, operates. *Hunter v. Colfax Consol. Coal Co.*, 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917 D, 15, Ann. Cas. 1917 E, 803.

A statute conferring on a transit commission authority to determine by which of two routes a subway tunnel shall be constructed, is not an unconstitutional delegation of legislative power. *Codman v. Crocker*, 203 Mass. 146, 89 N. E. 177, 25 L. R. A. (N. S.) 980.

It is within the power of the legislature to create a State insurance board, and to require every fire, tornado, and plate glass insurance company and every insurance company granting insurance against the liability of employees to file with said board a schedule of rates charged by it for such risks, and to prohibit a change in such rates except after ten days' notice to said board of such contemplated change, and authorizing said board, when it shall determine that any rate is excessive or unreasonably high, or that said rate is inadequate to the safety or soundness of the company granting the same, to direct said company to file a higher or lower rate, commensurate with the risk and further requiring that in every case the rate shall be reasonable, when provision is made for a review of orders of said board by the courts. *Insurance Co. of North America v. Welch*, 49 Okla. 620, 154 Pac. 48, Ann. Cas. 1918 E, 471.

"The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situa-

tions and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress." *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194, 214, 56 L. ed. 729, 32 Sup. Ct. Rep. 436; *Roe-buck & Co. v. Federal Trade Commission*, 258 Fed. 307, 312. See also *State v. Dudley*, 182 N. C. 822, 109 S. E. 63; *State v. Lyons*, 183 Wis. 107, 197 N. W. 578.

The legislature may, in the exercise of the police power, create ministerial boards, with power to prescribe rules and impose penalties for their violation and provide for the collection of such penalties, and the exercise of this power by the legislature is not a delegation of legislative power. *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 134 N. E. 815, 22 A. L. R. 835.

Under a general statute giving to the State department of health power to restrict and suppress contagious and infectious diseases, such department has authority to designate such diseases as are contagious and infectious, and the law is not void for this reason on the ground that it delegates legislative power. *People ex rel. Barmore v. Robertson*, 302 Ill. 422, 134 N. E. 815, 22 A. L. R. 835; *Ex parte McGee*, 105 Kan. 574, 185 Pac. 14, 8 A. L. R. 831.

In the exercise of its right to regulate the increase of the capital stock of railway corporations the legislature may enact a statute providing generally for what purposes and upon what terms, conditions, and limitations an increase of capital stock may be made, and confer upon a commission the duty of supervising any proposed increase. It may also delegate to the commission the duty of finding the facts in each particular case, and authorize and require it, if it finds the existence of facts that bring the case within the statute, to allow the proposed increase; otherwise, to refuse it. Any statute, however, which attempts to authorize the commission in its judgment to allow an increase of capital stock for such purposes and on such terms as it may deem advisable, or in its discretion to refuse it, would be unconstitu-

declared by the legislative enactment to be sufficient to warrant the suspension by an executive or administrative body whose duty it is to execute or administer the law suspended."<sup>1</sup> Under express constitutional provisions, in some jurisdictions, the power of suspending statutes can be exercised only by the legislature, or by its authority.<sup>2</sup> A constitutional provision restricting the power of suspension to the legislature is not violated by the suspension of an act upon a contingency, when such suspension is expressly provided for in the act itself.<sup>3</sup> We have elsewhere spoken of municipal corporations, and of the powers of legislation which may be and commonly are bestowed upon them, and the bestowal of which is not to be considered as trenching upon the maxim that legislative power must not be delegated, since that maxim is to be understood in the light of the immemorial practice of this country and of England, which has always recognized the propriety and policy of vesting in the municipal organizations certain powers of local regulation, in respect to which the parties immediately interested

tional, as an attempt to delegate legislative power. *State v. Great Northern R. Co.*, 100 Minn. 445, 111 N. W. 289, 10 L. R. A. (N. S.) 250.

A Federal statute empowering the Secretary of Labor to deport aliens convicted of certain charges if after hearing he should find such aliens are "undesirable residents of the United States", was held not to be an unconstitutional delegation of legislative authority, as our history has created a common understanding of the words "undesirable residents" which gives them the quality of a recognized standard. *Mahler v. Eby*, 264 U. S. 32, 44 Sup. Ct. Rep. 283, 68 L. ed. 549.

The legislature may create an administrative body and empower it to investigate conditions existing in the mining industry, make findings and reports, and establish rules with reference to the operation thereof, designed, among other purposes, to promote the health and safety of employees and the continuity of production, so long as the regulations are reasonable and not upon some special ground obnoxious to constitutional provisions. *State ex rel. Court of Industrial Relations v. Howat*, 107 Kan. 423, 191 Pac. 585.

A commission may be empowered to select a site for a public building.

*People v. Dunn*, 80 Cal. 211, 22 Pac. 140; *Terr. v. Scott*, 3 Dak. 357, 20 N. W. 401.

<sup>1</sup> *Winslow v. Fleischner*, 112 Oreg. 23, 228 Pac. 101, 34 A. L. R. 826.

A statute exempting from the application of the hours of rest law certain employees, "if the Commissioner of Labor in his discretion approves", is unconstitutional, as it vests the Commissioner with power wholly at his volition to suspend the operation of the statute. *People v. Klinck Packing Co.*, 214 N. Y. 121, 108 N. E. 278, Ann. Cas. 1916 D, 1051.

Permitting city councils upon petition of specified portion of voters of respective cities to suspend certain penalties of a prohibitory liquor law is not a delegation of legislative powers, nor is it an infringement of the pardoning power of the executive. *State v. Forkner*, 94 Iowa, 1, 62 N. W. 572, 28 L. R. A. 206.

<sup>2</sup> *McPherson v. State*, 174 Ind. 60, 90 N. E. 610, 31 L. R. A. (N. S.) 188; *Ex parte Smythe*, 56 Tex. Crim. Rep. 375, 120 S. W. 200, 133 Am. St. Rep. 976, 23 L. R. A. (N. S.) 854; *Ex parte Mode*, 77 Tex. Crim. Rep. 432, 180 S. W. 708, Ann. Cas. 1918 E, 845.

<sup>3</sup> *Ex parte Mode*, 77 Tex. Crim. Rep. 432, 180 S. W. 708, Ann. Cas. 1918 E, 845.

may fairly be supposed more competent to judge of their needs than any central authority. As municipal organizations are mere auxiliaries of the State government in the important business of municipal rule, the legislature may create them at will from its own views of propriety or necessity, and without consulting the parties interested; and it also possesses the like power to abolish them, without stopping to inquire what may be the desire of the corporators on that subject.<sup>1</sup>

Nevertheless, as the corporators have a special and peculiar interest in the terms and conditions of the charter, in the powers conferred and liabilities imposed, as well as in the general question whether they shall originally be or afterwards remain incorporated at all or not, and as the burdens of municipal government must rest upon their shoulders, and especially as by becoming incorporated they are held, in law, to undertake to discharge the duties the charter imposes, it seems eminently proper that their voice should be heard on the question of their incorporation, and that their decisions should be conclusive, unless, for strong reasons of State policy or local necessity, it should seem important for the State to overrule the opinion of the local majority. The right to refer any legislation of this character to the people peculiarly interested does not seem to be questioned, and the reference is by no means unusual.<sup>2</sup>

<sup>1</sup> *City of Paterson v. Society, &c.*, 24 N. J. L. 385; *Cheany v. Hooser*, 9 B. Monr. 330; *Berlin v. Gorham*, 34 N. H. 266; *State v. Holden*, 19 Neb. 249, 27 N. W. 120; *Attorney-General v. Weimer*, 59 Mich. 580, 26 N. W. 773; *Hunter v. Pittsburg*, 207 U. S. 161, 52 L. ed. 151, 28 Sup. Ct. Rep. 40; *Carrithers v. Shelbyville*, 126 Ky. 769; 104 S. W. 744, 17 L. R. A. (N. S.) 421.

<sup>2</sup> *Bull v. Read*, 13 Gratt. 78; *Corning v. Greene*, 23 Barb. 33; *Morford v. Unger*, 8 Iowa, 82; *City of Paterson v. Society, &c.*, 24 N. J. L. 385; *Gorham v. Springfield*, 21 Me. 58; *Commonwealth v. Judges of Quarter Sessions*, 8 Pa. St. 391; *Commonwealth v. Painter*, 10 Pa. St. 214; *Call v. Chadbourne*, 46 Me. 206; *State v. Scott*, 17 Mo. 521; *State v. Wilcox*, 45 Mo. 458; *Hobart v. Supervisors, &c.*, 17 Cal. 23; *Bank of Chenango v. Brown*, 26 N. Y. 467; *Steward v. Jefferson*, 3 Harr. 335; *Burgess v. Pue*, 2 Gill, 11; *Lafayette, &c. R. R. Co. v. Geiger*, 34 Ind. 185; *Clarke v. Rogers*, 81 Ky. 43; *Jacksonville v. Bowden*, 67 Fla.

181, 64 So. 769, L. R. A. 1916 D, 913, Ann. Cas. 1915 D, 99; *Cole v. Dorr*, 80 Kan. 251, 101 Pac. 1016, 22 L. R. A. (N. S.) 534; *Carrithers v. Shelbyville*, 126 Ky. 769, 104 S. W. 744, 17 L. R. A. (N. S.) 421; *Gretna v. Bailey*, 141 La. 625, 75 So. 491, Ann. Cas. 1918 E, 566; *Cunningham v. Cambridge*, 222 Mass. 574, 111 N. E. 409, Ann. Cas. 1917 C, 1100; *Cleveland v. Watertown*, 222 N. Y. 159, 118 N. E. 500, Ann. Cas. 1918 E, 574; *State ex rel. Hunt v. Tausick*, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802. As the question need not be submitted at all, the legislature may submit it to the freeholders alone. *People v. Butte*, 4 Mont. 174, 1 Pac. 414. The right to refer to the people of several municipalities the question of their consolidation was disputed in *Smith v. McCarthy*, 56 Pa. St. 359, but sustained by the court. And see *Smyth v. Titcomb*, 31 Me. 272; *Erlinger v. Boneau*, 51 Ill. 94; *Lammert v. Lidwell*, 62 Mo. 188; *State v. Wilcox*, 45 Mo. 458; *Brunswick v. Finney*, 54

For the like reasons the question whether a county or township shall be divided and a new one formed,<sup>1</sup> or two townships or school districts formerly one be reunited,<sup>2</sup> or a city charter be revised,<sup>3</sup> or a county seat located at a particular place, or after its location removed elsewhere,<sup>4</sup> or the municipality contract particular debts, or engage in a particular improvement<sup>5</sup> [or a general school law be

Ga. 317; Response to House Resolution, 55 Mo. 295; *People v. Fleming*, 10 Col. 553, 16 Pac. 298; *Graham v. Greenville*, 67 Tex. 62, 2 S. W. 742. Such reference is now permitted in Minnesota. *Hopkins v. Duluth*, 81 Minn. 189, 83 N. W. 536. For a consideration of various questions arising in regard to such a reference, see *State v. Denny*, 4 Wash. 135, 29 Pac. 991, 16 L. R. A. 214.

An amendment to a municipal charter may be submitted to the vote of the people of the municipality. *Keller v. Western Paving Co.*, (Tex. Civ. App.) 218 S. W. 1077. A statute providing a scheme of municipal government commonly known as the "commission plan", to be operative only in those cities that adopt its provisions by popular vote, is not void as an attempt to delegate legislative power to the people of such municipalities. *Cole v. Dorr*, 80 Kan. 251, 101 Pac. 1016, 22 L. R. A. (N. S.) 534; *State ex rel. Hunt v. Tausick*, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802.

<sup>1</sup> *State v. Reynolds*, 10 Ill. 1. See *State v. McNeill*, 24 Wis. 149; Response to House Resolution, 55 Mo. 205. For other cases on the same general subject, see *People v. Nally*, 49 Cal. 478; *Pike County v. Barnes*, 51 Miss. 305; *Brunswick v. Finney*, 54 Ga. 317.

<sup>2</sup> *Commonwealth v. Judges, &c.*, 8 Pa. St. 391; *Call v. Chadbourne*, 46 Me. 206; *People v. Nally*, 49 Cal. 478; *Erlinger v. Boneau*, 51 Ill. 94.

<sup>3</sup> *Brunswick v. Finney*, 54 Ga. 317.

<sup>4</sup> *Commonwealth v. Painter*, 10 Pa. St. 214; *Clarke v. Jack*, 60 Ala. 271. See *People v. Salomon*, 51 Ill. 37; *Slinger v. Henneman*, 38 Wis. 540; *Hall v. Marshall*, 80 Ky. 552; *post*, pp. 243-247.

<sup>5</sup> There are many cases in which

municipal subscriptions to works of internal improvement, under statutes empowering them to be made, have been sustained; among others, *Goddin v. Crump*, 8 Leigh, 120; *Bridgeport v. Housatonic Railroad Co.*, 15 Conn. 475; *Starin v. Genoa*, 29 Barb. 442, and 23 N. Y. 439; *Bank of Rome v. Village of Rome*, 18 N. Y. 38; *Prettyman v. Supervisors, &c.*, 19 Ill. 406; *Robertson v. Rockford*, 21 Ill. 451; *Johnson v. Stack*, 24 Ill. 75; *Bushnell v. Beloit*, 10 Wis. 195; *Clark v. Janesville*, 10 Wis. 136; *Stein v. Mobile*, 24 Ala. 591; *Mayor of Wetumpka v. Winter*, 29 Ala. 651; *Pattison v. Yuba*, 13 Cal. 175; *Blanding v. Burr*, 13 Cal. 343; *Hobart v. Supervisors, &c.*, 17 Cal. 23; *Taylor v. Newberne*, 2 Jones Eq. 141; *Caldwell v. Justices of Burke*, 4 Jones Eq. 323; *Louisville, &c. Railroad Co. v. Davidson*, 1 Sneed, 637; *Nichol v. Mayor of Nashville*, 9 Humph. 252; *Railroad Co. v. Commissioners of Clinton Co.*, 1 Ohio St. 77; *Trustees of Paris v. Cherry*, 8 Ohio St. 564; *Cass v. Dillon*, 2 Ohio St. 607; *State v. Commissioners of Clinton Co.*, 6 Ohio St. 280; *State v. Van Horne*, 7 Ohio St. 327; *State v. Trustees of Union*, 8 Ohio St. 394; *Trustees, &c. v. Shoemaker*, 12 Ohio St. 624; *State v. Commissioners of Hancock*, 12 Ohio St. 596; *Powers v. Dougherty Co.*, 23 Ga. 65; *San Antonio v. Jones*, 28 Tex. 19; *Commonwealth v. McWilliams*, 11 Pa. St. 61; *Sharpless v. Mayor, &c.*, 21 Pa. St. 147; *Moers v. Reading*, 21 Pa. St. 188; *Talbot v. Dent*, 9 B. Monr. 526; *Slack v. Railroad Co.*, 13 B. Monr. 1; *City of St. Louis v. Alexander*, 23 Mo. 483; *City of Aurora v. West*, 9 Ind. 74; *Cotton v. Commissioners of Leon*, 6 Fla. 610; *Copes v. Charleston*, 10 Rich. 491; *Commissioners of Knox County v. Aspinwall*, 21 How. 539, 16 L. ed. 208, and 24 How. 376, 16

accepted in a particular municipality,<sup>1</sup>] is always a question which may with propriety be referred to the voters of the municipality for decision.<sup>2</sup> [The operation of an act creating a municipal court may be made dependent on the approval of the municipal voters;<sup>3</sup> and a city may be empowered to decide by vote whether it will take control of the public schools in it.<sup>4</sup>

The legislature may incorporate in the charter of a municipal corporation a provision making the "initiative and referendum" a part of the local form of government.<sup>5</sup>]

The question then arises, whether that which may be done in reference to any municipal organization within the State may not also be done in reference to the State at large. May not any law framed for the State at large be made conditional on an acceptance by the people at large, declared through the ballot-box? If it is not unconstitutional to delegate to a single locality the power to decide whether it will be governed by a particular charter, must it

L. ed. 735; *Same v. Wallace*, 21 How. 547, 16 L. ed. 211; *Zabriskie v. Railroad Co.*, 23 How. 381, 16 L. ed. 488; *Amey v. Mayor, &c.*, 24 How. 364, 16 L. ed. 364; *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520; *Thomson v. Lee County*, 3 Wall. 327, 18 L. ed. 177; *Rogers v. Burlington*, 3 Wall. 654, 18 L. ed. 79; *Gibbons v. Mobile & Great Northern Railroad Co.*, 36 Ala. 410; *St. Joseph, &c., Railroad Co. v. Buchanan Co. Court*, 39 Mo. 485; *State v. Linn Co. Court*, 44 Mo. 504; *Stewart v. Supervisors of Polk Co.*, 30 Iowa, 9; *John v. C. R. & F. W. R. R. Co.*, 35 Ind. 539; *Leavenworth County v. Miller*, 7 Kan. 479; *Walker v. Cincinnati*, 21 Ohio St. 14; *Ex parte Selma, &c. R. R. Co.*, 45 Ala. 696; *S. & V. R. R. Co. v. Stockton*, 41 Cal. 149. In several of them the power to authorize the municipalities to decide upon such subscriptions has been contested as a delegation of legislative authority, but the courts — even those which hold the subscriptions void on other grounds — do not look upon these cases as being obnoxious to the constitutional principle referred to in the text. In any event the power must be exercised strictly in accordance with the conditions attached to the legislative permission. *Barnum v. Okolona*, 148 U. S. 393, 37 L. ed. 495, 13 Sup. Ct. Rep. 638.

<sup>1</sup> *State v. Wilcox*, 45 Mo. 458.

<sup>2</sup> Whatever powers the legislature may delegate to any public agency for exercise, it may itself resume and exercise. *Dyer v. Tuscaloosa Bridge Co.*, 2 Port. 296, 27 Am. Dec. 655; *Attorney-General v. Marr*, 55 Mich. 445, 21 N. W. 883; *Chicago & N. W. Ry. Co. v. Langlade Co.*, 56 Wis. 614, 14 N. W. 844; *Brand v. Multnomah Co.*, 38 Oreg. 79, 60 Pac. 390, 50 L. R. A. 389, 84 Am. St. 772. But this must be understood with the exception of those cases in which the constitution of the State requires local matters to be regulated by local authority.

Where local matters are required to be submitted to popular vote, if two or more propositions are submitted at one election, they must be so submitted that they may be voted on separately. *Denver v. Hayes*, 28 Col. 110, 63 Pac. 311.

<sup>3</sup> *Rutter v. Sullivan*, 25 W. Va. 427.

<sup>4</sup> *Werner v. Galveston*, 72 Tex. 22, 7 S. W. 726.

<sup>5</sup> *Ex parte Pfahler*, 150 Cal. 71, 88 Pac. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911; *State ex rel. Wagner v. Summers*, 33 S. D. 40, 144 N. W. 730, 50 L. R. A. (N. S.) 206, Ann. Cas. 1916 B, 860. The contrary rule prevails in Texas. *Ex parte Farnsworth*, 61 Tex. Crim. Rep. 353, 135 S. W. 535, 33 L. R. A. (N. S.) 968.

not quite as clearly be within the power of the legislature to refer to the people at large, from whom all power is derived, the decision upon any proposed statute affecting the whole State? And can that be called a delegation of power which consists only in the agent or trustee referring back to the principal the final decision in a case where the principal is the party concerned, and where perhaps there are questions of policy and propriety involved which no authority can decide so satisfactorily and so conclusively as the principal to whom they are referred?

If the decision of these questions is to depend upon the weight of judicial authority up to the present time, it must be held that there is no power to refer the adoption or rejection of a general law to the people of the State, any more than there is to refer it to any other authority. The prevailing doctrine in the courts appears to be, that, except in those cases where, by the constitution, the people have expressly reserved to themselves a power of decision, the function of legislation cannot be exercised by them, even to the extent of accepting or rejecting a law which has been framed for their consideration. "The exercise of this power by the people in other cases is not expressly and in terms prohibited by the constitution, but it is forbidden by necessary and unavoidable implication. The Senate and Assembly are the only bodies of men clothed with the power of general legislation. They possess the entire power, with the exception above stated. The people reserved no part of it to themselves [with that exception], and can therefore exercise it in no other case." It is therefore held that the legislature have no power to submit a proposed law to the people, nor have the people power to bind each other by acting upon it. They voluntarily surrendered that power when they adopted the constitution. The government of the State is democratic, but it is a representative democracy, and in passing general laws the people act only through their representatives in the legislature.<sup>1</sup>

<sup>1</sup> Per *Ruggles*, Ch. J. in *Barto v. Himrod*, 8 N. Y. 483. See also *People v. Kennedy*, 207 N. Y. 533, 101 N. E. 442, Ann. Cas. 1914 C, 616.

It is worthy of consideration, however, whether there is anything in the reference of a statute to the people for acceptance or rejection which is inconsistent with the representative system of government. To refer it to the people to frame and agree upon a statute for themselves would be equally

impracticable and inconsistent with the representative system; but to take the opinion of the people upon a bill already framed by representatives and submitted to them, is not only practicable, but is in precise accordance with the mode in which the constitution of the State is adopted, and with the action which is taken in many other cases. The representative in these cases has fulfilled precisely those functions which the people as a

Nor, it seems, can such legislation be sustained as legislation of a conditional character, whose force is to depend upon the happening of some future event, or upon some future change of circumstances. "The event or change of circumstances on which a law may be made to take effect must be such as, in the judgment of the legislature, affects the question of the expediency of the law; an event on which the expediency of the law in the opinion of the law-makers depends. On this question of expediency the legislature must exercise its own judgment definitely and finally. When a law is made to take effect upon the happening of such an event, the legislature in effect declare the law inexpedient if the event should not happen, but expedient if it should happen. They appeal to no other man or men to judge for them in relation to its present or future expediency. They exercise that power themselves, and then perform the duty which the Constitution imposes upon them." But it was held that in the case of the submission of a proposed free-school law to the people, no such event or change of circumstances affecting the expediency of the law was expected to happen. The wisdom or expediency of the School Act, abstractly considered, did not depend on the vote of the people. If it was unwise or inexpedient before that vote was taken, it was equally so afterwards. The event on which the act was to take effect was nothing else than the vote of the people on the identical question which the constitution makes it the duty of the legislature itself to decide. The legislature has no power to make a statute dependent on such a contingency, because it would be confiding to others that legislative discretion which they are bound to exercise themselves, and which they cannot delegate or commit to any other man or men to be exercised.<sup>1</sup>

democracy could not fulfil; and where the case has reached a stage when the body of the people can act without confusion, the representative has stepped aside to allow their opinion to be expressed. The legislature is not attempting in such a case to delegate its authority to a new agency, but the trustee, vested with a large discretionary authority, is taking the opinion of the principal upon the necessity, policy, or propriety of an act which is to govern the principal himself. See *Smith v. Janesville*, 26 Wis. 291; *Fell v. State*, 42 Md. 71, 20 Am. Rep. 83; *King v. Reed*, 43 N. J. L. 186.

<sup>1</sup> Per *Ruggles*, Ch. J., in *Barto v. Himrod*, 8 N. Y. 483. And see *State v. Hayes*, 61 N. H. 264; *Santo v. State*,

2 Iowa, 165; *State v. Beneke*, 9 Iowa, 203; *State v. Swisher*, 17 Tex. 441; *State v. Field*, 17 Mo. 529; *Bank of Chenango v. Brown*, 26 N. Y. 467; *People v. Stout*, 23 Barb. 349; *State v. Wilcox*, 45 Mo. 458; *Ex parte Wall*, 48 Cal. 279, 313; *Brown v. Fleischner*, 4 Oreg. 132.

Elective franchise cannot be conferred upon women upon condition that the statute be approved at a subsequent election. *Re Municipal Suffrage to Women*, 160 Mass. 586, 36 N. E. 488, 23 L. R. A. 113, and note thereto on power to make a statute contingent on popular approval.

The power to tax cannot be delegated except as by the Constitution is permitted. Where the Constitution



provided that the General Assembly shall have power to authorize the several counties and incorporated towns to impose taxes for county and corporation purposes respectively, it was held not competent to delegate the power to a school board. *Waterhouse v. Public Schools*, 9 Bax. 398.

But upon this point there is great force in what is said by *Redfield*, Ch. J., in *State v. Parker*, 26 Vt. 357: "If the operation of a law may fairly be made to depend upon a future contingency, then, in my apprehension, it makes no essential difference what is the nature of the contingency, so it be an equal and fair one, a moral and legal one, not opposed to sound policy, and so far connected with the object and purpose of the statute as not to be a mere idle and arbitrary one. And to us the contingency, upon which the present statute was to be suspended until another legislature should meet and have opportunity of reconsidering it, was not only proper and legal, and just and moral, but highly commendable and creditable to the legislature who passed the statute; for at the very threshold of inquiry into the expediency of such a law lies the other and more important inquiry, Are the people prepared for such a law? Can it be successfully enforced? These questions being answered in the affirmative, he must be a bold man who would even vote against the law; and something more must he be who would, after it had been passed with that assurance, be willing to embarrass its operation or rejoice at its defeat.

"After a full examination of the arguments by which it is attempted to be sustained that statutes made dependent upon such contingencies are not valid laws, and a good deal of study and reflection, I must declare that I am fully convinced — although at first, without much examination, somewhat inclined to the same opinion — that the opinion is the result of false analogies, and so founded upon a latent fallacy. It seems to me that the distinction attempted between the contingency of a popular vote and other future contingencies is without all just foundation in sound policy or sound

reasoning, and that it has too often been made more from necessity than choice, — rather to escape from an overwhelming analogy than from any obvious difference in principle in the two classes of cases; for . . . one may find any number of cases in the legislation of Congress, where statutes have been made dependent upon the shifting character of the revenue laws, or the navigation laws, or commercial rules, edicts, or restrictions of other countries. In some, perhaps, these laws are made by representative bodies, or, it may be, by the people of these States, and in others by the lords of the treasury, or the boards of trade, or by the proclamation of the sovereign; and in all these cases no question can be made of the perfect legality of our acts of Congress being made dependent upon such contingencies. It is, in fact, the only possible mode of meeting them, unless Congress is kept constantly in session. The same is true of acts of Congress by which power is vested in the President to levy troops or draw money from the public treasury, upon the contingency of a declaration or an act of war committed by some foreign state, empire, kingdom, prince, or potentate. If these illustrations are not sufficient to show the fallacy of the argument, more would not avail." See also *State v. Noyes*, 10 Fost. 279; *Bull v. Read*, 13 Gratt. 78; *Johnson v. Rich*, 9 Barb. 680; *State v. Reynolds*, 10 Ill. 1; *Robinson v. Bidwell*, 22 Cal. 379.

In the case of *Smith v. Janesville*, 26 Wis. 291, Chief Justice *Dixon* discusses this subject in the following language: "But it is said that the act is void, or at least so much of it as pertains to the taxation of shares in national banks, because it was submitted to a vote of the people, or provided that it should take effect only after approval by a majority of the electors voting on the subject at the next general election. This was no more than providing that the act should take effect on the happening of a certain future contingency, that contingency being a popular vote in its favor. No one doubts the general power of the legislature to make such regulations

The same reasons which preclude the original enactment of a law from being referred to the people would render it equally incompetent to refer to their decision the question whether an existing law should be repealed. If the one is "a plain surrender to the people of the law-making power", so also is the other.<sup>1</sup> It would

and conditions as it pleases with regard to the taking effect or operation of laws. They may be absolute, or conditional and contingent; and if the latter, they may take effect on the happening of any event which is future and uncertain. Instances of this kind of legislation are not unfrequent. The law of Congress suspending the writ of *habeas corpus* during the late rebellion is one, and several others are referred to in the case *In re Richard Oliver*, 17 Wis. 681. It being conceded that the legislature possesses this general power, the only question here would seem to be, whether a vote of the people in favor of a law is to be excluded from the number of those future contingent events upon which it may be provided that it shall take effect. A similar question was before this court in a late case (*State ex rel. Attorney-General v. O'Neill, Mayor, &c.*, 24 Wis. 149), and was very elaborately discussed. We came unanimously to the conclusion in that case that a provision for a vote of the electors of the city of Milwaukee in favor of an act of the legislature, before it should take effect, was a lawful contingency, and that the act was valid. That was a law affecting the people of Milwaukee particularly, while this was one affecting the people of the whole State. There the law was submitted to the voters of that city, and here it was submitted to those of the State at large. What is the difference between the two cases? It is manifest, on principle, that there cannot be any. The whole reasoning of that case goes to show that this act must be valid, and so it has been held in the best-considered cases, as will be seen by reference to that opinion. We are constrained to hold, therefore, that this act is and was in all respects valid from the time it took effect, in November, 1866; and consequently that there was no want of authority for the levy and collection of the taxes in question."

This decision, though opposed to many others, appears to us entirely sound and reasonable. See also *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633; *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 137 N. W. 20, 43 L. R. A. (N.S.) 339, Ann. Cas. 1913 C, 616.

A New Jersey statute, by its terms, was to become operative on the fourth Tuesday of November, 1913, provided that those voting for its adoption in a state-wide referendum at the election for members of the general assembly in that year should be a majority of all those voting on the question of the adoption or rejection of the act. It was held that this was not a delegation of legislative power to be exercised directly by the people; that it was a perfect piece of legislation in and of itself, and the provision that it should remain inoperative until the legal voters of the state adopted it was simply the contingency or condition upon which the statute should go into effect. The court said: "That statutes may be made to take effect upon the happening of contingencies is established. The legislature has made the approval by the people of the chancellor-sheriff jury act the contingency upon which that act was to take effect. We find nothing in the Constitution which amounts to a limitation of the legislature's right to do what they have done; and certainly there is no express prohibition against it in that instrument. In the absence of an express limitation upon the legislature's power in this regard, one ought not to be imported into the Constitution by implication. There is no necessity for such implication, and, in the absence of express prohibition, only a necessary implication will limit power." *Hudspeth v. Swayze*, 85 N. J. L. 592, 89 Atl. 780, Ann. Cas. 1916 A, 102.

<sup>1</sup> *Geebrick v. State*, 5 Iowa, 491; *Rice v. Foster*, 4 Harr. 479; *Parker v.*

seem, however, that if a legislative act is, by its terms, to take effect in any contingency, it is not unconstitutional to make the time when it shall take effect depend upon the event of a popular vote being for or against it, — the time of its going into operation being postponed to a later day in the latter contingency.<sup>1</sup> It would also seem that if the question of the acceptance or rejection of a municipal charter can be referred to the voters of the locality specially interested, it would be equally competent to refer to them the question whether a State law establishing a particular police regulation should be of force in such locality or not. Municipal charters refer most questions of local government, including police regulations, to the local authorities; on the supposition that they are better able to decide for themselves upon the needs, as well as the sentiments, of their constituents, than the legislature possibly can be, and are therefore more competent to judge what local regulations are important, and also how far the local sentiment will assist in their enforcement. The same reasons would apply in favor of permitting the people of the locality to accept or reject for themselves a particular police regulation, since this is only allowing them less extensive powers of local government than a municipal charter would confer; and the fact that the rule of law on that subject might be different in different localities, according as the people accepted or rejected the regulation, would not seem to affect the principle, when the same result is brought about by the different regulations which municipal corporations establish for themselves in the exercise of an undisputed authority.<sup>2</sup> It is not to be denied, however, that there

Commonwealth, 6 Pa. St. 507. The case in 5 Iowa was followed in *State v. Weir*, 33 Iowa, 134, 11 Am. Rep. 115.

<sup>1</sup> *State v. Parker*, 26 Vt. 357. The act under consideration in that case was, by its terms, to take effect on the second Tuesday of March after its passage, unless the people to whose votes it was submitted should declare against it, in which case it should take effect in the following December. The case was distinguished from *Barto v. Himrod*, 8 N. Y. 483, and the act sustained. At the same time the court express their dissent from the reasoning upon which the New York case rests. In *People v. Collins*, 3 Mich. 343, the court was equally divided in a case similar to that in Vermont, except that in the Michigan case the law which was passed and submitted to the people in 1853 was not to go into effect

until 1870, if the vote of the people was against it.

<sup>2</sup> In New Hampshire an act was passed declaring bowling-alleys, situate within twenty-five rods of a dwelling-house, nuisances, but the statute was to be in force only in those towns in which it should be adopted in town meeting. In *State v. Noyes*, 10 Fost. 279, this act was held to be constitutional. "Assuming," say the court, "that the legislature has the right to confer the power of local regulation upon cities and towns, that is, the power to pass ordinances and by-laws, in such terms and with such provisions, in the classes of cases to which the power extends, as they may think proper, it seems to us hardly possible seriously to contend that the legislature may not confer the power to adopt within such municipality a law drawn up and framed by

is considerable authority against the right of legislative delegation in these cases.

The legislature of Delaware, in 1847, passed an act to authorize the citizens of the several counties of the State to decide by ballot whether the license to retail intoxicating liquors should be permitted. By this act a general election was to be held; and if a majority of votes in any county should be cast against license, it should not thereafter be lawful for any person to retail intoxicating liquors within such county; but if the majority should be cast in favor of license, then licenses might be granted in the county so voting, in the manner and under the regulations in said act prescribed. The Court of Errors and Appeals of that State held this act void, as an attempted delegation of the trust to make laws, and upon the same reasons which support the cases before cited, where acts have been held void which referred to the people of the State for approval a law of general application.<sup>1</sup> A like decision was made near the same time by the Supreme Court of Pennsylvania,<sup>2</sup> followed afterwards by others in Iowa,<sup>3</sup> Indiana,<sup>4</sup> and California.<sup>5</sup> But the decision in Pennsylvania was afterwards overruled on full discussion and consideration,<sup>6</sup> and that in Indiana must, as we think, be

themselves. If they may pass a law authorizing towns to make ordinances to punish the keeping of billiard-rooms, bowling-alleys, and other places of gambling, they may surely pass laws to punish the same acts, subject to be adopted by the town before they can be of force in it." And it seems to us difficult to answer this reasoning, if it be confined to such laws as fall within the proper province of local government, and which are therefore usually referred to the judgment of the municipal authorities or their constituency. A similar question arose in *Smith v. Village of Adrian*, 1 Mich. 495, but was not decided.

In *Bank of Chenango v. Brown*, 26 N. Y. 467, it was held competent to authorize the electors of an incorporated village to determine for themselves what sections of the general act for the incorporation of villages should apply to their village. An act empowering a city, where the legal voters authorize it, to allow Sunday sales of refreshments, is valid. *State v. Francis*, 95 Mo. 44, 8 S. W. 1.

The operation of a park act may be left to the vote of a city. *State v.*

*District Court*, 33 Minn. 235, 22 N. W. 625. So, of a law vesting control of streets in aldermen instead of street commissioners. *State v. Hoagland*, 51 N. J. L. 62, 16 Atl. 166. So, of a law creating a new county. *People v. McFadden*, 81 Cal. 489, 22 Pac. 851. Whether an election to determine upon putting a law in operation shall be called, may be left to the discretion of officers. *Johnson v. Martin*, 75 Tex. 33, 12 S. W. 321. See, further, *People v. Salomon*, 51 Ill. 37; *Burgess v. Pue*, 2 Gill, 11; *Hammond v. Haines*, 25 Md. 541.

<sup>1</sup> *Rice v. Foster*, 4 Harr. 479.

<sup>2</sup> *Parker v. Commonwealth*, 6 Pa. St. 507. See *Commonwealth v. McWilliams*, 11 Pa. St. 61.

<sup>3</sup> *Geebrick v. State*, 5 Iowa, 491. See *State v. Weir*, 33 Iowa, 134, 11 Am. Rep. 115. But see *Des Moines v. Manhattan Oil Co.*, 193 Iowa, 1096, 184 N. W. 823, 23 A. L. R. 1322.

<sup>4</sup> *Maize v. State*, 4 Ind. 342; *Meshmeier v. State*, 11 Ind. 482.

<sup>5</sup> *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425.

<sup>6</sup> *Locke's Appeal*, 72 Pa. St. 491, 13 Am. Rep. 716.

deemed overruled also.<sup>1</sup> In other States a like delegation of authority to the local electors has generally been sustained. Such laws are known, in common parlance, as Local Option Laws. They relate to subjects which, like the retailing of intoxicating drinks, or the running at large of cattle in the highways, may be differently regarded in different localities, and they are sustained on what seems to us the impregnable ground, that the subject, though not embraced within the ordinary power of the municipalities to make by-laws and ordinances, is nevertheless within the class of police regulations, in respect to which it is proper that the local judgment should control.<sup>2</sup>

<sup>1</sup> *Groesch v. State*, 42 Ind. 547.

A majority of voters in a ward or township may be allowed by formal remonstrance to prevent the issuance of license to a particular applicant for the sale of liquors therein. *State v. Gerhardt*, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313.

<sup>2</sup> *Commonwealth v. Bennett*, 108 Mass. 27; *Commonwealth v. Dean*, 110 Mass. 357; *Commonwealth v. Fredericks*, 119 Mass. 199; *Bancroft v. Dumas*, 21 Vt. 456; *Slinger v. Henneman*, 38 Wis. 504; *Erlinger v. Boneau*, 51 Ill. 94; *Gunnarssohn v. Sterling*, 92 Ill. 569; *State v. Morris County*, 36 N. J. L. 72, 13 Am. Rep. 422; *State v. Circuit Court*, 50 N. J. L. 585, 15 Atl. 274; *State v. Wilcox*, 42 Conn. 364, 19 Am. Rep. 536; *Fell v. State*, 42 Md. 71, 20 Am. Rep. 83; *State v. Cocke*, 24 Minn. 247, 31 Am. Rep. 344; *Cain v. Commissioners*, 86 N. C. 8; *Boyd v. Bryant*, 35 Ark. 69, 37 Am. Rep. 6; *Savage v. Com.*, 84 Va. 619, 5 S. E. 565; *Caldwell v. Barrett*, 73 Ga. 604; *Ex parte Kennedy*, 23 Tex. App. 77, 3 S. W. 114; *Schulherr v. Bordeaux*, 64 Miss. 59, 8 So. 201; *State v. Pond*, 93 Mo. 606, 6 S. W. 469; *Terr v. O'Connor*, 5 Dak. 397, 41 N. W. 746; *Feek v. Bloomingdale*, 82 Mich. 393, 47 N. W. 37, 10 L. R. A. 69; *Chicago Terminal Transfer R. Co. v. Greer*, 223 Ill. 104, 79 N. E. 46, 114 Am. St. Rep. 313; *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; *Waugh v. Glos*, 246 Ill. 604, 92 N. E. 974, 138 Am. St. Rep. 259; *McPherson v. State*, 174 Ind. 60, 90 N. E. 610, 31 L. R. A. (N. S.) 188; *Cole v. Dorr*, 80 Kan. 251, 101 Pac. 1016, 22 L. R. A. (N. S.) 534;

*Gretna v. Bailey*, 141 La. 625, 75 So. 491, Ann. Cas. 1918 E, 566; *State v. Chicago, etc., R. Co.*, 195 Mo. 228, 93 S. W. 784, 113 Am. St. Rep. 661; *Hudspeth v. Swayze*, 85 N. J. L. 592, 89 Atl. 780, Ann. Cas. 1916 A, 102; *People v. Kennedy*, 207 N. Y. 533, 101 N. E. 442, Ann. Cas. 1914 C, 616, distinguishing *Barto v. Himrod* 8 N. Y. 483, 59 Am. Dec. 506; *Fouts v. Hood River*, 46 Ore. 492, 81 Pac. 370, 1 L. R. A. (N. S.) 483, 7 Ann. Cas. 1160; *Hall v. Dunn*, 52 Ore. 475, 97 Pac. 811, 25 L. R. A. (N. S.) 193; *State v. Summers*, 33 S. D. 40, 144 N. W. 730, 50 L. R. A. (N. S.) 206, Ann. Cas. 1916 B, 860; *Ex parte Mode*, 77 Tex. Crim. Rep. 432, 180 S. W. 708, Ann. Cas. 1918 E, 845; *Henrico County v. Richmond*, 106 Va. 282, 55 S. E. 683, 117 Am. St. Rep. 1001; *State v. Tausick*, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802; *State v. Frear*, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633; *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 137 N. W. 20, 43 L. R. A. (N. S.) 339, Ann. Cas. 1913 C, 774. But see *State v. Cope-land*, 3 R. I. 33. Local option, as applied to the sale of liquors, has also been sustained in Canada. *Mayor, &c. v. The Queen*, 3 Can. Sup. Ct. 505.

The question of a levee tax may lawfully be referred to the voters of the district or territory over which it is proposed to spread the tax, regardless of municipal divisions. *Alcorn v. Hamer*, 38 Miss. 652.

Power to grant an exclusive franchise in aid of navigation may be delegated to a village: *Farnum v. Johnson*, 62 Wis. 620, 22 N. W. 751; power to determine the penalty to be imposed.

*Irrepealable Laws.*

Similar reasons to those which forbid the legislative department of the State from delegating its authority will also forbid its passing any irrepealable law. The constitution, in conferring the legislative authority, has prescribed to its exercise any limitations which the people saw fit to impose; and no other power than the people can

for infraction of a State law may not: *Montross v. State*, 61 Miss. 429; nor power to increase its representation on a county board, when the constitution ordains that the legislature shall determine such representation: *People v. Riordan*, 73 Mich. 508, 41 N. W. 482. And see, in general, Angell and Ames on Corp. § 30 and note; also *post*, pp. 389-393.

In Washington it has been held that a question cannot be left to an election precinct. It must be submitted to a municipal corporation. *Thornton v. Territory*, 3 Wash. Ter. 482, 17 Pac. 896.

In Kentucky it has been held that a statute making it unlawful to maintain an industrial school without the consent of the majority of the voters in the precinct where the school is to be maintained is violative of a constitutional provision prohibiting the enactment of laws to take effect on the approval of any other authority than the legislature. *Columbia Trust Co. v. Lincoln Institute*, 138 Ky. 804, 129 S. W. 113, 29 L. R. A. (N. S.) 53.

In a Missouri case the court said: "Local option laws, that is, laws passed by the State which may or may not be taken advantage of and utilized as the people of each locality elect so to do or not, must apply to the whole State, and must confer upon the people of each locality a privilege of taking advantage, or not, of those laws as they see fit." *State v. Chicago, etc., R. Co.*, 195 Mo. 228, 93 S. W. 784, 113 Am. St. Rep. 661. See *State v. Field*, 17 Mo. 529; *Lammert v. Lidwell*, 62 Mo. 188.

The following question was submitted to the Justices of the Supreme Judicial Court of Massachusetts: Is it constitutional to provide in an act granting to women the right to vote in town and city elections, that it shall

take effect in a city or town upon its acceptance by a majority vote of the voters of such city or town? The majority of the court answered that such a provision would be unconstitutional. Opinions of the Justices, 160 Mass. 586, 36 N. E. 488, 23 L. R. A. 113. The court said: "It is certainly a difficult question to determine how far the principle of local option can be carried, and to what objects it can be applied. An act granting to women the right to vote in town and city elections does not relate to the powers of towns and cities, which in some respects may well be different in different towns and cities on account of the number, wealth, and pursuits of the inhabitants. Such an act relates solely to the persons who should be invested with a share of political power. Whether women should be permitted to vote in town and city elections seems to us a matter of general, and not of local concern. There is nothing in the history of Massachusetts which tends to show that the right to vote in towns and cities on town and city affairs has ever been regarded as a matter of police regulation or of merely local interest, or as a right which might be granted or withheld by a licensing board. It always has been determined by the legislature by a general law, in force uniformly throughout the Commonwealth. . . . Considering the nature of the power intended to be conferred, the history of legislation on the subject from the earliest times, and the language of the Constitution, we are of opinion that, if a law is to be enacted such as the question contemplates, it must operate uniformly throughout the Commonwealth." Dissenting opinions were submitted by Justices *Holmes*, *Barker*, and *Knowlton*.

superadd other limitations. To say that the legislature may pass irrepealable laws, is to say that it may alter the very constitution from which it derives its authority; since, in so far as one legislature could bind a subsequent one by its enactments, it could in the same degree reduce the legislative power of its successors; and the process might be repeated, until, one by one, the subjects of legislation would be excluded altogether from their control, and the constitutional provision that the legislative power shall be vested in two houses would be to a greater or less degree rendered ineffectual.<sup>1</sup>

"Acts of Parliament," says Blackstone, "derogatory from the power of subsequent Parliaments, bind not; so the statute 11 Henry VII. c. 1, which directs that no person for assisting a king *de facto* shall be attainted of treason by act of Parliament or otherwise, is held to be good only as to common prosecution for high treason, but it will not restrain nor clog any parliamentary attainder. Because the legislature, being in truth the sovereign power, is always

<sup>1</sup> "Unlike the decision of a court, a legislative act does not bind a subsequent legislature. Each body possesses the same power, and has the right to exercise the same discretion. Measures, though often rejected, may receive legislative sanction. There is no mode by which a legislative act can be made irrepealable, except it assume the form and substance of a contract. If in any line of legislation a permanent character could be given to acts, the most injurious consequences would result to the country. Its policy would become fixed and unchangeable on great national interests, which might retard, if not destroy, the public prosperity. Every legislative body, unless restricted by the constitution, may modify or abolish the acts of its predecessors; whether it would be wise to do so is a matter for legislative discretion." *Bloomer v. Stolley*, 5 McLean, 158. See this subject considered in *Wall v. State*, 23 Ind. 150; *State v. Oskins*, 28 Ind. 364; *Oleson v. Green Bay, &c. R. R. Co.*, 36 Wis. 383.

In *Stone v. Mississippi*, 101 U. S. 814, 820, 25 L. ed. 1079, Chief Justice Waite says: "The power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have es-

tablished their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must vary with varying circumstances." See also, on the same subject, *Morgan v. Smith*, 4 Minn. 104; *Kincaid's Appeal*, 66 Pa. St. 411, 5 Am. Rep. 377; *Hamrick v. Rouse*, 17 Ga. 56, where it was held that the legislature could not bind its successors not to remove a county seat. *Bass v. Fontleroy*, 11 Tex. 698; *Shaw v. Macon*, 21 Ga. 280; *Regents of University v. Williams*, 9 G. & J. 365; *Mott v. Pennsylvania Railroad Co.*, 30 Pa. St. 9.

In *Kellogg v. Oshkosh*, 14 Wis. 623, it was held that one legislature could not bind a future one to a particular mode of appeal.

In *Bank of Republic v. Hamilton*, 21 Ill. 53, it was held that, in construing a statute, it will not be intended that the legislature designed to abandon its right as to taxation. This subject is considered further, *post*, pp. 572-580.

of equal, always of absolute authority ; it acknowledges no superior upon earth, which the prior legislature must have been if its ordinances could bind a subsequent Parliament. And upon the same principle, Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses which endeavor to tie up the hands of succeeding legislatures. 'When you repeal the law itself,' says he, 'you at the same time repeal the prohibitory clause which guards against such repeal.'"<sup>1</sup>

Although this reasoning does not in all its particulars apply to the American legislatures, the principle applicable in each case is the same. There is a modification of the principle, however, by an important provision of the Constitution of the United States, forbidding the States passing any laws impairing the obligation of contracts. Legislative acts are sometimes in substance contracts between the State and the party who is to derive some right under them, and they are not the less under the protection of the clause quoted because of having assumed this form. Charters of incorporation, except those of a municipal character, — and which, as we have already seen, create mere agencies of government, — are held to be contracts between the State and the corporators, and not subject to modification or change by the act of the State alone, except as may be authorized by the terms of the charters themselves.<sup>2</sup> And it now seems to be settled, by the decisions of the Supreme Court of the United States, that a State, by contract to that effect, based upon a consideration, may exempt the property of an individual or corporation from taxation for any specified period, or even permanently. And it is also settled by the same decisions, that where a charter, containing an exemption from taxes, or an agreement that the taxes shall be to a specified amount only, is accepted by the corporators, the exemption is presumed to be upon sufficient consideration, and consequently binding upon the State.<sup>3</sup>

### *Territorial Limitation to State Legislative Authority.*

The legislative authority of every State must spend its force within the territorial limits of the State. The legislature of one

<sup>1</sup> 1 Bl. Com. 90.

<sup>2</sup> Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; Planters' Bank v. Sharp, 6 How. 301, 12 L. ed. 447.

<sup>3</sup> Gordon v. Appeal Tax Court, 3 How. 133, 11 L. ed. 529; New Jersey v. Wilson, 7 Cranch, 164, 3 L. ed. 303; Piqua Branch Bank v. Knoop, 16

How. 369, 14 L. ed. 977; Ohio Life Ins. and Trust Co. v. Debolt, 16 How. 416, 432, 14 L. ed. 997; Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; Mechanics' and Traders' Bank v. Debolt, 18 How. 380, 15 L. ed. 458; Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173; Erie R. R. Co. v. Pennsylvania, 21 Wall.



State cannot make laws by which people outside the State must govern their actions, except as they may have occasion to resort to the remedies which the State provides, or to deal with property situated within the State.<sup>1</sup> It can have no authority upon the high seas beyond State lines, because there is the point of contact with other nations, and all international questions belong to the national government.<sup>2</sup> It cannot provide for the punishment as crimes, of acts committed beyond the State boundary, because such acts, if offenses at all, must be offenses against the sovereignty within whose limits they have been done.<sup>3</sup> But if the consequences of an unlawful act committed outside the State have reached their ultimate and injurious result within it, it seems that the perpetrator may be punished as an offender against such State.<sup>4</sup>

492, 22 L. ed. 595. See also *Hunsaker v. Wright*, 30 Ill. 146; *Morgan v. Cree*, 46 Vt. 773; *Spooner v. McConnell*, 1 McLean, 347; *post*, p. 570.

<sup>1</sup> *Atchison, etc., R. Co. v. Sowers*, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397; *Galveston, etc., R. Co. v. Wallace*, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205; *Bond v. Hume*, 243 U. S. 15, 61 L. ed. 565, 37 Sup. Ct. Rep. 366; *Quong Ham Wah Co. v. Industrial Acc. Commission*, 184 Cal. 26, 192 Pac. 1021, 12 A. L. R. 1190; *Dougherty v. American McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619, L. R. A. 1915 F, 955, Ann. Cas. 1913 D, 568; *Louisville, etc., R. Co. v. Burkhart*, 154 Ky. 92, 157 S. W. 18, 46 L. R. A. (N. S.) 687; *Faulkner v. Hart*, 82 N. Y. 413, 37 Am. Rep. 574; *Snyder v. Yates*, 112 Tenn. 309, 79 S. W. 796, 105 Am. St. Rep. 941, 64 L. R. A. 353; *International Harvester Co. v. McAdam*, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. S.) 774, 20 Ann. Cas. 614.

<sup>2</sup> 1 Bish. Cr. Law, § 120.

The territorial jurisdiction of a State bordering upon the high seas extends one marine league from shore and is subject over that space only to the federal power over navigation. State has full control of the fisheries therein. *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559.

<sup>3</sup> *State v. Knight*, 2 Hayw. 109; *People v. Merrill*, 2 Park. Cr. R. 590; *Adams v. People*, 1 N. Y. 173; *Tyler*

*v. People*, 8 Mich. 320; *Morrissey v. People*, 11 Mich. 327; *Bromley v. People*, 7 Mich. 472; *State v. Main*, 16 Wis. 398; *Watson's Case*, 36 Miss. 593; *In re Carr*, 28 Kan. 1. See *In re Rosdeitscher*, 33 Fed. Rep. 657. And as to crimes on Indian reservations, see *United States v. Kagama*, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; *Ex parte Cross*, 20 Neb. 417, 30 N. W. 428; *Marion v. State*, *id.* 233, 20 N. W. 911.

<sup>4</sup> *Tyler v. People*, 8 Mich. 320; *State v. Wellman*, 102 Kan. 503, 170 Pac. 1052, L. R. A. 1918 D, 949, Ann. Cas. 1918 D, 1006.

Murder is committed in the District of Columbia if the fatal blow is struck there, though the death occurs elsewhere. *United States v. Guiteau*, 1 Mackey, 498. See *Hatfield v. Com.*, 11 Ky. L. 468, 12 S. W. 309.

That where a larceny is committed in one State and the property carried by the thief into another, this may be treated as a continuous larceny wherever the property is taken. See *Commonwealth v. Cullins*, 1 Mass. 116; *Commonwealth v. Andrews*, 2 Mass. 14, 3 Am. Dec. 17; *Commonwealth v. Holder*, 9 Gray, 7; *Commonwealth v. White*, 123 Mass. 430; *State v. Ellis*, 3 Conn. 185, 8 Am. Dec. 175; *State v. Cummings*, 33 Conn. 260; *State v. Bartlett*, 11 Vt. 650; *State v. Bennett*, 14 Iowa, 479; *People v. Williams*, 24 Mich. 156; *State v. Main*, 16 Wis. 398; *Hamilton v. State*, 11 Ohio, 435; *State v. Seay*, 3 Stew. 123, 20

Upon the principle of comity, however, which is a part of the law of nations, recognized as such by every civilized people, effect is given in one State or country to the laws of another in a great variety of ways, especially upon questions of contract rights to property, and rights of action connected with and dependent upon such foreign laws; without which commercial and business intercourse between the people of different States and countries could scarcely exist.<sup>1</sup> [The extent to which comity will be extended is very much a matter of judicial policy to be determined within reasonable limitations by each State for itself.<sup>2</sup>] In the making of contracts, the local law enters into and forms a part of the obligation; and if the contract is valid in the State where it is made,<sup>3</sup> any other State will give remedies for its enforcement, unless, according to the standard of such latter State, it is bad for immorality, or is opposed in its provisions to some accepted principle of public policy, or unless its enforcement would be prejudicial to the State or its people,<sup>4</sup> [or

Am. Dec. 66; *State v. Johnson*, 2 Oreg. 115; *Myers v. People*, 26 Ill. 173; *Watson v. State*, 36 Miss. 593; *State v. Underwood*, 49 Me. 181; *Ferrell v. Commonwealth*, 1 Duv. 153; *Regina v. Hennessy*, 35 Up. Can. R. 603; *Tramwill v. Com.*, 148 Ky. 624, 147 S. W. 36, 42 L. R. A. (N. S.) 207. *Contra*, *State v. Brown*, 1 Hayw. 100, 1 Am. Dec. 548; *People v. Gardner*, 2 Johns. 477; *Simmons v. Commonwealth*, 5 Binn. 617; *Simpson v. State*, 4 Humph. 456; *Beal v. State*, 15 Ind. 378; *State v. LeBlanch*, 31 N. J. L. 82; *Brown v. United States*, 35 App. Dec. (D. C.) 548, Ann. Cas. 1912 A, 388; *Ex parte Sullivan*, 84 Neb. 493, 121 N. W. 456, 28 L. R. A. (N. S.) 750, 18 Ann. Cas. 1024. And where the larceny took place in a foreign country: *Stanley v. State*, 24 Ohio St. 166, 15 Am. Rep. 604; *Commonwealth v. Uprichard*, 3 Gray, 434.

<sup>1</sup> *Thompson v. Waters*, 25 Mich. 214, 225; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274; *Bond v. Hume*, 243 U. S. 15, 61 L. ed. 565, 37 Sup. Ct. Rep. 366; *Cristilly v. Warner*, 87 Conn. 461, 88 Atl. 711, 51 L. R. A. (N. S.) 415; *Halloran v. Jacob Schmidt Brewing Co.*, 137 Minn. 141, 162 N. W. 1082, L. R. A. 1917 E, 777; *Snyder v. Yates*, 112 Tenn. 309, 79 S. W. 796, 105 Am. St. Rep. 941, 64 L. R. A. 353; *Hall v. Industrial Commission*, 165

Wis. 364, 162 N. W. 312, L. R. A. 1917 D, 829.

<sup>2</sup> *International Harvester Co. v. McAdam*, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. S.) 774, 20 Ann. Cas. 614.

<sup>3</sup> The contract is made in the State in which the offer is accepted. *Holder v. Aultman, Miller & Co.*, 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. Rep. 269, aff. 68 Fed. Rep. 467.

Upon validity of contracts made by foreign corporations which have not complied with statutory conditions prescribed as precedent to their right to do business in the State, see *Edison Gen. Electric Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370, 36 Pac. 260, 24 L. R. A. 315 and note, 40 Am. St. 910.

<sup>4</sup> *Runyon v. Coster's Lessee*, 14 Pet. 122, 10 L. ed. 382; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Saul v. His Creditors*, 5 Mart. (N. S.) 569, 16 Am. Dec. 212; *Greenwood v. Curtis*, 6 Mass. 258, 4 Am. Dec. 145; *Galveston, etc. R. Co. v. Wallace*, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205; *Bond v. Hume*, 243 U. S. 15, 61 L. ed. 565, 37 Sup. Ct. Rep. 366; *Union Trust Co. v. Grosman*, 245 U. S. 412, 62 L. ed. 368, 38 Sup. Ct. Rep. 147; *Smead v. Chandler*, 71 Ark. 505, 76 S. W. 1066, 65 L. R. A. 353; *Beauchamp v. Bertig*, 90 Ark. 351, 119 S. W. 75, 23

would violate its constitution or statutes.]<sup>1</sup> So, though a corporation created by or under the laws of one State has, in strictness, no

L. R. A. (N. S.) 659; *Collins v. Metropolitan L. Ins. Co.*, 232 Ill. 37, 83 N. E. 542, 122 Am. St. Rep. 54, 14 L. R. A. (N. S.) 356, 13 Ann. Cas. 129; *Clarey v. Union Cent. Life Ins. Co.*, 143 Ky. 540, 136 S. W. 1014, 33 L. R. A. (N. S.) 881; *Corbin v. Houlehan*, 100 Me. 246, 61 Atl. 131, 70 L. R. A. 568; *Meacham v. Jamestown, etc., R. Co.*, 211 N. Y. 346, 105 N. E. 653, Ann. Cas. 1915 C, 851; *Cannaday v. Atlantic Coast Line R. Co.*, 143 N. C. 439, 55 S. E. 836, 118 Am. St. Rep. 821, 8 L. R. A. (N. S.) 939; *Burrus v. Witcover*, 158 N. C. 384, 74 S. E. 11, 39 L. R. A. (N. S.) 1005; *Klein v. Keller*, 42 Okla. 592, 141 Pac. 1117, Ann. Cas. 1916 D, 1070; *Marx v. Hefner*, 46 Okla. 453, 149 Pac. 207, Ann. Cas. 1917 B, 656; *Winward v. Lincoln*, 23 R. I. 476, 51 Atl. 106, 64 L. R. A. 160; *First National Bank of Geneva v. Shaw*, 109 Tenn. 237, 70 S. W. 807, 97 Am. St. Rep. 840, 59 L. R. A. 498; *Snyder v. Yates*, 112 Tenn. 309, 79 S. W. 796, 105 Am. St. Rep. 941, 64 L. R. A. 353; *Chicago, etc., R. Co. v. Thompson*, 100 Tex. 185, 97 S. W. 459, 123 Am. St. Rep. 798, 7 L. R. A. (N. S.) 191; *Palmer v. Palmer*, 26 Utah, 31, 72 Pac. 3, 99 Am. St. Rep. 820, 61 L. R. A. 641; *National Car Advertising Co. v. Louisville, etc., R. Co.*, 110 Va. 413, 66 S. E. 88, 24 L. R. A. (N. S.) 1010; *Presbyterian Ministers' Fund v. Thomas*, 126 Wis. 281, 105 N. W. 801, 110 Am. St. Rep. 919; *Fox v. Postal Tel. Cable Co.*, 138 Wis. 648, 120 N. W. 399, 28 L. R. A. (N. S.) 490; *International Harvester Co. v. McAdam*, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. S.) 774.

In *Greenwood v. Curtis*, 6 Mass. 258, 4 Am. Dec. 145, *Parsons*, Ch. J., says the rule that foreign contracts will be enforced in our own courts is subject to two exceptions. One is when the Commonwealth or its citizens may be injured by giving legal effect to the contract by a judgment in our courts; and the other is, when the giving of legal effect to the contract would exhibit to the citizens of the

State an example pernicious and detestable. The first he illustrates by a contract for an importation forbidden by the local law, and the second by an agreement for an incestuous marriage. Another illustration under the first head is, where enforcing the foreign contract would deprive a home creditor of a lien. *Ingraham v. Geyer*, 13 Mass. 146. Compare *Oliver v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 312; *Arayo v. Currell*, 1 La. 528, 20 Am. Dec. 286.

From the fact that a contract could not have been validly made in a State, it does not necessarily follow that it is contrary to the public policy of the State. To be so, the contract must be, by moral standards in the judgment of the court, pernicious and injurious to the public welfare. *International Harvester Co. v. McAdam*, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. S.) 774, 20 Ann. Cas. 614.

<sup>1</sup>*Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 26 L. ed. 539; *Falls v. United States Savings Loan & Bldg. Co.*, 97 Ala. 417, 13 So. 25, 38 Am. St. Rep. 194, 24 L. R. A. 174; *Rhodes v. Missouri Savings & Loan Co.*, 173 Ill. 621, 50 N. E. 998, 42 L. R. A. 93; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687, 10 Am. St. Rep. 23, 5 L. R. A. 432; *Moore v. Church*, 70 Iowa, 208, 30 N. W. 855, 59 Am. Rep. 439; *Galliano v. Pierre*, 18 La. Ann. 10, 89 Am. Dec. 643; *Corbin v. Houlehan*, 100 Me. 246, 61 Atl. 131, 70 L. R. A. 568; *Baltimore, etc., R. Co. v. Genn*, 28 Md. 287, 92 Am. Dec. 688; *Com. v. Griffith*, 204 Mass. 18, 90 N. E. 394, 134 Am. St. Rep. 645, 25 L. R. A. (N. S.) 957; *Seamans v. Temple Co.*, 105 Mich. 400, 63 N. W. 408, 55 Am. St. Rep. 457, 28 L. R. A. 430; *Ivey v. Lalland*, 42 Miss. 444, 97 Am. Dec. 475, 2 Am. Rep. 606; *Richardson v. De Giverville*, 107 Mo. 422, 17 S. W. 974, 28 Am. St. Rep. 426; *Smith v. Godfrey*, 28 N. H. 379, 61 Am. Dec. 617; *Varnum v. Camp*, 13 N. J. L. 326, 25 Am. Dec. 476; *Flagg v. Baldwin*, 38 N. J. Eq. 219, 48 Am. Rep. 308; *Vanderpoel v. Gorman*,

extra-territorial life or authority, and cannot of right insist upon extending its operations within the limits of another, yet this will

140 N. Y. 563, 35 N. E. 932, 37 Am. St. Rep. 601, 24 L. R. A. 548; *Cannaday v. Atlantic Coast Line R. Co.*, 143 N. C. 439, 55 S. E. 836, 118 Am. St. Rep. 821, 8 L. R. A. (N. s.) 939; *Burrus v. Witcover*, 158 N. C. 384, 74 S. E. 11, 39 L. R. A. (N. s.) 1005; *Swing v. Munson*, 191 Pa. St. 582, 43 Atl. 342, 71 Am. St. Rep. 772, 58 L. R. A. 223; *Brown v. Browning*, 15 R. I. 422, 7 Atl. 403, 2 Am. St. Rep. 908; *Gist v. Western Union Tel. Co.*, 45 S. C. 344, 23 S. E. 143, 55 Am. St. Rep. 763; *Fidelity Mut. Life Ass'n v. Harris*, 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 813; *Palmer v. Palmer*, 26 Utah, 31, 72 Pac. 3, 99 Am. St. Rep. 820, 61 L. R. A. 641; *Presbyterian Ministers' Fund v. Thomas*, 126 Wis. 281, 105 N. W. 801, 110 Am. St. Rep. 919; *Fox v. Postal Tel. Cable Co.*, 138 Wis. 648, 120 N. W. 399, 28 L. R. A. (N. s.) 490; *International Harvester Co. v. McAdam*, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. s.) 774, 20 Ann. Cas. 614.

In *Bond v. Hume*, 243 U. S. 15, 61 L. ed. 565, 37 Sup. Ct. Rep. 366, Mr. Chief Justice *White*, who delivered the opinion of the court, said: "Elementary as is the rule of comity, it is equally rudimentary that an independent State under that principle will not lend the aid of its courts to enforce a contract founded upon a foreign law where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or, in other words, violate the public policy of the State where the enforcement of the foreign contract is sought. It is, moreover, axiomatic that the existence of the described conditions preventing the enforcement in a given case does not exclusively depend upon legislation, but may result from a judicial consideration of the subject, although it is also true that courts of one sovereignty will not refuse to give effect to the principle of comity by declining to enforce contracts which are valid under the laws of another sovereignty unless constrained to do so

by clear convictions of the existence of the conditions justifying that course. And finally, it is certain that, as it is peculiarly within the province of the law-making power to define the public policy of the State, where that power has been exerted in such a way as to manifest that a violation of public policy would result from the enforcement of a foreign contract validly entered into under a foreign law, comity will yield to the manifestation of the legislative will and enforcement will not be permitted. It is certain that these principles which govern as between countries foreign to each other apply with greater force to the relation of the several states to each other, since the obligations of the Constitution which bind them all in a common orbit of national unity impose of necessity restrictions which otherwise would not obtain, and exact a greater degree of respect for each other than otherwise by the principles of comity would be expected."

If a sale of goods is valid where made though it would not be where the buyer lives and where it is sought to be enforced, it will be upheld in the latter State, unless the seller participates in the reselling there: *Feineman v. Sachs*, 33 Kan. 621; *Parsons Oil Co. v. Boyett*, 44 Ark. 230; not if the order was unlawfully solicited in the buyer's State. *Jones v. Surprise*, 64 N. H. 243.

Gambling contracts as to stocks valid in New York will not be enforced in New Jersey. *Flagg v. Baldwin*, 38 N. J. Eq. 219. But a contract limiting a carrier's liability, valid in New York where made, will be enforced in Pennsylvania, though invalid if made there. *Forepaugh v. Del. L. & W. R. R. Co.*, 128 Pa. St. 217, 18 Atl. 503.

The rule that the law of a place of a contract governs, as to the validity and interpretation, applies to the capacity, including that of married women, to contract. *International Harvester Co. v. McAdam*, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. s.) 774, 20 Ann. Cas. 614.

be suffered without objection where no local policy forbids;<sup>1</sup> and the corporation may make contracts, and acquire, hold, and convey

<sup>1</sup> The question whether a foreign corporation shall be permitted to do business in a State rests wholly with the State which the corporation seeks to enter for that purpose; and if permission is granted it may be under such conditions and regulations as the State shall impose, providing matters of a Federal nature are not affected thereby. *Crescent Cotton Oil Co. v. Mississippi*, 257 U. S. 129, 66 L. ed. 166, 42 Sup. Ct. Rep. 42; *State v. Hodges*, 114 Ark. 155, 168 S. W. 942, L. R. A. 1916 F, 122; *International Trust Co. v. A. Leschen, etc., Rope Co.*, 41 Colo. 299, 92 Pac. 727, 14 Ann. Cas. 861; *In re Speed*, 216 Ill. 23, 74 N. E. 809, 108 Am. St. Rep. 189; *Lehigh Portland Cement Co. v. McLean*, 245 Ill. 326, 92 N. E. 248, 137 Am. St. Rep. 322; *Prewitt v. Security Life Ins. Co.*, 119 Ky. 321, 83 S. W. 611, 84 S. W. 527, 115 Am. St. Rep. 264, 1 L. R. A. (N. S.) 1019, affirmed 202 U. S. 246, 50 L. ed. 1013; 26 Sup. Ct. Rep. 619, *State v. Hammond Packing Co.*, 110 La. 180, 34 So. 368, 98 Am. St. Rep. 459; *Metropolitan Life Ins. Co. of New York v. Assessors of Parish of Orleans*, 115 La. 698, 39 So. 846, 116 Am. St. Rep. 179, 9 L. R. A. (N. S.) 1240; *Southern Electric Securities Co. v. State*, 91 Miss. 195, 44 So. 785, 124 Am. St. Rep. 638; *State v. Louisville, etc., R. Co.*, 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912 C, 1150; *Cheek v. Prudential Ins. Co., (Mo.)* 192 S. W. 387, L. R. A. 1918 A, 166; *Northwestern Mut. Life Ins. Co. v. Lewis, etc., County*, 28 Mont. 484, 72 Pac. 982, 98 Am. St. Rep. 572; *Boston Ice Co. v. Boston, etc. R.*, 77 N. H. 6, 86 Atl. 356, 45 L. R. A. (N. S.) 835, Ann. Cas. 1914 A, 1090; *Woodward v. Mutual Reserve Life Ins. Co.*, 178 N. Y. 485, 71 N. E. 10, 102 Am. St. Rep. 519; *Williams v. Mutual Reserve Fund Life Ass'n*, 145 N. C. 128, 58 S. E. 802, 13 Ann. Cas. 51; *Frink v. National Mut. Fire Ins. Co.*, 90 S. C. 544, 74 S. E. 33, Ann. Cas. 1913 D, 221; *Cunningham v. Shelby*, 136 Tenn. 176, 188 S. W. 1147, L. R. A.

1917 B, 572; *Cook v. Howland*, 74 Vt. 393, 52 Atl. 973, 93 Am. St. Rep. 912, 59 L. R. A. 338.

"The authority of the State to restrict the right of a foreign corporation to engage in business within its limits or to sue in its courts, so long as interstate commerce be not thereby burdened, is perfectly well settled. *Paul v. Virginia*, 8 Wall. 168, 181, 19 L. ed. 357, 360; *Hooper v. California*, 155 U. S. 648, 655, 39 L. ed. 297, 300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Bank of Augusta v. Earle*, 13 Pet. 519, 589, 591, 10 L. ed. 274, 308, 309; *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92; *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 203, 59 L. ed. 193, 197, 35 Sup. Ct. Rep. 57." *Interstate Amusement Co. v. Albert*, 239 U. S. 560, 60 L. ed. 439, 36 Sup. Ct. Rep. 168. See also *Munday v. Wisconsin Trust Co.*, 252 U. S. 499, 64 L. ed. 684, 40 Sup. Ct. Rep. 365; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 66 L. ed. 239, 42 Sup. Ct. Rep. 106; *State ex rel. Kimberlite Diamond Mining, etc., Co. v. Hodges*, 114 Ark. 155, 169 S. W. 942, L. R. A. 1916 F, 122.

A State may prescribe conditions upon which a foreign corporation may do business within its borders, and for breach of such conditions may exclude the corporation, except where it is doing business of a Federal nature. *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518, aff. 19 Tex. Civ. App. 1, 44 S. W. 936. Upon admission or exclusion of foreign corporations, see *Cone Export and Commission Co. v. Poole*, 41 S. C. 70, 19 S. E. 203, 24 L. R. A. 289 and note; exclusion, regulation, and taxation of foreign corporations, note to 24 C. C. A. 13; regulation of business of a foreign corporation by State, *Boulware v. Davis*, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601 and note; and that foreign corporations are amenable to local law, see *Talbot v. Fidelity, &c. Co.*, 74 Md.

536, 22 Atl. 395, 13 L. R. A. 584; *Stone v. Illinois Cent. R. Co.*, 116 U. S. 347, 29 L. ed. 650, 6 Sup. Ct. Rep. 348; *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 66 L. ed. 1044, 42 Sup. Ct. Rep. 516, 27 A. L. R. 27; *Thomas v. Wentworth Hotel Co.*, 158 Cal. 275, 110 Pac. 942, 139 Am. St. Rep. 120; *McGuire v. Chicago, etc., R. Co.*, 131 Iowa, 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706; *In re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790, 11 Ann. Cas. 1069.

A foreign life insurance company which enters a State and does business therein is bound to observe the laws of that State, and its contracts thus made will be interpreted according to the laws of that State even though the parties expressly stipulate that the contract shall be interpreted according to the laws of another State. *N. Y. Life Ins. Co. v. Cravens*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962, aff. 148 Mo. 583, 50 S. W. 519, 71 Am. St. 628; *Cook v. Howland*, 74 Vt. 393, 52 Atl. 973, 93 Am. St. Rep. 912, 59 L. R. A. 338. A State has power to prescribe the conditions under which a foreign insurance corporation may do business within its borders, and to provide and enforce penalties for breach of those conditions. *Noble v. Mitchell*, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110. And the State may penalize any act done within its borders looking toward the formation of contract relations with a foreign corporation which it has forbidden to do business within its borders. *Hooper v. California*, 155 U. S. 647, 39 L. ed. 297, 15 Sup. Ct. Rep. 207; but it cannot prevent the doing within its borders by its citizens of acts otherwise lawful which are reasonably necessary to the enjoyment of contracts which such citizens have made without its borders, even though they be made with foreign corporations which the State has forbidden to do business within its borders. *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427. And a requirement that before doing business within the State the foreign corporation shall surrender a right which it derives from the Con-

stitution and laws of the United States is void. *Southern Pac. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44.

If State taxes its own corporations upon their entire capital, the foreign corporation doing business in the State cannot object to being taxed upon its entire capital, even though it uses only a very small fraction of its capital within the State. *Horn Silver Mining Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 12 Sup. Ct. Rep. 403, aff. 105 N. Y. 76, 11 N. E. 155.

A foreign corporation does business in a particular State not by right but by comity, and its license to do so may be revoked at pleasure. *State v. Standard Oil Co.*, 61 Neb. 28, 84 N. W. 413, 87 Am. St. 449; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. ed. 148; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 10 Sup. Ct. Rep. 308; *Security Mut. Life Ins. Co. v. Perwitt*, 202 U. S. 246, 50 L. ed. 1013, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317; *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645.

A railroad corporation whose road lies entirely within one State, but is a link in a through route traversing several States, over which through route interstate commerce is carried on, is engaged in interstate commerce, and no State can exact of it a license before permitting it to open an office within the borders of the State, in which office it transacts only business relating to its interstate commerce. *McCall v. California*, 136 U. S. 104, 34 L. ed. 392, 10 Sup. Ct. Rep. 881; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 10 Sup. Ct. Rep. 958. For note upon exclusion of foreign corporations as an interference with interstate commerce, see 24 L. R. A. 311. License for current year may be revoked for refusal to pay unpaid license fees for previous years. *Travelers' Ins. Co. v. Fricke*, 99 Wis. 367, 74 N. W. 372, 78 N. W. 407, 41 L. R. A. 557.

The exclusion of a foreign corporation cannot operate to prevent the performance of contracts lawfully entered

property as it would have a right to do in the State of its origin.<sup>1</sup> [By compliance with the Constitution and laws of the State into which it has extended its operations, it may do business within the State at its pleasure, and, when dissatisfied, can withdraw at will.<sup>2</sup>]

into before the order of exclusion was passed, nor impair the right to enforce the obligations arising through such performance. *Bedford v. E. B'd'g & Loan Ass'n*, 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597.

Upon right to sue in foreign State, see *Cone E. & C. Co. v. Poole*, 41 S. C. 70, 19 S. E. 203, 24 L. R. A. 289, and note therein on recognition or exclusion of foreign corporations. On power of a State to prevent foreign corporations operating within its borders from violating its exemption laws by garnishment proceedings in other States, see *Singer M'f'g Co. v. Fleming*, 39 Neb. 679, 58 N. W. 226, 23 L. R. A. 210, 42 Am. St. 613.

An action to exclude a foreign corporation from the State is a civil action, and the defendant corporation may be compelled to give evidence against itself. *State v. Standard Oil Co.*, 61 Neb. 28, 84 N. W. 413.

For other cases upon foreign corporations, see *Southern B. & L. Ass'n v. Norman*, 98 Ky. 294, 32 S. W. 952, 31 L. R. A. 41, 56 Am. St. 367; *Kindel v. Beck & P. Lith. Co.*, 19 Col. 310, 35 Pac. 538, 24 L. R. A. 311; *Gunn v. White S. M. Co.*, 57 Ark. 24, 20 S. W. 591, 18 L. R. A. 206, 38 Am. St. 223; *State v. Phipps*, 50 Kan. 609, 31 Pac. 1097, 18 L. R. A. 657, 34 Am. St. 152.

<sup>1</sup> *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Jessup v. Carnegie*, 80 N. Y. 441; *Lumbard v. Aldrich*, 8 N. H. 31; *Lothrop v. Commercial Bank*, 8 Dana, 114; *National Trust Co. v. Murphy*, 30 N. J. Eq. 408; *Elston v. Piggott*, 94 Ind. 14; *People v. Howard*, 50 Mich. 239; *Christian Union v. Yount*, 101 U. S. 352, 25 L. ed. 888; *Armour Packing Co. v. Vinegar Bend Lumber Co.*, 149 Ala. 205, 42 So. 866, 13 Ann. Cas. 951; *American De Forest Wireless Tel. Co. v. Superior Ct.*, 153 Cal. 533, 96 Pac. 15, 126 Am. St. Rep. 125, 17 L. R. A. (N. S.), 1117; *Squire v. Portland*, 106 Me. 234, 76 Atl. 679, 30 L. R. A. (N. S.) 576, 20 Ann. Cas.

603; *Helena Power Transmission Co. v. Spratt*, 35 Mont. 108, 88 Pac. 773, 8 L. R. A. (N. S.) 567, 10 Ann. Cas. 1055; *McCarter v. Firemen's Ins. Co.*, 74 N. J. Eq. 372, 73 Atl. 80, 414, 135 Am. St. Rep. 708, 29 L. R. A. (N. S.) 1194, 18 Ann. Cas. 1048; *Booth v. Weigand*, 30 Utah, 135, 83 Pac. 734, 10 L. R. A. (N. S.) 693; *Cook v. Howland*, 74 Vt. 393, 52 Atl. 973, 93 Am. St. Rep. 912, 59 L. R. A. 338.

<sup>2</sup> *Jennings v. Idaho Ry., etc., Co.*, 26 Idaho, 703, 146 Pac. 101, L. R. A. 1915 D, 115, Ann. Cas. 1916 E, 359.

A foreign corporation has no right to do business in any other State except by comity and upon the express or implied consent of such other State and upon such conditions as such other State may think proper to impose. But the principle of comity which permits corporations of one State to transact business in another State is one of general acceptance, and is enforced by the courts of every jurisdiction until destroyed by the law-making power. *People ex rel. Potts v. Continental Beneficial Ass'n*, 280 Ill. 113, 117 N. E. 482. But though a corporation organized under the laws of one State is permitted by another State, upon compliance with its laws, to carry on its business there, such permission and compliance does not make it a resident of such other State. *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 277; *New York Ins. Co. v. Pike*, 51 Colo. 238, 117 Pac. 899; *Barbour v. Paige Hotel Co.*, 2 App. D. C. 174; *Boyer v. Northern Pac. R. Co.*, 8 Idaho, 74, 66 Pac. 826, 70 L. R. A. 691; *Jennings v. Idaho Ry., etc., Co.*, 26 Idaho, 703, 146 Pac. 101, L. R. A. 1915 D, 115, Ann. Cas. 1916 E, 359; *Blackstone Mfg. Co. v. Blackstone*, 13 Gray (Mass.) 488; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Cowardin v. Universal Life Ins. Co.* 32 Gratt. (Va.) 445.

The words "doing business", as used in a constitutional provision for-

bidding corporations to do business in the State without having a place of business, with an agent on whom process may be served, etc., refer to a general transaction of business, and not to an isolated transaction, or to single, or wholly collateral acts. *Booth v. Weigand*, 30 Utah, 135, 83 Pac. 734, 10 L. R. A. (N. S.) 693. Taking an order in one State for the delivery of goods in another is not such a doing of business as to require compliance with a statute for filing certificate, &c., before transacting of business by a foreign corporation. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739. Discounting a note sent from another State is not doing business in the State from which the note is sent. *Bamberger & Co. v. Schoolfield*, 160 U. S. 149, 40 L. ed. 374, 16 Sup. Ct. Rep. 225. Nor is filling an order for coal, order being sent from another State, a doing of business in that other State. *Delaware & H. Canal Co. v. Mahlenbrock*, 63 N. J. L. 281, 43 Atl. 978, 45 L. R. A. 538. Being interested as silent partner in a limited partnership in the State is doing business within it. *People v. Roberts*, 152 N. Y. 59, 46 N. E. 161, 36 L. R. A. 756. But prosecuting a suit is not. *St. Louis, A. & T. R. Co. v. Fire Assn. of Phila.*, 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83. Nor is taking a single mortgage for past-due indebtedness for goods sold at its domicile. *Florsheim, &c. Co. v. Lester*, 60 Ark. 120, 29 S. W. 34, 27 L. R. A. 505, 46 Am. St. 162. Where the foreign corporation has no office or agency within the State, its sale of machinery to a resident and its subsequent coming into the State and erecting the machinery is only interstate commerce and not a doing business within the State which the State can control. *Milan M. & M. Co. v. Gorton*, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135. Upon what is doing business within a State, and under what circumstances an agent doing business within the State may be served with process against the corporation, see *Connecticut Life Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569,

19 Sup. Ct. Rep. 308, aff. 99 Tenn. 322, 42 S. W. 145. As to what constitutes doing business in a State, see also *State ex rel. Kimberlite Diamond Mining, etc., Co. v. Hodges*, 114 Ark. 155, 169 S. W. 942, L. R. A. 1916 F, 122; *Atkinson v. United States Operating Co.*, 129 Minn. 232, 152 N. W. 410, L. R. A. 1916 E, 241; *Saxony Mills v. Wagner*, 94 Miss. 233, 47 So. 899, 136 Am. St. Rep. 575, 23 L. R. A. (N. S.) 834, 19 Ann. Cas. 199; *Berger v. Pennsylvania R. Co.*, 27 R. I. 583, 65 Atl. 261, 9 L. R. A. (N. S.) 1214, 8 Ann. Cas. 941.

Where corporation is foreign and does no business in the State, nor has any agent or property therein, service of summons upon the president temporarily within the State is ineffective to give jurisdiction to a Federal circuit court sitting therein, and appearance specially and solely for purpose of petitioning for removal of cause to another Federal court does not waive the objection to insufficiency of summons and service. *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559.

Foreign corporation doing business within a State thereby subjects itself to the local regulations concerning suits against non-residents. *N. Y., L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 37 L. ed. 292, 13 Sup. Ct. Rep. 444. And to local tax laws. *Horn Silver Mining Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 12 Sup. Ct. Rep. 403. And the State may by penalties enforce it to comply with its laws. *Moses v. State*, 65 Miss. 56. But it is beyond the power of a State to forfeit or extend the corporate existence of a foreign corporation. It can exercise no power or control over the corporation as such. *Jennings v. Idaho Ry., etc., Co.*, 26 Idaho, 703, 146 Pac. 101, L. R. A. 1915 D, 115, Ann. Cas. 1916 E, 359. And after the corporation has completely withdrawn from the State and no longer does any business there, it is not subject to State process. *Mutual R. F. Life Assn. v. Boyer*, 62 Kan. 31, 61 Pac. 387, 50 L. R. A. 538. Powers not allowed to such a corporation in the State where created, it will not be



Real estate, however, it can only take, hold, and transmit in accordance with the rules prescribed by the law of the State in which the estate is situate;<sup>1</sup> and the principle of comity is never so far extended as to give force and effect to the penal laws of one political society within the territory of another, even though both belong to one political system.<sup>2</sup> The question whether a statute giving a right of action for a death occurring within a State can be enforced in another State has given rise to much discussion. In several States it is held that the remedy is purely local, and that the action can only be brought in the State where the killing takes place. But in several the rule is that an action will lie in another State, if the

suffered to exercise elsewhere. *Starkweather v. Bible Society*, 72 Ill. 50, 22 Am. Rep. 133; *Kerr v. Dougherty*, 79 N. Y. 327; *Thompson v. Waters*, 25 Mich. 214. If it acts in excess of its conferred authority, it may be questioned as to its authority only by the State. *Migatt v. Ponca City Land, etc., Co.*, 14 Okla. 189, 78 Pac. 185, 68 L. R. A. 810.

<sup>1</sup> A rule which applies even to the government itself. *United States v. Fox*, 94 U. S. 315, 24 L. ed. 192. See *State v. Scott*, 22 Neb. 628, 36 N. W. 121.

Only a State can raise the question whether a foreign corporation can rightfully acquire land for its business purposes. *Barnes v. Suddard*, 117 Ill. 237, 7 N. E. 477. Failure of such corporation to comply with statutory conditions precedent to doing business does not avoid a conveyance to it so that a private person can attack it collaterally. *Fritts v. Palmer*, 132 U. S. 382, 33 L. ed. 317, 10 Sup. Ct. Rep. 93. Compare *Koenig v. Chicago, B. & Q. R. R. Co.*, 27 Neb. 699, 43 N. W. 423. But it has been held that where, in an action by a foreign corporation, there is an attempt on the part of such corporation to acquire title to property vested in an individual, such individual may deny its corporate capacity as a defense to its right of recovery. *Myatt v. Ponca City Land, etc., Co.*, 14 Okla. 189, 78 Pac. 185, 68 L. R. A. 810. See also *Plummer v. Chesapeake, etc., R. Co.*, 143 Ky. 102, 136 S. W. 162, 33 L. R. A. (N. S.) 362; *Hanna v. Kelsey Realty*

*Co.*, 145 Wis. 276, 129 N. W. 1080, 140 Am. St. Rep. 1075, 33 L. R. A. (N. S.) 355.

<sup>2</sup> *Dickson v. Dickson*, 1 Yerg. 110, 24 Am. Dec. 444; *Scoville v. Canfield*, 14 Johns. 338, 7 Am. Dec. 467; *First National Bank v. Price*, 33 Md. 487, 3 Am. Rep. 204; *Lindsey v. Hill*, 66 Me. 212, 22 Am. Rep. 564; *Galveston, etc., R. Co. v. Wallace*, 223 U. S. 481, 56 L. ed. 516, 32 Sup. Ct. Rep. 205; *Cristilly v. Warner*, 87 Conn. 461, 88 Atl. 711, 51 L. R. A. (N. S.) 415; *Raisor v. Chicago, etc., R. Co.*, 215 Ill. 47, 74 N. E. 69, 106 Am. St. Rep. 153, 2 Ann. Cas. 802; *Rogers v. Western Union Tel. Co.*, 122 Ind. 395, 24 N. E. 157, 17 Am. St. Rep. 373; *Great Western Machinery Co. v. Smith*, 87 Kan. 331, 124 Pac. 414, 41 L. R. A. (N. S.) 379, Ann. Cas. 1913 E, 243; *Gulledge Bros. Lumber Co. v. Wenatchee Land Co.*, 122 Minn. 266, 142 N. W. 305, 46 L. R. A. (N. S.) 697; *Hill v. Boston, etc., R. Co.*, 77 N. H. 151, 89 Atl. 482, Ann. Cas. 1914 C, 714; *Gardner v. Rumsey*, 81 Okla. 20, 196 Pac. 941, 25 A. L. R. 1411; *Nesbitt v. Clark*, 272 Pa. St. 161, 116 Atl. 404, 25 A. L. R. 1406; *Brower v. Watson*, 146 Tenn. 626, 244 S. W. 362, 26 A. L. R. 991; *State v. Peet*, 80 Vt. 449, 68 Atl. 661, 130 Am. St. Rep. 998.

The Federal courts will not enforce at the suit of a State its penal laws against a foreign corporation. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370.

statutes of the latter are substantially like those of the State where the death is caused.<sup>1</sup>

[The Constitution of the United States empowers Congress to exercise exclusive jurisdiction over places purchased by consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. When the United States acquire lands without such consent, the State jurisdiction is as complete as if the lands were owned by private citizens; and the State, in giving consent, may reserve the right to serve State process within the territory,<sup>2</sup> or to tax railroads in it,<sup>3</sup> and its railroad fencing statutes remain in force.<sup>4</sup> But offenses within the purchased territory can only be punished by the United States,<sup>5</sup> even though death ensues out of the territory;<sup>6</sup> and residents within such territory are not citizens of the State.<sup>7</sup>]

### *Other Limitations of Legislative Authority.*

Besides the limitations of legislative authority to which we have referred, others exist which do not seem to call for special remark. Some of these are prescribed by constitutions,<sup>8</sup> but others spring from

<sup>1</sup> See *Taylor v. Penn. Co.*, 78 Ky. 348; *Debevoise v. New York, L. E. & W. R. R. Co.*, 98 N. Y. 377; *St. Louis, I. M. & C. Co. v. McCormick*, 71 Tex. 660, 9 S. W. 540; *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. ed. 439; *Florida Cent. R. Co. v. Sullivan*, 57 C. C. A. 167, 120 Fed. 799, 61 L. R. A. 410; *Weir v. Rountree*, 97 C. C. A. 500, 173 Fed. 776, 19 Ann. Cas. 1204; *Strait v. Yazoo, etc., R. Co.*, 126 C. C. A. 105, 209 Fed. 157, 49 L. R. A. (N. S.) 1068; *Weissengoff v. Davis*, 171 C. C. A. 52, 260 Fed. 16, 7 A. L. R. 307; *Dougherty v. American McKenna Press Co.*, 255 Ill. 369, 99 N. E. 619, Ann. Cas. 1913 D, 568; *In re Coe*, 130 Iowa, 307, 106 N. W. 743, 114 Am. St. Rep. 416, 8 Ann. Cas. 148, 4 L. R. A. (N. S.) 814; *Renlund v. Commodore Min. Co.*, 89 Minn. 41, 93 N. W. 1057, 99 Am. St. Rep. 534; *Stewart v. Great Northern R. Co.*, 103 Minn. 156, 114 N. W. 953, 123 Am. St. Rep. 318; *McGinnis v. Missouri Car, etc., Co.*, 174 Mo. 225, 73 S. W. 586, 97 Am. St. Rep. 553; *Baltimore, etc., R. Co. v. Chambers*, 73 Ohio St. 16, 76 N. E. 91, 11 L. R. A. (N. S.) 1012; *Dennis v. Atlantic Coast Line*

*R. Co.*, 70 S. C. 254, 49 S. E. 869, 106 Am. St. Rep. 746; *Sharp v. Cincinnati, etc., R. Co.*, 133 Tenn. 1, 179 S. W. 375, Ann. Cas. 1917 C, 1212.

<sup>2</sup> *State v. Dimick*, 12 N. H. 194; *Commonwealth v. Clary*, 8 Mass. 72; *United States v. Cornell*, 2 Mass. 60; *Opinion of Judges*, 1 Met. 580.

<sup>3</sup> *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995.

<sup>4</sup> *Chicago, R. I., & C. Co. v. McGlinn*, 114 U. S. 542, 29 L. ed. 270, 5 Sup. Ct. Rep. 1005.

<sup>5</sup> *United States v. Ames*, 1 Wood. & M. 76; *Mitchell v. Tibbetts*, 17 Pick. 298.

<sup>6</sup> *Kelly v. United States*, 27 Fed. 616; *State v. Kelly*, 76 Me. 331.

<sup>7</sup> *Commonwealth v. Clary*, 8 Mass. 72; *Sinks v. Roese*, 19 Ohio St. 306.

<sup>8</sup> The restrictions upon State legislative authority are much more extensive in some constitutions than in others. The Constitution of Missouri of 1865 had the following provision: "The General Assembly shall not pass special laws divorcing any named parties, or declaring any named person of age, or authorizing any named minor to

sell, lease, or encumber his or her property, or providing for the sale of the real estate of any named minor or other person laboring under legal disability, by any executor, administrator, guardian, trustee, or other person, or establishing, locating, altering the course, or affecting the construction of roads, or the building or repairing of bridges, or establishing, altering, or vacating any street, avenue, or alley in any city or town, or extending the time for the assessment or collection of taxes, or otherwise relieving any assessor or collector of taxes from the due performance of his official duties, or giving effect to informal or invalid wills or deeds, or legalizing, except as against the State, the unauthorized or invalid acts of any officer, or granting to any individual or company the right to lay down railroad tracks in the streets of any city or town, or exempting any property of any named person or corporation from taxation. The General Assembly shall pass no special law for any case for which provision can be made by a general law, but shall pass general laws providing, so far as it may deem necessary, for the cases enumerated in this section, and for all other cases where a general law can be made applicable." Art. 4, § 27. We should suppose that so stringent a provision would, in some of these cases, lead to the passage of general laws of doubtful utility in order to remedy the hardships of particular cases; but the Constitution adopted in 1875 is still more restrictive. Art. 4, § 53.

Under a Constitution providing that "where a general law can be made applicable no special law shall be enacted", laws of a general nature do not necessarily have to operate upon every locality in the State, but such laws must apply equally to all classes similarly situated and to like conditions and subjects. *Sapulpa v. Land*, 101 Okla. 22, 223 Pac. 640, 35 A. L. R. 872.

"A law is general in the constitutional sense, which applies to and operates uniformly upon all members of any class of persons, places or things requiring legislation peculiar

to itself in matters covered by the law, while a special law is one which relates and applies to particular members of a class, either particularized by the express terms of the act or separated by any method of selection from the whole class to which the law might, but for such limitation, be applicable." *Clendaniel v. Conrad*, 3 Boyce (Del.) 549, 83 Atl. 1036, Ann. Cas. 1915 B, 968, quoting *Lewis' Sutherland Statutory Construction* (2nd Ed.) § 196. See also *Title, etc., Restoration Co. v. Kerrigan*, 150 Cal. 289, 88 Pac. 356, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682; *Mix v. Nez Perce County*, 18 Idaho, 695, 112 Pac. 215, 32 L. R. A. (N. S.) 534; *Mathews v. People*, 202 Ill. 389, 67 N. E. 28, 95 Am. St. Rep. 241, 63 L. R. A. 73; *King v. Com.*, 194 Ky. 143, 238 S. W. 373, 22 A. L. R. 535; *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; *State v. Swagerty*, 203 Mo. 517, 102 S. W. 483, 120 Am. St. Rep. 671, 10 L. R. A. (N. S.) 601, 11 Ann. Cas. 725; *Hays v. Hogan*, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918 C, 715; *Boorum v. Connelly*, 66 N. J. L. 197, 48 Atl. 955, 88 Am. St. Rep. 469; *Bishop v. Tulsa*, (Okla. Crim. Rep.) 209 Pac. 228, 27 A. L. R. 1008; *Ladd v. Holmes*, 40 Oreg. 167, 66 Pac. 714, 91 Am. St. Rep. 457; *In re Washington St.*, 132 Pa. St. 257, 19 Atl. 219, 7 L. R. A. 193; *Usey v. Hiott*, 30 S. C. 360, 9 S. E. 338, 14 Am. St. Rep. 910; *McEldowney v. Wyatt*, 44 W. Va. 711, 30 S. E. 239, 45 L. R. A. 609.

"Laws which are framed in general terms and are not restricted in locality, but operate equally upon all groups of objects, which, having regard to the purpose of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, are general. Special legislation is such as relates either to particular persons, places, or things, or to persons, places, or things which, though not particularized, are separated by any method of selection from the whole class to which the law might, but for such legislation, be applied, while a local law is one whose

operation is confined within territorial limits, other than those of the whole State or any properly constituted class or locality therein." *King v. Com. ex rel. Smith*, 194 Ky. 143, 238 S. W. 373, 22 A. L. R. 535.

A statute which applies to all persons or things of a designated class uniformly throughout the State, omitting no person or thing belonging under that classification, is a general law within the meaning of the constitution. *Bishop v. City of Tulsa*, (Okla. Crim. Rep.) 209 Pac. 228, 27 A. L. R. 1008. Thus a statute creating and relating to municipal courts, and providing that the act shall apply to cities having more than 50,000 and less than 80,000 inhabitants, as determined by the last preceding Federal census, is a "General Law", *Bishop v. City of Tulsa*, (Okla. Crim. Rep.) 209 Pac. 228, 27 A. L. R. 1008.

In *State v. Hitchcock*, 1 Kan. 178, it was held that the constitutional provision, that "in all cases where a general law can be made applicable, no special law shall be enacted", left a discretion with the legislature to determine the cases in which special laws should be passed. See, to the same effect, *Marks v. Trustees of Purdue University*, 37 Ind. 155; *State v. Tucker*, 46 Ind. 355, overruling *Thomas v. Board of Commissioners*, *supra*; *Johnson v. Com'rs Wells Co.*, 107 Ind. 15; *State v. County Court of Boone*, 50 Mo. 317, 11 Am. Rep. 415; *State v. Robbins*, 51 Mo. 82; *Hall v. Bray*, 51 Mo. 288; *St. Louis v. Shields*, 62 Mo. 247; *Carpenter v. People*, 8 Col. 116, 5 Pac. 825; *Richman v. Supervisors*, 77 Iowa, 513, 42 N. W. 422; *Davis v. Gaines*, 48 Ark. 370; *Fairfield v. Huntington*, 23 Ariz. 528, 205 Pac. 814, 22 A. L. R. 1438; *Missouri R. Co. v. State*, 92 Ark. 1, 121 S. W. 930, 135 Am. St. Rep. 164, 31 L. R. A. (N. S.) 861; *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; *Weston v. Ryan*, 70 Neb. 211, 97 N. W. 347, 6 Ann. Cas. 922; *Bishop v. City of Tulsa*, (Okla. Crim. Rep.) 209 Pac. 228, 27 A. L. R. 1008; *Woodall v. Darst*, 71 W. Va. 350,

77 S. E. 264, 80 S. E. 367, 44 L. R. A. (N. S.) 83, Ann. Cas. 1914 B, 1278. Compare *Hess v. Pegg*, 7 Nev. 23; *Darling v. Rogers*, 7 Kan. 592; *Ex parte Pritz*, 9 Iowa, 30; *Bank of Commerce v. Wiltzie*, 153 Ind. 460, 53 N. E. 950, 55 N. E. 224, 47 L. R. A. 489; *State v. Kolsem*, 130 Ind. 434, 29 N. E. 595, 14 L. R. A. 566, and note; *Richman v. Muscatine County*, 77 Iowa, 513, 42 N. W. 422, 4 L. R. A. 445, 14 Am. St. 308; *People v. Levee Dist. No. 6*, 131 Cal. 30, 63 Pac. 342; *State v. Carter*, 30 Wyo. 22, 215 Pac. 477, 28 A. L. R. 1089. But see *Silberman v. Hay*, 59 Ohio St. 582, 53 N. E. 258, 44 L. R. A. 264, holding that right of trial by jury is general, and that a law relating thereto and expressly made applicable to a single county is void. Such a constitutional provision does not prohibit the enactment of a special statute appropriating money to discharge a moral obligation of the State, for the fact that the legislature acknowledges one such claim as just and equitable is no reason for holding that it must recognize all other claims of a similar nature by passing a general law. The peculiar incidents connected with such claims may, in the judgment of the legislature, strongly differentiate them in relation to the moral obligation presented. "For the court to hold that a general law must be passed, if any, under which all claims of a general class of this kind could be presented and paid would . . . unduly interfere with the legislative discretion to determine what is and what is not, in its judgment, a moral, just, and equitable obligation which demands payment at its hands." *State v. Carter*, 30 Wyo. 22, 215 Pac. 477, 28 A. L. R. 1089. See also *Woodall v. Darst*, 71 W. Va. 350, 77 S. E. 264, 44 L. R. A. (N. S.) 83, Ann. Cas. 1914 B, 1278.

The fact that an act appropriating money for the relief of an employee of the State who was injured while in the performance of his duty is passed for the benefit of only one individual does not make it special legislation. *Fairfield v. Huntington*, 23 Ariz. 528, 205 Pac. 814, 22 A. L. R. 1438. See also *Munro v. State*, 223 N. Y. 208,

119 N. E. 444; *Babcock v. State*, 190 App. Div. 147, 180 N. Y. Supp. 3, affirmed without opinion, 231 N. Y. 560, 132 N. E. 888; *Kahn v. State*, 117 Misc. 186, 190 N. Y. Supp. 894; *Mackey v. Reeves*, 44 S. D. 153, 182 N. W. 700; *Woodall v. Darst*, 71 W. Va. 350, 77 S. E. 264, 80 S. E. 367, 44 L. R. A. (N. S.) 83, Ann. Cas. 1914 B, 1278.

Gambling cannot be made a crime everywhere except "within the limits or enclosure of a regular race course." *State v. Walsh*, 136 Mo. 400, 37 S. W. 1112, 35 L. R. A. 231; see also *State v. Elizabeth*, 56 N. J. L. 71, 28 Atl. 51, 23 L. R. A. 525.

As to when a general law can be made applicable, see *Thomas v. Board of Commissioners*, 5 Ind. 4; *State v. Squires*, 26 Iowa, 340; *Johnson v. Railroad Co.*, 23 Ill. 202.

Where the legislature is forbidden to pass special or local laws regulating county or township business, a special act allowing and ordering payment of a particular claim is void, even though the claim, being merely an equitable one, cannot be audited by any existing board. *Williams v. Bidleman*, 7 Nev. 68. See *Darling v. Rogers*, 7 Kan. 592; *Dean v. Spartanburg County*, 59 S. C. 110, 37 S. E. 226; *Uffert v. Vogt*, 65 N. J. L. 377, 621, 47 Atl. 225, 48 Atl. 574; *Black v. Gloucester City*, (N. J. L.) 48 Atl. 1112.

Special tax liens cannot be provided for certain towns only. *Burnet v. Dean*, 60 N. J. Eq. 9, 46 Atl. 532. Such a provision does not prevent a special act to locate a county seat. *State v. Sumter Co.*, 19 Fla. 518. But one arbitrarily classifying counties is special. *Edmunds v. Herbrandson*, 2 N. D. 270, 50 N. W. 970, 14 L. R. A. 725. So is one changing ward boundaries in a single city. *State v. Newark*, 53 N. J. L. 4, 20 Atl. 886, 10 L. R. A. 700.

A statute forbidding the award of a contract for county printing to a paper which has not been published in the county for one year preceding the awarding of the contract, is not a special law. *State ex rel. Woare v. Board of Com'rs*, 70 Mont. 252, 225 Pac. 389. See also *Hersey v. Neilson*,

47 Mont. 132, 131 Pac. 30, Ann. Cas. 1914 C, 963; *Stange v. Esval*, 67 Mont. 301, 215 Pac. 807.

A statute is not special because it is not universal in operation by reason of earlier special laws not affected by the constitutional provision. *Evans v. Phillipi*, 117 Pa. St. 226, 11 Atl. 630. And a law which gives to any city having a special charter the option to adopt the provisions of a general act is not special. *Adams v. Beloit*, 105 Wis. 363, 81 N. W. 869, 47 L. R. A. 441.

A statute providing for abatement of bawdyhouses, which applies to all persons maintaining and operating bawdyhouses in the State, wherever situated or of whatever nature or class, is neither a special nor a local law. *King v. Com. ex rel. Smith*, 194 Ky. 143, 238 S. W. 373, 22 A. L. R. 535.

An act laying a tax on anthracite coal, but not imposing it upon bituminous coal, is not local or special legislation. *Heisler v. Thomas Colliery Co.*, 274 Pa. St. 448, 118 Atl. 394, 24 A. L. R. 1215, affirmed 260 U. S. 245, 67 L. ed. 237, 43 Sup. Ct. Rep. 83.

A statute requiring, but only in cities of the second class, notice of injury on a city street, within a specified time thereafter, as a condition to a right of action against the city is not a local or special law. *Randolph v. City of Springfield*, 302 Mo. 33, 257 S. W. 449, 31 A. L. R. 612.

An act creating a criminal court for a particular county is not in conflict with the constitutional prohibition of special legislation. *Eitel v. State*, 33 Ind. 201. See *Matter of Boyle*, 9 Wis. 264. Nor one allowing recovery from railroad of \$5,000 in case of death. *Carroll v. Missouri P. Ry. Co.*, 88 Mo. 239. But one providing for interchange of judges in a single county is. *Ashbrook v. Schaub*, 160 Mo. 87, 60 S. W. 1085.

A Sunday law making it a misdemeanor for a baker to engage in the business of baking on Sunday is a special law, and unconstitutional in California. *Ex parte Westerfield*, 55 Cal. 550, 36 Am. Rep. 47.

"The fact that an act authorizing the formation of corporations or con-

ferring powers or privileges on corporations does not apply to every person or corporation in the State, does not render the act special, if it has a uniform operation as to all persons uniformly situated. In other words, the fact that an act classifies persons who may form a corporation, or the purposes for which corporations may be formed, or the corporations which shall enjoy the powers or privileges granted, does not render it a special act, if the classification is reasonable, and if the act applies to all persons or corporations falling within particular classes." *Clendaniel v. Conrad*, 3 Boyce (Del.) 549, 83 Atl. 1036, Ann. Cas. 1915 B, 968, quoting Clark & Marshall on Corporations, vol. 1, p. 105.

Where special acts conferring corporate powers are prohibited, the State cannot specially authorize a school district to issue bonds to erect a school-house. *School District v. Insurance Co.*, 103 U. S. 707, 26 L. ed. 601. See, for another example, *Grey v. Newark Plank-Road Co.*, 65 N. J. L. 51, 603, 46 Atl. 606, 48 Atl. 557. The provision does not forbid legalizing bonds of a city void from want of power to issue them: *Read v. Platts-mouth*, 107 U. S. 568, 27 L. ed. 414, 2 Sup. Ct. Rep. 208; nor in Tennessee does it cover municipal corporations: *State v. Wilson*, 12 Lea, 246; *Burnett v. Maloney*, 97 Tenn. 697, 37 S. W. 689, 34 L. R. A. 541; nor in Wisconsin a commission created under the police power to establish drains: *State v. Stewart*, 74 Wis. 620, 43 N. W. 947; applies to counties in Nevada: *Schweiss v. First Judicial Dist. Ct.*, 23 Nev. 226, 45 Pac. 289, 34 L. R. A. 602.

The word "corporations", in a Mississippi statute providing that "no special or local law shall be enacted for the benefit of individuals or corporations in cases which are or can be provided for by general law", means private corporations, and does not include municipal corporations. *Feemster v. Tupelo*, 121 Miss. 733, 83 So. 804.

A statute authorizing the merger of gas companies, which applies to all gas companies doing business in the

same city, is not violative of a constitutional provision prohibiting special laws granting exclusive privileges to any corporation, association or person. *People ex rel. Deneen v. People's Gaslight, etc., Co.*, 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244.

Where the Constitution provides that "the legislature shall not, except as otherwise provided in this Constitution, pass any local or special law . . . regulating the practice or jurisdiction of . . . the courts", the jurisdiction and practice of the courts of the same class must be uniform throughout the State. *Sapulpa v. Land*, 101 Okla. 22, 223 Pac. 640, 35 A. L. R. 872.

A constitutional provision that requires all laws of a general nature to have uniform operation throughout the State is complied with in a statute applicable to all cities of a certain class having less than one hundred thousand inhabitants, though in fact there be but one city in the State of that class. *Welker v. Potter*, 18 Ohio St. 85; *Wheeler v. Philadelphia*, 77 Pa. St. 338; *Kilgore v. Magee*, 85 Pa. St. 401. *Contra*, *Divine v. Commissioners*, 84 Ill. 590. And see *Desmond v. Dunn*, 55 Cal. 24; *Earle v. Board of Education*, 55 Cal. 489; *Van Riper v. Parsons*, 40 N. J. L. 123, 29 Am. Rep. 210; *State v. Trenton*, 42 N. J. L. 486; *State v. Hammer*, 42 N. J. L. 435; *Worthley v. Steen*, 43 N. J. L. 542; *Bumsted v. Govern*, 47 N. J. L. 368, 1 Atl. 835; *Van Giesen v. Bloomfield*, *id.* 442, 2 Atl. 249; *Hightstown v. Glenn*, *id.* 105; *New Brunswick v. Fitzgerald*, 48 N. J. L. 457, 8 Atl. 729; *State v. Hoagland*, 51 N. J. L. 62, 16 Atl. 166; *McCarthy v. Com.*, 110 Pa. St. 243, 2 Atl. 423; *App. of Scranton Sch. Dist.*, 113 Pa. St. 176, 6 Atl. 158; *Wilkes-Barre v. Meyers*, *id.* 395; *Reading v. Savage*, 124 Pa. St. 328, 16 Atl. 788; *Ex parte Falk*, 42 Ohio St. 638; *State v. Pugh*, 43 Ohio St. 98, 1 N. E. 439; *State v. Hawkins*, 44 Ohio St. 98, 5 N. E. 225; *State v. Anderson*, *id.* 247, 6 N. E. 571; *Ewing v. Hoblitzelle*, 85 Mo. 64; *Kelly v. Meeks*, 87 Mo. 396; *State v. Co. Court*, 89 Mo. 237, 1 S. W. 307; *State v. Pond*, 93 Mo. 606, 6 S. W. 469; *State v. Donovan*, 20 Nev. 75,

15 Pac. 783; *Darrow v. People*, 8 Col. 417, 8 Pac. 661; *People v. Henshaw*, 76 Cal. 436, 18 Pac. 413; *Title, etc., Restoration Co. v. Kerrigan*, 150 Cal. 289, 88 Pac. 356, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682; *In re Martin*, 157 Cal. 51, 106 Pac. 235, 26 L. R. A. (N. S.) 242; *Clendaniel v. Conrad*, 3 Boyce (Del.) 549, 83 Atl. 1036, Ann. Cas. 1915 B, 968; *Givens v. Hillsborough County*, 46 Fla. 502, 35 So. 88, 110 Am. St. Rep. 104; *Mix v. Nez Perce County*, 18 Idaho, 695, 112 Pac. 215, 32 L. R. A. (N. S.) 534; *Ritchie v. Wayman*, 244 Ill. 509, 91 N. E. 695, 27 L. R. A. (N. S.) 994; *State v. Fairmont Creamery Co.*, 153 Iowa, 702, 133 N. W. 895, 42 L. R. A. (N. S.) 821; *State v. Swagerty*, 203 Mo. 517, 102 S. W. 483, 120 Am. St. Rep. 671, 10 L. R. A. (N. S.) 601, 11 Ann. Cas. 725; *Bishop v. Tulsa*, (Okla. Crim. Rep.) 209 Pac. 228, 27 A. L. R. 1008; *Ladd v. Holmes*, 40 Oreg. 167, 66 Pac. 714, 91 Am. St. Rep. 457. And on the general subject, see further, *Bourland v. Hildreth*, 26 Cal. 161; *Brooks v. Hyde*, 37 Cal. 366; *McAunich v. Mississippi, &c. R. R. Co.*, 20 Iowa, 338; *Rice v. State*, 3 Kan. 141; *Jackson v. Shaw*, 29 Cal. 267; *Gentile v. State*, 29 Ind. 409; *State v. Parkinson*, 5 Nev. 15; *Ensworth v. Albin*, 46 Mo. 450; *People v. Wallace*, 70 Ill. 680; *State v. Camden Common Pleas*, 41 N. J. L. 495; *O'Kane v. Treat*, 25 Ill. 557; *Commonwealth v. Patton*, 88 Pa. St. 258; *Cox v. State*, 8 Tex. App. 254; *State v. Monahan*, 69 Mo. 556; *State v. Clark*, 23 Minn. 422; *Speight v. People*, 87 Ill. 595; *Morris v. Stout*, 110 Iowa, 659, 78 N. W. 843, 50 L. R. A. 97; *Re Henneberger*, 155 N. Y. 420, 50 N. E. 61, 42 L. R. A. 132; *West Chicago Park Com'rs v. McMullen*, 134 Ill. 170, 25 N. E. 676, 10 L. R. A. 215; *Lodi Twp. v. State*, 51 N. J. L. 402, 18 Atl. 749, 6 L. R. A. 56; *State v. Somers' Point*, 52 N. J. L. 32, 18 Atl. 694, 6 L. R. A. 57; *Terr. v. School Dist.*, 10 Okla. 556, 64 Pac. 241; *State v. Thomas*, 25 Mont. 226, 64 Pac. 503; *Lougher v. Soto*, 129 Cal. 610, 62 Pac. 184; *Fox v. Mohawk & H. R. H. Society*, 165 N. Y. 517, 59 N. E. 353.

Where the legislation shows the legislative intent to be the substitution of isolation for classification, it is invalid. *State v. Jones*, 66 Ohio St. 453, 64 N. E. 424; *State v. Beacom*, 66 Ohio St. 491, 64 N. E. 427. See also upon the general question, *Com. v. Moir*, 199 Pa. St. 534, 49 Atl. 351, 85 Am. St. 801.

Insane persons having no dependents nor persons who could take from them under the law of succession may have their expenses while in the asylum charged upon their estates, while the expenses of other insane persons in the same asylum are paid out of the public funds. *Bon Homme Co. v. Berndt*, 13 S. D. 309, 83 N. W. 333, 50 L. R. A. 351.

Where the Constitution provides that "corporations other than banking shall not be created by special act", the extension of an old special charter of such other corporation is equally prohibited. *Bank of Commerce v. Wiltsie*, 153 Ind. 460, 53 N. E. 950, 55 N. E. 224, 47 L. R. A. 489. And where the grant of any special privileges, immunities, or franchises whatever is prohibited, certain named societies cannot be empowered to appoint designated State officers, *e.g.* members of a State board of inspectors of the business of licensed commission merchants. *Lasher v. People*, 183 Ill. 226, 55 N. E. 663, 47 L. R. A. 802, 75 Am. St. 103. Nor can the number of deputies for certain county officers be prescribed for some counties and left to the discretion of the county court in others. *Weaver v. Davidson County*, 104 Tenn. 315, 59 S. W. 1105.

Where classification of cities is permitted, it must be for city purposes only. *Re Washington St.*, 132 Pa. St. 257, 19 Atl. 219, 7 L. R. A. 193 and note.

Statute providing for cure of inebriates at public expense in counties having fifty thousand population or more is void for arbitrariness. *Murray v. Ramsey County Com'rs*, 81 Minn. 359, 84 N. W. 103, 51 L. R. A. 828.

Bicycle tax levied in certain counties only is void, although proceeds form a special fund for construction of bicycle paths. *Ellis v. Frazier*, 38 Oreg. 462, 63 Pac. 642.

the very nature of free government. The latter must depend for their enforcement upon legislative wisdom, discretion, and conscience.<sup>1</sup> The legislature is to make laws for the public good, and not for the benefit of individuals. It has control of the public moneys, and should provide for disbursing them only for public purposes. Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful.<sup>2</sup> Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes; not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives.<sup>3</sup>

As to what differences should underlie a classification, see *Cobb v. Bord*, 40 Minn. 479, 42 N. W. 396.

All classification must be reasonable. An exemption of ex-soldiers and marines, honorably dismissed from the service of the United States, from a pedler's license tax is void. *State v. Garbroski*, 111 Iowa, 496, 82 N. W. 959, 82 Am. St. 524.

If special legislation is prohibited, a classification such that one class has but one member and, because the classification is based upon a past fact, can never have more, is void. *Campbell v. Indianapolis*, 155 Ind. 186, 57 N. E. 920. And see *Knopf v. People*, 185 Ill. 20, 57 N. E. 22.

An arbitrary exemption from a license tax of all dealers whose business is less than a thousand dollars a year, others having no equal exemption, is void as class legislation. *Com. v. Clark*, 195 Pa. St. 634, 46 Atl. 286, 86 Am. St. 694. See also *Burnet v. Dean*, 63 N. J. Eq. 253, 49 Atl. 503.

The erection of a memorial hall to perpetuate the memory of soldiers who dedicated their lives to the service of the country and allowing organizations of veterans to have the exclusive use of such hall, does not violate the constitutional inhibition against the

making of a gift of public money or thing of value. *Allied Architects Association v. Payne*, 192 Cal. 431, 221 Pac. 209, 30 A. L. R. 1029.

Where the legislature, for urgent reasons, may suspend the rules and allow a bill to be read twice on the same day, what constitutes a case of urgency is a question for the legislative discretion. *Hull v. Miller*, 4 Neb. 503.

The legislature's power over its own proceedings cannot be controlled by a statute requiring notice in advance of the session, in case of petition affecting private interests. *Opinion of Court*, 63 N. H. 625.

Where the Constitution provides that no county seat shall be changed except by approval of two-thirds of voters voting thereon, the legislature may intensify the requirement, and require the approval of two-thirds of all the voters in the county. *State v. White*, 162 Mo. 533, 63 S. W. 104.

<sup>1</sup> *Walker v. Cincinnati*, 21 Ohio St. 14, 41. But see *The Stratton Claimants v. The Morris Claimants*, 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70.

<sup>2</sup> As to what are public purposes, see *post*, p. 1026, note.

<sup>3</sup> *State v. McCann*, 21 Ohio St. 198, 212; *Adams v. Howe*, 14 Mass. 340, 7



Am. Dec. 216; *State v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; *Mount v. Richey*, 90 Ind. 29. See cases, *post*, pp. 345, 346 *et seq.*

The means and methods of promoting a public purpose by legislative enactment are ordinarily for legislative determination. *Allied Architects Association v. Payne*, 192 Cal. 431, 221 Pac. 209, 30 A. L. R. 1029. "Aside from constitutional restrictions, the legislature is the sole judge of the wisdom, expedience, and necessity for expending the State's money, the amount to be expended, and the inauguration of the policy of government under which it is spent.

*Com. v. Puder*, 261 Pa. St. 129, 136, 104 Atl. 505. The judiciary 'cannot run a race of opinions upon points of right, reason, and expediency with the law-making power.' *Com. ex rel. Elkin v. Moir*, 199 Pa. St. 534, 542, 53 L. R. A. 837, 85 Am. St. Rep. 801, 49 Atl. 352." *Busser v. Snyder*, 282 Pa. St. 440, 128 Atl. 80, 37 A. L. R. 1515. But the decision of the question of whether a tax is for a public purpose is for the courts when there is a manifest attempt on the part of the legislature to authorize a levy for a purpose not public. *Dodge v. Mission Township*, 46 C. C. A. 661, 107 Fed. 827. See *post*, p. 1026, *et seq.*

## CHAPTER VI

### OF THE ENACTMENT OF LAWS

WHEN the supreme power of a country is wielded by a single man, or by a single body of men, any discussion, in the courts, of the rules which should be observed in the enactment of laws must generally be without practical value, and in fact impertinent; for, whenever the unfettered sovereign power of any country expresses its will in the promulgation of a rule of law, the expression must be conclusive, though proper and suitable forms may have been wholly omitted in declaring it. It is a necessary attribute of sovereignty that the expressed will of the sovereign is law; and while we may question and cross-question the words employed, to make certain of the real meaning, and may hesitate and doubt concerning it, yet, when the intent is made out, it must govern, and it is idle to talk of forms that should have surrounded the expression, but do not. But when the legislative power of a State is to be exercised by a department composed of two branches, or, as in most of the American States, of three branches, and these branches have their several duties marked out and prescribed by the law to which they owe their origin, and which provides for the exercise of their powers in certain modes and under certain forms, there are other questions to arise than those of the mere intent of the law-makers, and sometimes forms become of the last importance. For in such case not only is it important that the will of the law-makers be clearly expressed, but it is also essential that it be expressed in due form of law; since nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect, in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential.<sup>1</sup> And if, when the constitution was adopted, there were known and settled rules and usages, forming a part of

<sup>1</sup> A bill becomes a law only when it has gone through all the forms made necessary by the constitution to give it validity. *Jones v. Hutchinson*, 43 Ala. 721; *State v. Platt*, 2 S. C. 150, 16 Am. Rep. 647; *People v. Commis-*

*sioners of Highways*, 54 N. Y. 276; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *Legg v. Annapolis*, 42 Md. 203; *Walnut v. Wade*, 103 U. S. 683, 26 L. ed. 526. And where the constitution prescribes an interval of time

the law of the country, in reference to which the constitution has evidently been framed, and these rules and usages required the observance of particular forms, the constitution itself must also be understood as requiring them, because in assuming their existence, and being framed with reference to them, it has in effect adopted them as a part of itself, as much as if they were expressly incorporated in its provisions. Where, for an instance, the legislative power is to be exercised by two houses, and by settled and well-understood parliamentary law these two houses are to hold separate sessions for their deliberations, and the determination of the one upon a proposed law is to be submitted to the separate determination of the other, the constitution, in providing for two houses, has evidently spoken in reference to this settled custom, incorporating it as a rule of constitutional interpretation; so that it would require no prohibitory clause to forbid the two houses from combining in one, and jointly enacting laws by the vote of a majority of all. All those rules which are of the essentials of law-making must be observed and followed; and it is only the customary rules of order and routine, such as in every deliberative body are always understood to be under its control, and subject to constant change at its will, that the constitution can be understood to have left as matters of discretion, to be established, modified, or abolished by the bodies for whose government in non-essential matters they exist.

### *Of the Two Houses of the Legislature.<sup>1</sup>*

In the enactment of laws the two houses of the legislature are of equal importance, dignity, and power, and the steps which result in laws may originate indifferently in either. This is the general rule;

to elapse after the adjournment of the legislature, the full period of time must intervene between the date of adjournment and that on which the law becomes effective. *Halbert v. San Saba Springs L. & L. S. Ass'n*, 89 Tex. 230, 34 S. W. 639, 49 L. R. A. 193. Upon what constitutes presentation of bill to governor after it has duly passed the legislature, and the interval of time within which he must sign it, see *State v. Michel*, 52 La. Ann. 936, 27 So. 565, 49 L. R. A. 218, 78 Am. St. 364.

Where act is void for lack of uniformity of operation, the defect may be corrected by subsequent amendment making non-uniform portion uniform

with rest of original act, and the whole will then be good. *Walsh v. State*, 142 Ind. 357, 41 N. E. 65, 33 L. R. A. 392. For other cases upon necessity of recognizing prescribed forms of enactment, see *Swindell v. State*, 143 Ind. 153, 42 N. E. 528, 35 L. R. A. 50; *Com. v. Illinois Cent. R. Co.*, 160 Ky. 745, 170 S. W. 171, L. R. A. 1915 B. 1060, Ann. Cas. 1916 A, 515; *State v. Narragansett*, 16 R. I. 424, 16 Atl. 901, 3 L. R. A. 295.

The power to declare whether an act has become a law is judicial. *Wolfe v. McCaull*, 76 Va. 876. *State v. Powell*, 77 Miss. 543, 27 So. 927.

<sup>1</sup> The wisdom of a division of the legislative department has been dem-

but as one body is more numerous than the other, and more directly represents the people, and in many of the States is renewed by more frequent elections, the power to originate all money bills, or bills for the raising of revenue, is left exclusively, by the constitutions of some of the States, with this body, in accordance with the custom in England, which does not permit bills of this character to originate with the House of Lords.<sup>1</sup> To these bills, however, the other house may propose alterations, and they require the assent of that house to their passage, the same as other bills.<sup>2</sup> The time for the meeting

onstrated by the leading writers on constitutional law, as well as by general experience. See De Lolme, *Const. of England*, b. 2, c. 3; *Federalist*, No. 22; 1 *Kent*, 208; *Story on Const.* §§ 545-570.

The early experiments in Pennsylvania and Georgia, based on Franklin's views, for which see his *Works*, Vol. V. p. 165, were the only ones made by any of the original States with a single house. The first Constitution of Vermont also provided for a single legislative body.

<sup>1</sup> There are provisions in the Constitutions of Massachusetts, Delaware, Minnesota, Mississippi, New Hampshire, New Jersey, Pennsylvania, South Carolina, Vermont, Indiana, Oregon, Kentucky, Louisiana, Alabama, Arkansas, Georgia, Virginia, Maine, and Colorado, requiring revenue bills to originate in the more popular branch of the legislature, but allowing the Senate the power of amendment usual in other cases.

A bill to license saloons is a police regulation, not a revenue law. *State v. Wright*, 14 *Oreg.* 365, 12 *Pac.* 708. Money cannot be appropriated by joint resolution in Indiana. *May v. Rice*, 91 *Ind.* 546.

"Bills for raising revenue", within the meaning of the constitutional requirement that such bills shall originate in the House of Representatives, are bills that levy taxes, in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue. *Twin City National Bank v. Nebecker*, 167 *U. S.* 196, 42 *L. ed.* 134, 17 *Sup. Ct. Rep.* 766; *Millard v. Rogers*, 202 *U. S.* 429, 50 *L. ed.* 1090, 26 *Sup. Ct. Rep.* 674;

*Perry Co. v. Selma*, 58 *Ala.* 546; *Lang v. Com.*, 190 *Ky.* 29, 226 *S. W.* 379; *Northern Counties Invest. Trust v. Sears*, 30 *Oreg.* 388, 41 *Pac.* 931, 35 *L. R. A.* 188.

An act of Congress providing a national currency secured by a pledge of bonds of the United States, and which, in the furtherance of that object, and also to meet the expenses attending the execution of the act, imposes a tax on the notes in circulation of the banking associations organized under the statute, is clearly not a revenue bill within the meaning of the Federal Constitution. *Twin City National Bank v. Nebecker*, 167 *U. S.* 196, 42 *L. ed.* 134, 17 *Sup. Ct. Rep.* 766.

During the second session of the forty-first Congress, the House of Representatives by their vote denied the right of the Senate under the Constitution to originate a bill repealing a law imposing taxes; but the Senate did not assent to this conclusion. In England the Lords are not allowed to amend money bills, and by resolutions of 5th and 6th July, 1860, the Commons deny their right even to reject them.

Law directing payment of bounties by county treasurer, such payments to be credited to him by state treasurer, is void under constitutional provision that "no money shall be paid out of the treasury except upon appropriations made by law and on warrant drawn by the proper officer." *Institution for Edu. Mute & Blind v. Henderson*, 18 *Col.* 98, 31 *Pac.* 714, 18 *L. R. A.* 398.

<sup>2</sup> The Constitution of the United States, art. 1, § 7, provides that all

of the legislature will be such time as is fixed by the constitution or by statute; but it may be called together by the executive in special session as the constitution may prescribe, and the two houses may also adjourn any general session to a time fixed by them for the holding of a special session, if any agreement to that effect can be arrived at; and if not, power is conferred by a majority of the constitutions upon the executive to prorogue and adjourn them. And if the executive in any case undertake to exercise this power to prorogue and adjourn, on the assumption that a disagreement exists between the two houses which warrants his interference, and his action is acquiesced in by those bodies, who thereupon cease to hold their regular sessions, the legislature must be held in law to have adjourned, and no inquiry can be entered upon as to the rightfulness of the governor's assumption that such a disagreement existed.<sup>1</sup>

bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments, as on other bills. This provision is not violated by the substitution by the Senate of a tax on incomes of corporations for a tax on inheritance in a bill for raising revenue originating in the House of Representatives. *Flint v. Stone Tracy Co.*, 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342. Nor is it violated by the fact that a tariff act for raising revenue, originating in the House, is amended in the Senate by a provision imposing an excise tax based on gross tonnage upon the use of foreign-built pleasure yachts. *Rainey v. United States*, 232 U. S. 310, 58 L. ed. 617, 34 Sup. Ct. Rep. 429. In this case the court approved and adopted the following statement of the court below: "Having become an enrolled and duly authenticated act of Congress, it is not for this court to determine whether the amendment was or was not outside the purposes of the original bill." *Rainey v. United States*, 232 U. S. 310, 58 L. ed. 617, 34 Sup. Ct. Rep. 429.

<sup>1</sup> This question became important, and was passed upon in *People v. Hatch*, 33 Ill. 9. The Senate had passed a resolution for an adjournment of the session *sine die* on a day named, which was amended by the House by fixing a different day. The Senate refused to concur, and the

House then passed a resolution expressing a desire to recede from its action in amending the resolution and requesting a return of the resolution by the Senate. While matters stood thus, the governor, assuming that such a disagreement existed as empowered him to interfere, sent in his proclamation, declaring the legislature adjourned to a day named, and which was at the very end of the official term of the members. The message created excitement; it does not seem to have been at once acquiesced in, and a protest against the governor's authority was entered upon the journal; but for eleven days in one house and twelve in the other no entries were made upon their journals, and it was unquestionable that practically they had acquiesced in the action of the governor, and adjourned. At the expiration of the twelve days, a portion of the members came together again, and it was claimed by them that the message of the governor was without authority, and the two houses must be considered as having been, in point of law, in session during the intervening period, and that consequently any bills which had before been passed by them and sent to the governor for his approval, and which he had not returned within ten days, Sundays excepted, had become laws under the Constitution. The Supreme Court held that, as the two houses had practically acquiesced in the action of

There are certain matters which each house determines for itself, and in respect to which its decision is conclusive. It chooses its own officers, except where, by constitution or statute, other provision is made;<sup>1</sup> it determines its own rules of proceeding;<sup>2</sup> it decides upon the election and qualification of its own members.<sup>3</sup> These powers it is obviously proper should rest with the body immediately interested, as essential to enable it to enter upon and proceed with its legislative functions without liability to interruption and confusion. In determining questions concerning contested

the governor, the session had come to an end, and that the members had no power to reconvene on their own motion, as had been attempted. The case is a very full and valuable one on several points pertaining to legislative proceedings and authority. Governor's decision that disagreement exists declared conclusive in *Re Legislative Adjournment*, 18 R. I. 824, 27 Atl. 324, 22 L. R. A. 716, and see note in L. R. A. upon power as to adjournment of legislature.

<sup>1</sup> The house, by a majority vote of all members elected, may retire its speaker and elect another. *Re Speakership*, 15 Col. 520, 25 Pac. 707, 11 L. R. A. 241.

<sup>2</sup> In *French v. Senate*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756, the court said: "The senate has power to adopt any procedure and to change it at any time and without notice. It cannot tie its own hands by establishing rules which, as a matter of power purely, it cannot at any time change and disregard."

<sup>3</sup> In *People v. Mahaney*, 13 Mich. 481, it was held that the correctness of a decision by one of the houses, that certain persons had been chosen members, could not be inquired into by the courts. In that case a law was assailed as void, on the ground that a portion of the members who voted for it, and without whose votes it would not have had the requisite majority, had been given their seats in the house in defiance of law, and to the exclusion of others who had a majority of legal votes. See the same principle in *State v. Jarrett*, 17 Md. 309. See also *Lamb v. Lynd*, 44 Pa. St. 336; *Opinion of Justices*, 56 N. H. 570.

The persons who are to constitute the *prima facie* house, and to organize and examine into the qualifications of the members, to determine contests, &c., are those who bring certificates of election from the proper officers. *Re Gunn*, 50 Kan. 155, 32 Pac. 470, 948, 19 L. R. A. 519, a case where two rival bodies each claimed to be the true house of representatives.

In Kansas the legislature gave seats to several persons as representatives of districts not entitled to representation at all. By the concurrent vote of four of these a certain bill was passed. Held, that it was illegally passed, and did not become a law. *State v. Francis*, 26 Kan. 724.

The legislature cannot transfer its power to judge of the election of its members, to the courts. *State v. Gilman*, 20 Kan. 551, 27 Am. Rep. 189. See *Dalton v. State*, 43 Ohio St. 652. But courts may procure and present evidence to the legislature. *In re McNeill*, 111 Pa. St. 235, 2 Atl. 341.

The legislative power to judge of the election of members is not possessed by municipal bodies: *People v. Hall*, 80 N. Y. 117; nor by boards of supervisors: *Robinson v. Cheboygan Supervisors*, 49 Mich. 321, 13 N. W. 622; except when conferred by law. *Mayor v. Morgan*, 7 Mart. (N. S.) 1, 18 Am. Dec. 232; *Peabody v. School Committee*, 115 Mass. 383; *Cooley v. Fitzgerald*, 41 Mich. 2, 2 N. W. 179. See *Commonwealth v. Leech*, 44 Pa. St. 332; *Doran v. De Long*, 48 Mich. 552, 12 N. W. 848.

To exclude the jurisdiction of the courts, the council's power must be unequivocal. *State v. Kempf*, 69

seats, the house will exercise judicial power, but generally in accordance with a course of practice which has sprung from precedents in similar cases, and no other authority is at liberty to interfere.

Each house has also the power to punish members for disorderly behavior, and other contempts of its authority, as well as to expel a member for any cause which seems to the body to render it unfit that he continue to occupy one of its seats. This power is generally enumerated in the constitution among those which the two houses may exercise, but it need not be specified in that instrument, since it would exist whether expressly conferred or not. It is "a necessary and incidental power, to enable the house to perform its high functions, and is necessary to the safety of the State. It is a power of protection. A member may be physically, mentally, or morally wholly unfit; he may be affected with a contagious disease, or insane, or noisy, violent, and disorderly, or in the habit of using profane, obscene, and abusive language." And, "independently of parliamentary customs and usages, our legislative houses have the power to protect themselves by the punishment and expulsion of a member"; and the courts cannot inquire into the justice of the decision, or even so much as examine the proceedings to see whether or not the proper opportunity for defence was furnished.<sup>1</sup>

Wis. 470, 34 N. W. 226; *State v. Gates*, 35 Minn. 385, 28 N. W. 927.

The power of the court to call a new election to elect a member of a general assembly is not precluded by the power of the house to pass upon the election of its members, even though the calling the election is a passing upon the validity of a prior election. *State v. South Kingstown*, 18 R. I. 258, 27 Atl. 599, 22 L. R. A. 65.

While each house judges of the election and qualifications of its members, and while the duties of canvassing boards are purely ministerial, yet the court will not aid a clearly ineligible candidate by issuing mandamus to the board of canvassers to give the candidate a certificate of election, even though it is admitted that he received the plurality vote. *People v. State Bd. of Canvassers*, 129 N. Y. 360, 29 N. E. 345, 14 L. R. A. 646. But it will correct a fraud through which the candidate rightfully entitled is deprived of his certificate, as that makes him *prima facie* a member. *Ellison v. Barnes*, 23 Utah, 183, 63 Pac. 899.

<sup>1</sup> *Hiss v. Bartlett*, 3 Gray, 468. And see *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242; *French v. Senate*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756.

The authority of the house is equally absolute in regard to the rule usually prescribed in the Constitution that any member may have his protest entered upon the journal. If the house neglect to recognize this rule, no outside power can compel it. *Turnbull v. Giddings*, 95 Mich. 314, 54 N. W. 887, 19 L. R. A. 853.

"The power to control and compel the attendance of members of deliberative and legislative bodies and their officers is lodged in those bodies and not in the courts." Concurring opinion of *Grant, J.*, in *Wilson v. Cleveland*, 157 Mich. 510, 122 N. W. 284, 133 Am. St. Rep. 352.

"Under our form of government the judicial department has no power to revise even the most arbitrary and unfair action of the legislative department, or of either house thereof, taken in pursuance of the power com-

Each house may also punish contempts of its authority by other persons, where they are committed in its presence, or where they tend directly to embarrass or obstruct its legislative proceedings; and it requires for the purpose no express provision of the constitution conferring the authority.<sup>1</sup> It is not very well settled what are the limits to this power; and in the leading case in this country the speaker's warrant for the arrest of the person adjudged guilty of contempt was sustained, though it did not show in what the alleged contempt consisted.<sup>2</sup> In the leading English case a libellous publication concerning the house was treated as a contempt;<sup>3</sup> and punishment has sometimes been inflicted for assaults upon members of the house, not committed in or near the place of sitting, and for the arrest of members in disregard of their constitutional privilege.<sup>4</sup>

But in America the authority of legislative bodies in this regard is much less extensive than in England, and we are in danger, perhaps, of being misled by English precedents. The Parliament, before its separation into two bodies, was a high court of judicature, possessed of the general power, incident to such a court, of punishing contempts, and after the separation the power remained with each body, because each was considered to be a court of judicature and exercised the functions of such a court. American legislative bodies have not been clothed with the judicial function, and they do not therefore possess the general power to punish for contempt; but, as incidental to their legislative authority, they have the power to punish as con-

mitted exclusively to that department by the Constitution." *French v. Senate*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756.

Where a State senate expels a member thereof in the mode prescribed by the State Constitution, such member is not deprived of his office without due process of law, in violation of the fourteenth amendment to the Constitution of the United States. *French v. Senate*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756. And a resolution or other action of a State Senate resulting in the expulsion of a member is not the issuance of a bill of attainder in violation of the State or Federal Constitution. *French v. Senate*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756.

<sup>1</sup> *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242; *Burdett v. Abbott*, 14 East, 1; *Burnham v. Morrissey*, 14

*Gray*, 226; *State v. Matthews*, 37 N. H. 450. See also *ex parte Wolters*, 64 Tex. Crim. Rep. 238, 144 S. W. 531, Ann. Cas. 1916 B, 1071. See *post*, p. 949, note.

<sup>2</sup> *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242; questioned and rejected as to some of its reasoning in *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377. And see *Gosset v. Howard*, 10 Q. B. 451; *Stewart v. Blaine*, 1 McArthur, 453.

<sup>3</sup> *Burdett v. Abbott*, 14 East, 1.

<sup>4</sup> Mr. Potter discusses such a case in his edition of *Dwarris on Statutes*, c. 18, and Mr. Robinson deals with the case of an arrest for a criminal act, not committed in the presence of the house, in the preface to the sixth volume of his *Practice*. As to the general right of Parliament to punish for contempt, see *Gosset v. Howard*, 10 Q. B. 411.



tempts those acts of members or others which tend to obstruct the performance of legislative duty, or to defeat, impede, or embarrass the exercise of legislative power.<sup>1</sup>

<sup>1</sup> See the subject considered fully and learnedly in *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377.

Said Chief Justice *White* in delivering the opinion of the court in *Marshall v. Gordon*, 243 U. S. 521, 61 L. ed. 881, 37 Sup. Ct. Rep. 448, L. R. A. 1917 F, 279, Ann. Cas. 1918 B, 371, "Certain is it that authority was possessed by the House of Commons in England to punish for contempt directly, that is, without the intervention of courts, and that such power included a variety of acts and many forms of punishment, including the right to fix a prolonged term of imprisonment. Indubitable also is it, however, that this power rested upon an assumed blending of legislative and judicial authority possessed by the Parliament when the Lords and Commons were one, and continued to operate after the division of the Parliament into two houses, either because the interblended power was thought to continue to reside in the Commons, or by the force of routine the mere reminiscence of the commingled powers led to a continued exercise of the wide authority as to contempt formerly existing long after the foundation of judicial-legislative power upon which it rested had ceased to exist. . . . In the State governments prior to the formation of the Constitution the incompatibility of the intermixture of the legislative and judicial power was recognized and the duty of separating the two was felt, as was manifested by provisions contained in some of the State Constitutions enacted prior to the adoption of the Constitution of the United States. . . . No power was expressly conferred by the Constitution of the United States on the subject except that given to the House to deal with contempt committed by its own members. Article 1, § 5. As the rule concerning the Constitution of the United States is that powers not delegated were reserved to the people or the States, it follows that no express

authority to deal with contempt can be conceived of. It comes, then, to this: Was such an authority implied from the powers granted? As it is unthinkable that in any case from a power expressly granted there can be implied the authority to destroy the grant made, and as the possession by Congress of the commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive, and judicial authority which is interwoven in the very fabric of the Constitution, and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any implication as to such power may be deduced from any grant of authority made to Congress by the Constitution. This conclusion has long since been authoritatively settled and is not open to be disputed. *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377. Whether the right to deal with contempt in the limited way provided in the State Constitutions may be implied in Congress as the result of the legislative power granted must depend upon how far such limited power is ancillary or incidental to the power granted to Congress. . . . The rule of constitutional interpretation announced in *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, that that which was reasonably appropriate and relevant to the exercise of granted power was to be considered as accompanying the grant, has been so universally applied that it suffices merely to state it. And as there is nothing in the inherent nature of the power to deal with contempt that causes it to be an exception to such rule, there can be no reason for refusing to apply it to that subject. . . . Without undertaking to inclusively mention the subjects embraced in the implied power, we think from the very nature of that

When imprisonment is imposed as a punishment, it must terminate with the final adjournment of the house, and if the prisoner be not then discharged by its order, he may be released on *habeas corpus*.<sup>1</sup>

By common parliamentary law, the members of the legislature are privileged from arrest on civil process during the session of that body, and for a reasonable time before and after, to enable them to go to and return from the same. By the constitutions of some of the States this privilege has been enlarged, so as to exempt the persons of legislators from any service of civil process,<sup>2</sup> and in others their estates are exempt from attachment for some prescribed period.<sup>3</sup> For any arrest contrary to the parliamentary law or to these provisions, the house of which the person arrested is a member may give summary relief by ordering his discharge, and if the order is not complied with, by punishing the persons concerned in the arrest as for a contempt of its authority. The remedy of the member, however, is not confined to this mode of relief. His privilege is not the privilege

power it is clear that it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation; that is, the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed."

The contempt for which either house of Congress may punish an outsider may consist of either misbehavior or of disobedience; but misbehavior, to constitute a contempt, must be such as to injuriously affect the ability of the house to function; and for disobedience to constitute a contempt, there must be a duty of obedience. *Ex parte Dougherty*, 299 Fed. 620.

<sup>1</sup> *Marshall v. Gordon*, 243 U. S. 521, 61 L. ed. 881, 37 Sup. Ct. Rep. 448, L. R. A. 1917 F, 279, Ann. Cas. 1918 B, 371; *Jefferson's Manual*, § 18; *Prichard's Case*, 1 Lev. 165; 1 Sid. 245, T. Raym. 120.

<sup>2</sup> "Senators and representatives shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest. They shall not be subject to any civil process during the session of the legislature, or for fifteen days next before the commencement

and after the termination of each session." Const. of Mich. art. 4, § 7. A like exemption from civil process is found in the Constitutions of Kansas, Alabama, Arkansas, California, Missouri, Mississippi, Wisconsin, Indiana, Oregon, and Colorado.

Exemption from arrest is not violated by the service of citations or declarations in civil cases. *Gentry v. Griffith*, 27 Tex. 461; *Case v. Rorabacher*, 15 Mich. 537; *Phillips v. Browne*, 270 Ill. 450, 110 N. E. 601, Ann. Cas. 1917 B, 637. So, of a member of Congress during the session. *Merrick v. Giddings*, MacAr. & Mack. 55; *Worth v. Norton*, 56 S. C. 56, 479, 33 S. E. 792, 35 S. E. 135, 45 L. R. A. 563; 76 Am. St. 524. But in *Miner v. Markham*, 28 Fed. 387, a California member *en route* to Washington was held exempt from service of summons in Wisconsin.

<sup>3</sup> The Constitution of Rhode Island provides that "the person of every member of the General Assembly shall be exempt from arrest, and his estate from attachment, in any civil action, during the session of the General Assembly, and two days before the commencement and two days after the termination thereof, and all process served contrary hereto shall be void." Art. 4, § 5.

of the house merely, but of the people, and is conferred to enable him to discharge the trust confided to him by his constituents;<sup>1</sup> and if the house neglect to interfere, the court from which the process issued should set it aside on the facts being represented,<sup>2</sup> and any court or officer having authority to issue writs of *habeas corpus* may also inquire into the case, and release the party from the unlawful imprisonment.<sup>3</sup>

Each house must also be allowed to proceed in its own way in the collection of such information as may seem important to a proper discharge of its functions,<sup>4</sup> and whenever it is deemed desirable that witnesses should be examined, the power and authority to do so is very properly referred to a committee, with any such powers short of final legislative or judicial action as may seem necessary or expedient in the particular case. Such a committee has no authority to sit during a recess of the house which has appointed it, without permission to that effect.<sup>5</sup> [One branch of the legislature, acting alone, may appoint a committee to act during the session;<sup>6</sup> but it would seem that it cannot, by its independent action, create a com-

<sup>1</sup> *Coffin v. Coffin*, 4 Mass. 27, 3 Am. Dec. 189.

<sup>2</sup> Courts do not, however, *ex officio* notice the privileges of members; they must be brought to their attention by some proper motion. *Prentiss v. Commonwealth*, 5 Rand. 697, 16 Am. Dec. 782, and note.

<sup>3</sup> On this subject, Cushing on Law and Practice of Parliamentary Assemblies, §§ 546-597, will be consulted with profit. It is not a trespass to arrest a person privileged from arrest, even though the officer may be aware of the fact. The arrest is only voidable; and in general the party will waive the privilege unless he applies for discharge by motion or on *habeas corpus*. *Tarlton v. Fisher*, Doug. 671; *Fletcher v. Baxter*, 2 Aik. 224; *Fox v. Wood*, 1 Rawle, 143; *Sperry v. Willard*, 1 Wend. 32; *Wilmarth v. Burt*, 7 Met. 257; *Aldrich v. Aldrich*, 8 Met. 102; *Chase v. Fish*, 16 Me. 132. But where the privilege is given on public grounds, or for the benefit of others, discharge may be obtained on the motion of any party concerned, or made by the court *sua sponte*.

<sup>4</sup> See *Tillinghast v. Carr*, 4 McCord, 152; *Ex parte Parker*, 74 S. C. 466, 55 S. E. 122, 114 Am. St. Rep. 1011, 7

Ann. Cas. 874; *Ex parte Wolters*, 64 Tex. Crim. Rep. 238, 144 S. W. 531, Ann. Cas. 1916 B, 1071.

<sup>5</sup> *Branham v. Lange*, 16 Ind. 497; *Marshall v. Harwood*, 7 Md. 466. See also parliamentary cases, 5 Grey, 374; 9 Grey, 350; 1 Chandler, 50.

<sup>6</sup> *Dickinson v. Johnson*, 117 Ark. 582, 176 S. W. 116, L. R. A. 1916 E, 496, Ann. Cas. 1916 B, 1067; *Fergus v. Russel*, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916 B, 1120; *Ex parte Caldwell*, 61 W. Va. 49, 55 S. E. 910, 10 L. R. A. (N. S.) 172, 11 Ann. Cas. 646.

In *Ex parte Caldwell*, 61 W. Va. 49, 55 S. E. 910, 10 L. R. A. (N. S.) 172, the Court said: "There can be no question but that during the session one branch can appoint a committee alone to act during the session because each body had power of action during the session to entertain bills, and may use a committee to investigate and report upon any matter which may come before it. . . . This is necessary to enable it to perform its part in the legislative function committed to both houses. The Congress of the United States is composed of a Senate and House of Representatives, and in these two branches the Federal

mittee of investigation with power to sit after the legislature adjourns. Such authority can be conferred only by an act or a joint resolution of the legislature.<sup>1</sup> A refusal to appear or to testify before such committee, or to produce books or papers, would be a contempt of the house;<sup>2</sup> but the committee cannot punish for contempt; it can only report the conduct of the offending party to the house for its action.<sup>3</sup> The power of the committee will terminate with the final dissolution of the house appointing it.<sup>4</sup> [Where the

Constitution vests all legislative power granted by it, as our Constitution vests in the legislature the legislative power of the State. There is no doubt of the power of either branch of Congress or legislature to appoint a committee of investigation, without the concurrence of the other branch, to act during the session. *In re Chapman*, 166 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677; *Anderson v. Dunn*, 6 Wheat. 204, 5 L. ed. 242; *Ex parte Dalton*, 44 Ohio St. 142, 5 N. E. 136, 58 Am. Rep. 800." But in Ohio it has been held that the whole legislative power of the State having been conferred by the Constitution upon the General Assembly as a unit and not upon the Senate or House of Representatives acting separately, a single branch of the General Assembly so acting has no power of independent legislation, except as expressly granted in the Constitution or as necessarily implied in the express grants, and that the Constitution contains no express grant of power to either branch of the General Assembly to appoint a select investigating committee for general legislative purposes and such power is not necessarily implied from the express grants to each house. *State ex rel. Robertson Realty Co. v. Guilbert*, 75 Ohio St. 1, 78 N. E. 931.

<sup>1</sup> *Tipton v. Parker*, 71 Ark. 193, 74 S. W. 298; *Com. v. Costello*, 21 Pa. Dist. R. 232; *Com. v. McCall*, 21 Pa. Dist. R. 238; *Ex parte Wolters*, 64 Tex. Crim. Rep. 238, 144 S. W. 531, Ann. Cas. 1916 B, 1071; *Ex parte Caldwell*, 61 W. Va. 49, 55 S. E. 910, 10 L. R. A. (N. s.) 172, 11 Ann. Cas. 646. Compare *Branham v. Lange*, 16 Ind. 497; *Marshall v. Harwood*, 7 Md. 466.

<sup>2</sup> *In re Falvey*, 7 Wis. 630; *Burnham*

*v. Morrissey*, 14 Gray, 226; *People v. Keeler*, 99 N. Y. 463; *State ex rel. Peers v. Fitzgerald*, 131 Minn. 116, 154 N. W. 750, 8 A. L. R. 1582; *Ex parte Parker*, 74 S. C. 466, 55 S. E. 122, 114 Am. St. Rep. 1011. In *People v. Keeler*, *supra*, a statute expressly permitted the house to punish for such contempt. But the privilege of a witness to be exempt from a compulsory disclosure of his own criminal conduct is the same when examined by a legislative body or committee as when sworn in court. *Emery's Case*, 107 Mass. 172.

An outsider does not owe obedience to an order of either house of Congress to give testimony or produce documents in aid of an investigation judicial in character, unless it is an investigation in the execution of judicial power expressly conferred. An exception to this is that, where the investigation concerns contempt, there is power to punish for contempt. *Ex parte Daugherty*, 299 Fed. 620. See also *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377.

On questions of conflict between the legislature and the courts in matters of contempt, the great case of *Stockdale v. Hansard*, 9 Ad. & El. 1; s. c. 3 Per. & Dav. 330, is of the highest interest. See May, *Const. Hist.* c. 7.

<sup>3</sup> *In re Davis*, 58 Kan. 379, 49 Pac. 160. But in South Carolina it has been held that a legislative committee has power to commit a witness for contempt upon his refusal to answer a question in relation to a matter which the committee is authorized to investigate. *Ex parte Parker*, 74 S. C. 466, 55 S. E. 122, 114 Am. St. Rep. 1011, 7 Ann. Cas. 874.

<sup>4</sup> The general rule undoubtedly is

Constitution provides that when the legislature is convened in special session, there shall be no legislation upon subjects other than those designated in the proclamation of the governor calling such session, or presented to them by the governor, the legislature has no power to appoint committees to investigate matters upon which it cannot legislate and to punish for contempt witnesses who refuse to answer questions relating to such matters.<sup>1]</sup>

Each house keeps a journal of its proceedings, which is a public record, and of which the courts are at liberty to take judicial notice.<sup>2</sup> If it should appear from these journals that any act did not receive the requisite majority, or that in respect to it the legislature did not follow any requirement of the constitution, or that in any other respect the act was not constitutionally adopted, the courts may act upon this evidence, and adjudge the statute void.<sup>3</sup> But whenever it

that the powers of committees of legislative bodies cease on the final adjournment of the body, unless express provision is made for their continuance; but the legislature has power to confer authority on a committee to continue its labors after adjournment. *In re Davis*, 58 Kan. 379, 49 Pac. 160.

<sup>1</sup> *Ex parte Wolters*, 64 Tex. Crim. Rep. 238, 144 S. W. 531, Ann. Cas. 1916 B, 1071.

<sup>2</sup> *Spangler v. Jacoby*, 14 Ill. 297; *Turley v. Logan Co.*, 17 Ill. 151; *Jones v. Hutchinson*, 43 Ala. 721; *State v. Moffit*, 5 Ohio, 358; *Miller v. State*, 3 Ohio St. 475; *Fordyce v. Godman*, 20 Ohio St. 1; *People v. Supervisors of Chenango*, 8 N. Y. 317; *People v. Mahaney*, 13 Mich. 481; *Southwark Bank v. Commonwealth*, 2 Pa. St. 446; *McCulloch v. State*, 11 Ind. 430; *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640; *State v. Platt*, 2 S. C. (N. s.) 150, 16 Am. Rep. 647; *Moody v. State*, 48 Ala. 115; *Houston, &c. R. R. Co. v. Odum*, 53 Tex. 343; *Gardner v. The Collector*, 6 Wall. 499, 18 L. ed. 890; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *State v. Joseph*, 175 Ala. 579, 57 So. 942, Ann. Cas. 1914 D, 248; *Jobe v. Urquhart*, 102 Ark. 470, 143 S. W. 121, Ann. Cas. 1914 A, 351; *French v. California*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756; *Amos v. Moseley*, 74 Fla. 555, 77 So. 619, L. R. A. 1918 C, 482; *Portland v. Yick*, 44 Oreg. 439, 75 Pac. 706, 102

Am. St. Rep. 633; *Heiskell v. Knox County*, 132 Tenn. 180, 177 S. W. 483, Ann. Cas. 1916 E, 1281; *Gottstein v. Lister*, 88 Wash. 462, 153 Pac. 595, Ann. Cas. 1917 D, 1008.

<sup>3</sup> *Prescott v. Trustees, &c.*, 19 Ill. 324; *Koehler v. Hill*, 60 Iowa, 543, 549, 14 N. W. 738, 15 N. W. 609; *Amos v. Moseley*, 74 Fla. 555, 77 So. 619, L. R. A. 1918 C, 482; *King Lumber Co. v. Crow*, 155 Ala. 504, 46 So. 646, 130 Am. St. Rep. 65; *Andrews v. People*, 33 Colo. 193, 79 Pac. 1031, 108 Am. St. Rep. 76; *Adams v. Clark*, 36 Colo. 65, 85 Pac. 642, 10 Ann. Cas. 774; *Palatine Ins. Co. v. Northern Pacific R. Co.*, 34 Mont. 268, 85 Pac. 1032, 9 Ann. Cas. 579.

Upon this question the authorities are not in entire accord. The presumption is, when the act, as signed and enrolled, does not show the contrary, that it has gone through all necessary formalities: *State v. McConnell*, 3 Lea, 341; *Blessing v. Galveston*, 42 Tex. 641; *State v. Francis*, 26 Kan. 724; *Clendaniel v. Conrad*, 3 Boyce (Del.) 549, 83 Atl. 1036, Ann. Cas. 1915 B, 968; *Heiskell v. Knox County*, 132 Tenn. 180, 177 S. W. 483, Ann. Cas. 1916 E, 1281; *Town of Narrows v. Board of Supr's*, 128 Va. 572, 105 S. E. 82. And many cases hold, agreeably to the statement in the text, that this *prima facie* case may be overthrown by the journals: *Spangler v. Jacoby*, 14 Ill. 297; *Houston, &c. R. R. Co. v. Odum*, 53 Tex. 343;

*Burr v. Ross*, 19 Ark. 250; *Smithee v. Campbell*, 41 Ark. 471; *Jones v. Hutchinson*, 43 Ala. 721; *Moog v. Randolph*, 77 Ala. 597; *Berry v. Baltimore, &c. R. R. Co.*, 41 Md. 446, 20 Am. Rep. 69; *Green v. Weller*, 32 Miss. 650; *People v. McElroy*, 72 Mich. 446, 40 N. W. 750; *Brewer v. Mayor, &c.*, 86 Tenn. 732, 9 S. W. 166; *State v. Frank*, 60 Neb. 327, 61 Neb. 679, 83 N. W. 74, 85 N. W. 956; *Lambert v. Smith*, 98 Va. 268, 38 S. E. 938; *State v. Burlington & M. R. Co.*, 60 Neb. 741, 84 N. W. 254; *Andrews v. People*, 33 Colo. 193, 79 Pac. 1031, 108 Am. St. Rep. 76; *Adams v. Clark*, 36 Colo. 65, 85 Pac. 642, 10 Ann. Cas. 774; *State v. Andrews*, 64 Kan. 474, 67 Pac. 870; *Ritzman v. Campbell*, 93 Ohio St. 246, 112 N. E. 591, L. R. A. 1916 E, 1251, Ann. Cas. 1918 D, 248; *Boyd v. Olcott*, 102 Oreg. 327, 202 Pac. 431.

Under constitutional requirements that journals of the proceedings of the legislative bodies shall be kept and published, where the journal entries as to the legislative proceedings are explicit, and conflict even with legislative acts regularly authenticated, the journals are superior, and the courts will be governed by them as to matters clearly, explicitly, and affirmatively stated therein. *Amos v. Moseley*, 74 Fla. 555, 77 So. 619, L. R. A. 1918 C, 482. The journal entry, if in compliance with a constitutional requirement, is the best evidence of a resolution, and cannot be contradicted. *Koehler v. Hill*, 60 Iowa, 543, 15 N. W. 609. So, as to the entry of the number voting. *Wise v. Bigger*, 79 Va. 269. And as to which bill was voted on. *State v. Wendler*, 94 Wis. 369, 68 N. W. 759.

An enrolled bill may be impeached on the ground that it has not received a constitutional majority of the members elect of both branches of the General Assembly, and upon this question the legislative journals must provide the appropriate as well as the conclusive evidence. *Ritzman v. Campbell*, 93 Ohio St. 246, 112 N. E. 591, L. R. A. 1916 E, 1251, Ann. Cas. 1918 D, 248.

The journal cannot be contradicted

by parol to show that a mere title or skeleton was introduced as a bill. *Attorney-General v. Rice*, 64 Mich. 385, 31 N. W. 203. If a journal shows an act passed, it cannot be attacked on the ground that some members voting for it were improperly seated. *State v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829. And see *Opinions of Justices*, 52 N. H. 622; *Hensoldt v. Petersburg*, 63 Ill. 157; *Larrison v. Peoria, &c. R. R. Co.*, 77 Ill. 11; *People v. Commissioners of Highways*, 54 N. Y. 276; *English v. Oliver*, 28 Ark. 317; *In re Wellman*, 20 Vt. 653; *Osburn v. Staley*, 5 W. Va. 85; *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *State v. Platt*, 2 S. C. 150, 16 Am. Rep. 647; *Worthen v. Badget*, 32 Ark. 496; *Southwark Bank v. Commonwealth*, 26 Pa. St. 446; *Fordyce v. Godman*, 20 Ohio St. 1; *People v. Starne*, 35 Ill. 121; *Supervisors v. Keenan*, 2 Minn. 321; *People v. Mahaney*, 13 Mich. 481; *Berry v. Doane Point R. R. Co.*, 41 Md. 446. Compare *Brodnax v. Groom*, 64 N. C. 244; *Annapolis v. Harwood*, 32 Md. 471. But some cases hold that the enrolled statute is conclusive evidence of its due passage and validity. See *Sherman v. Story*, 30 Cal. 253; *People v. Burt*, 43 Cal. 560; *Louisiana Lottery Co. v. Richoux*, 23 La. Ann. 743, 8 Am. Rep. 602; *Green v. Weller*, 32 Miss. 650; *Swan v. Buck*, 40 Miss. 268; *Ex parte Wren*, 63 Miss. 512; *Pacific R. R. Co. v. Governor*, 23 Mo. 353; *State v. Swift*, 10 Nev. 176; *Pangborn v. Young*, 32 N. J. L. 29; *Evans v. Brown*, 30 Ind. 514; *Duncombe v. Prindle*, 12 Iowa, 1; *Terr. v. O'Connor*, 5 Dak. 397, 41 N. W. 746; *Re Tipton*, 28 Tex. App. 438, 13 S. W. 610, 8 L. R. A. 326, and note; *Narregang v. Brown County*, 14 S. D. 357, 85 N. W. 602; *State v. Bacon*, 14 S. D. 394, 85 N. W. 605; *Yolo County v. Colgan*, 132 Cal. 265, 64 Pac. 403; *State v. Savings Bank of New London*, 79 Conn. 141, 64 Atl. 5; *Atchison, etc., R. Co. v. State*, 28 Okla. 94, 113 Pac. 921, 40 L. R. A. (N. S.) 1; *State v. Jones*, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340.

It has been held that where the Constitution requires previous notice of an application for a private act,

is acting in the apparent performance of legal functions, every reasonable presumption is to be made in favor of the action of a legislative body; it will not be presumed in any case, from the mere silence of the journals, that either house has exceeded its authority, or disregarded a constitutional requirement in the passage of legislative acts, unless where the constitution has expressly required the journals to show the action taken, as, for instance, where it requires the yeas and nays to be entered.<sup>1</sup>

the courts cannot go behind the act to inquire whether the notice was given. *Brodnax v. Groom*, 64 N. C. 244; *Cox v. Pitt County*, 146 N. C. 584, 60 S. E. 516, 16 L. R. A. (N. s.) 253; *Cravens v. State*, 57 Tex. Crim. Rep. 135, 122 S. W. 29, 136 Am. St. Rep. 977. See *People v. Hurlbut*, 24 Mich. 44; *Day v. Stetson*, 8 Me. 365; *M'Clinch v. Sturgis*, 72 Me. 288; *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184; *Speer v. Athens*, 85 Ga. 49, 11 S. E. 802, 9 L. R. A. 402.

In Indiana the courts cannot look beyond the enrolled act and its authentication to determine the validity of an act; but in the case of an act passed over the governor's veto, where no authentication is required, the journals of the two houses of the legislature, upon which the governor's objections to the bill are required to be entered, and which show the passage of the bill notwithstanding such objections, are proper evidence of the passage of the bill over the veto. *Evans v. Browne*, 30 Ind. 514; *State ex rel. Holt v. Denny*, 118 Ind. 449, 21 N. E. 274.

As to use to be made of the journals in determining the true contents of a bill, see *Milwaukee County v. Isenring*, 109 Wis. 9, 85 N. W. 131.

The Supreme Court of the United States applies the rule of conclusiveness of an enrolled act as applied to acts of Congress and territorial statutes, but as to State statutes applies the rule prevailing in the State from which the case comes. *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *Post v. Supervisors*, 105 U. S. 667, 26 L. ed. 1204; *Field v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Lyons v. Woods*, 153 U. S. 649, 38 L. ed. 854, 14 Sup. Ct. Rep. 959; *Harwood v. Wentworth*, 162 U. S.

547, 40 L. ed. 1069, 16 Sup. Ct. Rep. 890; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912 B, 1312.

As to what papers constitute the journal and what changes may be made in them and when, see *Montgomery B. B. Works v. Gaston*, 126 Ala. 425, 28 So. 497, 51 L. R. A. 396, 85 Am. St. 42.

<sup>1</sup> *Miller v. State*, 3 Ohio St. 475; *McCulloch v. State*, 11 Ind. 424; *Supervisors v. People*, 25 Ill. 181; *Hall v. Steele*, 82 Ala. 562; *Glidewell v. Martin*, 11 S. W. 882; *People v. Dunn*, 22 Pac. 140; *State v. Brown*, 20 Fla. 407; *Matter of Vanderberg*, 28 Kan. 243; *State v. Peterson*, 38 Minn. 143, 36 N. W. 443; *State v. Algood*, 87 Tenn. 163, 10 S. W. 310; *Hunt v. State*, 22 Tex. App. 396, 3 S. W. 233; *State v. Joseph*, 175 Ala. 579, 57 So. 942, Ann. Cas. 1914 D, 248; *Andrews v. People*, 33 Colo. 193, 79 Pac. 1031, 108 Am. St. Rep. 76; *Adams v. Clark*, 36 Colo. 65, 85 Pac. 642, 10 Ann. Cas. 774; *Clendaniel v. Conrad*, 3 Boyce (Del.) 549, 83 Atl. 1036, Ann. Cas. 1915 B, 968; *Amos v. Moseley*, 74 Fla. 555, 77 So. 619, L. R. A. 1918 C, 482; *In re Drainage Dist. No. 1*, 26 Idaho, 311, 143 Pac. 299, L. R. A. 1915 A, 1210; *State v. Akers*, 92 Kan. 169, 140 Pac. 637, Ann. Cas. 1916 B, 543; *Portland v. Yick*, 44 Oreg. 439, 75 Pac. 706, 102 Am. St. Rep. 633. But where a statute can only be enacted by a certain majority, *e.g.* two-thirds, it must affirmatively appear by the printed statute or the act on file that such a vote was had. *People v. Commissioners of Highways*, 54 N. Y. 276.

It seems that, in Illinois, if one claims that a supposed law was never passed, and relies upon the records to

The law also seeks to cast its protection around legislative sessions, and to shield them against corrupt and improper influences, by making void all contracts which have for their object to influence legislation in any other manner than by such open and public presentation of facts, arguments, and appeals to reason as are recognized as proper and legitimate with all public bodies. While counsel may be properly employed to present the reasons in favor of any public measure to the body authorized to pass upon it, or to any of its committees empowered to collect facts and hear arguments, and parties interested may lawfully contract to pay for this service,<sup>1</sup> yet

show it, he must prove them. *Illinois Cent. R. R. Co. v. Wren*, 43 Ill. 77; *Grob v. Cushman*, 45 Ill. 119; *Bedard v. Hall*, 44 Ill. 91. The court will not act upon the admission of parties that an act was not passed in the constitutional manner. *Happel v. Brethauer*, 70 Ill. 166; *Attorney-General v. Rice*, 64 Mich. 385, 31 N. W. 203.

The Constitution of Alabama, art. 4, § 27, requires the presiding officer of each house, in the presence of the house, to sign acts "after the titles have been publicly read immediately before signing, and the fact of signing shall be entered on the journal." This seems a very imperative requirement. But in Colorado a like provision is held directory, and the presumption in case of silence of journal is in favor of the act. *In re Roberts*, 5 Col. 525.

That requirement to enter yeas and nays is mandatory, see *Com'rs of Stanly Co. v. Snuggs*, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439. That journals must affirmatively show full compliance with constitutional requirements, see *Cohn v. Kingsley*, 5 Idaho, 416, 49 Pac. 985, 38 L. R. A. 74; *Lynch v. Hutchinson*, 219 Ill. 193, 76 N. E. 370, 4 Ann. Cas. 904; *Palatine Ins. Co. v. Northern Pacific R. Co.*, 34 Mont. 268, 85 Pac. 1032, 9 Ann. Cas. 579; *State v. Mickey*, 73 Neb. 281, 102 N. W. 679, 119 Am. St. Rep. 894; *Union Bank v. Com'rs of Oxford*, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487; *George Bollin Co. v. North Platte Val. Irrigation Co.*, 19 Wyo. 542, 121 Pac. 22, 39 L. R. A. (N. S.) 868. *Contra*, *Lafferty v. Huffman*, 99 Ky. 80, 35 S. W. 123, 32 L. R. A. 203;

*McKinnon v. Cotner*, 30 Oreg. 588, 49 Pac. 956. If the journals do not show that an aye and nay vote was taken, as is directed by the Constitution, the act will be void. *Montgomery Beer Bottling Works v. Gaston*, 126 Ala. 425, 28 So. 497, 85 Am. St. Rep. 42, 51 L. R. A. 396; *Palatine Ins. Co. v. Northern Pacific R. Co.*, 34 Mont. 268, 85 Pac. 1032, 9 Ann. Cas. 579; *Osburn v. Staley*, 5 W. Va. 85, 13 Am. Rep. 640.

The court will not declare a statute void because of fraud in procuring its enrolment and the signatures of the proper officers thereto. Such fraud must be corrected by the legislature. *Carr v. Coke*, 116 N. C. 223, 22 S. E. 16, 28 L. R. A. 737, 47 Am. St. 801.

Parol testimony is inadmissible to impeach legislative records. *White v. Hinton*, 3 Wyo. 753, 30 Pac. 953, 17 L. R. A. 66. Upon conclusiveness of legislative records, see *Detroit v. Rentz*, 91 Mich. 78, 51 N. W. 787, 16 L. R. A. 59. And upon records of Secretary of State in regard to passage of bills and submission to governor, see *Lankford v. Somerset Co.*, 73 Md. 105, 20 Atl. 1017, 22 Atl. 412, 11 L. R. A. 491.

Matters of detail will be presumed properly performed where journal records the doing of the main act and is silent as to the subsidiary matters. *Barber Asphalt Co. v. Hunt*, 100 Mo. 22, 13 S. W. 98, 8 L. R. A. 110, 18 Am. St. 530.

<sup>1</sup> See *Willey v. Collier*, 7 Md. 273; *Bryan v. Reynolds*, 5 Wis. 200; *Brown v. Brown*, 34 Barb. 533; *Russell v. Burton*, 66 Barb. 539; *Houlton v. Nichol*, 93 Wis. 393, 67 N. W. 715,



to secretly approach the members of such a body with a view to influence their action at a time and in a manner that do not allow the presentation of opposite views, is improper and unfair to the opposing interest; and a contract to pay for this irregular and improper service would not be enforced by the law.<sup>1</sup> [To render the

33 L. R. A. 166; *Cole v. Brown-Hurley Hardware Co.*, 139 Iowa, 487, 117 N. W. 746, 16 Ann. Cas. 846, 18 L. R. A. (N. S.) 1161; *Adams v. East Boston Co.*, 236 Mass. 121, 127 N. E. 628; *Hyland v. Oregon Hassam Paving Co.*, 74 Oreg. 1, 144 Pac. 1160, L. R. A. 1915 C, 823, Ann. Cas. 1916 E, 941; *Herrick v. Barzee*, 96 Oreg. 357, 190 Pac. 141; *Stansell v. Roach*, 147 Tenn. 183, 246 S. W. 520, 29 A. L. R. 143.

"A contract for services to be rendered by an attorney before the legislature or the Congress of the United States, in securing the passage of a law providing for the payment of a just claim, is not unlawful if it does not contemplate the use of improper means and if the services to be rendered are such as to appeal to the reason of those whom it is sought to persuade. Drafting the petition to set forth the claim, collecting facts, preparing and submitting arguments either orally or in writing to a committee or other proper authority, and other services of like character, are within the category of professional services. They rest on the same principle of ethics as professional services rendered in a court of justice and are no more exceptionable. Services of such nature are separated by a broad line of demarcation from personal solicitation and similar means and appliances." *Herrick v. Barzee*, 96 Oreg. 357, 190 Pac. 141. See also *Hyland v. Oregon Hassam Paving Co.*, 74 Oreg. 1, 144 Pac. 1160, L. R. A. 1915 C, 823, Ann. Cas. 1916 E, 941.

<sup>1</sup> This whole subject was very fully considered in the case of *Frost v. Inhabitants of Belmont*, 6 Allen, 152, which was a bill filed to restrain the payment by the town of demands to the amount of nearly \$9,000, which the town had voted to pay as expenses in obtaining their act of incorporation. By the court, *Chapman, J.*: "It is to

be regretted that any persons should have attempted to procure an act of legislation in this Commonwealth, by such means as some of these items indicate. By the regular course of legislation, organs are provided through which any parties may fairly and openly approach the legislature, and be heard with proofs and arguments respecting any legislative acts which they may be interested in, whether public or private. These organs are the various committees appointed to consider and report upon the matters to be acted upon by the whole body. When private interests are to be affected, notice is given of the hearings before these committees; and thus opportunity is given to adverse parties to meet face to face and obtain a fair and open hearing. And though these committees properly dispense with many of the rules which regulate hearings before judicial tribunals, yet common fairness requires that neither party shall be permitted to have secret consultations, and exercise secret influences that are kept from the knowledge of the other party. The business of 'lobby members' is not to go fairly and openly before the committees, and present statements, proofs, and arguments that the other side has an opportunity to meet and refute if they are wrong, but to go secretly to the members and ply them with statements and arguments that the other side cannot openly meet, however erroneous they may be, and to bring illegitimate influence to bear upon them. If the 'lobby member' is selected because of his political or personal influence, it aggravates the wrong. If his business is to unite various interests by means of projects that are called 'log-rolling', it is still worse. The practice of procuring members of the legislature to act under the influence of what they have eaten and drank at houses of entertainment, tends to render those

of them who yield to such influences wholly unfit to act in such cases. They are disqualified from acting fairly towards interested parties or towards the public. The tendency and object of these influences are to obtain by corruption what it is supposed cannot be obtained fairly.

"It is a well-established principle, that all contracts which are opposed to public policy, and to open, upright, and fair dealing, are illegal and void. The principle was fully discussed in *Fuller v. Dame*, 18 Pick. 472. In several other States it has been applied to cases quite analogous to the present case.

"In *Pingrey v. Washburn*, 1 Aik. 264, it was held in Vermont that an agreement, on the part of a corporation, to grant to individuals certain privileges in consideration that they would withdraw their opposition to the passage of a legislative act touching the interests of the corporation, is against sound policy, prejudicial to correct and just legislation, and void. In *Gulick v. Ward*, 5 Halst. 87, it was decided in New Jersey that a contract which contravenes an act of Congress, and tends to defraud the United States, is void. A. had agreed to give B. \$100, on condition that B. would forbear to propose or offer himself to the Postmaster-General to carry the mail on a certain mail route, and it was held that the contract was against public policy and void. The general principle as to contracts contravening public policy was discussed in that case at much length. In *Wood v. McCann*, 6 Dana, 366, the defendant had employed the plaintiff to assist him in obtaining a legislative act in Kentucky, legalizing his divorce from a former wife, and his marriage with his present wife. The court say: 'A lawyer may be entitled to compensation for writing a petition, or even for making a public argument before the legislature or a committee thereof; but the law should not help him or any other person to a recompense for exercising any personal influence, in any way, in any act of legislation. It is certainly important to just and wise legislation, and therefore to the most essential interests of

the public, that the legislature should be perfectly free from any extraneous influence which may either corrupt or deceive the members, or any of them.'

"In *Clippinger v. Hepbaugh*, 5 Watts & S. 315, it was decided in Pennsylvania that a contract to procure or endeavor to procure the passage of an act of the legislature by using personal influence with the members, or by any sinister means, was void, as being inconsistent with public policy and the integrity of our political institutions. And an agreement for a contingent fee to be paid on the passage of a legislative act was held to be illegal and void, because it would be a strong incentive to the exercise of personal and sinister influences to effect the object.

"The subject has been twice adjudicated upon in New York. In *Harris v. Roof*, 10 Barb. 489, the Supreme Court held that one could not recover for services performed in going to see individual members of the house, to get them to aid in voting for a private claim, the services not being performed before the house as a body nor before its authorized committees. In *Sedgwick v. Stanton*, 4 Kernan, 289, the Court of Appeals held the same doctrine, and stated its proper limits. *Selden*, J., makes the following comments on the case of *Harris v. Roof*: 'Now, the court did not mean by this decision to hold that one who has a claim against the State may not employ competent persons to aid him in properly presenting such claim to the legislature, and in supporting it with the necessary proofs and arguments. Mr. Justice *Hand*, who delivered the opinion of the court, very justly distinguishes between services of the nature of those rendered in that case, and the procuring and preparing the necessary documents in support of a claim, or acting as counsel before the legislature or some committee appointed by that body. Persons may, no doubt, be employed to conduct an application to the legislature, as well as to conduct a suit at law; and may contract for and receive pay for their services in preparing documents, collecting evidence, making statements

of facts, or preparing and making oral or written arguments, provided all these are used or designed to be used before the legislature or some committee thereof as a body; but they cannot, with propriety, be employed to exert their personal influence with individual members, or to labor in any form privately with such members out of the legislative halls. Whatever is laid before the legislature in writing, or spoken openly or publicly in its presence or that of a committee, if false in fact, may be disproved, or if wrong in argument may be refuted; but that which is whispered into the private ear of individual members is frequently beyond the reach of correction. The point of objection in this class of cases, then, is, the personal and private nature of the services to be rendered.'

"In *Fuller v. Dame*, cited above, *Shaw*, Ch. J., recognizes the well-established right to contract and pay for professional services when the promisee is to act as attorney and counsel, but remarks that 'the fact appearing that persons do so act prevents any injurious effects from such proceeding. Such counsel is considered as standing in the place of his principal, and his arguments and representations are weighed and considered accordingly.' He also admits the right of disinterested persons to volunteer advice; as when a person is about to make a will, one may represent to him the propriety and expediency of making a bequest to a particular person; and so may one volunteer advice to another to marry another person; but a promise to pay for such service is void.

"Applying the principles stated in these cases to the bills which the town voted to pay, it is manifest that some of the money was expended for objects that are contrary to public policy, and of a most reprehensible character, and which could not, therefore, form a legal consideration for a contract."

See, further, a full discussion of the same subject, and reaching the same conclusion, by Mr. Justice *Grier*, in *Marshall v. Baltimore & Ohio R. R. Co.*, 16 How. 314, 14 L. ed. 953. That

contracts for lobby services in procuring or preventing legislation are void, see *Usher v. McBratney*, 3 Dill. 385; *Trist v. Child*, 21 Wall. 441, 22 L. ed. 623; *McKee v. Cheney*, 52 How. (N. Y.) 144; *Weed v. Black*, 2 MacArthur, 268; *Sweeney v. McLeod*, 15 Oreg. 330, 15 Pac. 275; *Cary v. Western U. Tel. Co.*, 47 Hun, 610; *Adams v. East Boston Co.*, 236 Mass. 121, 127 N. E. 628; *Davis v. Janeway*, 55 Okla. 725, 155 Pac. 241, L. R. A. 1916 D, 722; *Hyland v. Oregon Hassam Paving Co.*, 74 Oreg. 1, 144 Pac. 1160, L. R. A. 1915 C, 823, Ann. Cas. 1916 E, 941; *Herrick v. Barzee*, 96 Oreg. 357, 190 Pac. 141; *Stansell v. Roach*, 147 Tenn. 183, 246 S. W. 520, 29 A. L. R. 143. Or for influence in procuring contracts. *Tool Co. v. Norris*, 2 Wall. 45, 17 L. ed. 868. And any contract the purpose of which is to influence a public officer or body to favor persons in the performance of his public duty is void, on grounds of public policy. *Ordineal v. Barry*, 24 Miss. 9. Compare *Cole v. Brown-Hurley Hardware Co.*, 139 Iowa, 487, 117 N. W. 746, 18 L. R. A. (N. S.) 1161, 16 Ann. Cas. 846. The same general principle will be found applied in the following cases: *Swayze v. Hull*, 8 N. J. L. 54, 14 Am. Dec. 399; *Wood v. McCann*, 6 Dana, 366; *Hatzfield v. Gulden*, 7 Watts, 152; *Gill v. Davis*, 12 La. Ann. 219; *Powers v. Skinner*, 34 Vt. 274; *Frankfort v. Winterport*, 54 Me. 250; *Rose v. Truax*, 21 Barb. 361; *Devlin v. Brady*, 32 Barb. 518; *Oscanyan v. Arms Company*, 103 U. S. 261, 26 L. ed. 539; *Meguire v. Corwin*, 3 MacArthur, 81; *Dodson v. McCurnin*, 178 Iowa, 1211, 160 N. W. 927, L. R. A. 1917 C, 1084; *Davis v. Janeway*, 55 Okla. 725, 155 Pac. 241, L. R. A. 1916 D, 722. See further, *post*, 1391, note.

"Public policy requires that legislators or councilmen act solely from considerations of public duty and with an eye single to the public interests, and the courts uniformly hold to be illegal contracts for services that involve the use of secret means or the exercise of sinister or personal influences upon lawmakers to secure the passage or the defeat of proposed laws

contract void, it is not necessary that the parties should stipulate for corrupt action to be procured or induced by bribery, or the promise of future monetary gain, or the emolument of office; it is sufficient if the contract when applied to the facts inevitably tends to results which impair not merely the character of the legislature, but the public confidence in its integrity.<sup>1</sup> There is conflict among the authorities as to the effect upon a contract for services before legislative bodies of a provision making the compensation therefor contingent upon success in obtaining the desired results. Some cases hold that such a provision will invalidate the contract even though the services to be rendered are entirely legitimate.<sup>2</sup> But

or ordinances. This principle applies to common councils or other law-making bodies of municipal corporations to the same extent that it does to Congress or the legislature of a State." *Hyland v. Oregon Hassam Paving Co.*, 74 Oreg. 1, 144 Pac. 1160, L. R. A. 1915 C, 823, Ann. Cas. 1916 E, 941.

Contract of employment in which employee is assured of only a nominal salary and a large addition thereto is made contingent upon the adoption by a city council of a certain ordinance is void. *Crichfield v. Bermudez Asphalt Paving Co.*, 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347.

A sale of a town office, though by the town itself, cannot be the consideration for a contract. *Meredith v. Ladd*, 2 N. H. 517. See *Carleton v. Whitcher*, 5 N. H. 196; *Eddy v. Capron*, 4 R. I. 394.

A town cannot incur expenses in opposing before a legislative committee a division of the territorial limits: *Westbrook v. Deering*, 63 Me. 231; or to pay the expenses of a committee to procure the annexation of the town to another. *Minot v. West Roxbury*, 112 Mass. 1, 17 Am. Rep. 52. But in view of the provision in the Constitution of the United States securing to the people the right to petition the government for the redress of grievances, a contract for services to be rendered by an attorney before Congress in securing the passage of a law providing for the payment of a just claim is not rendered unlawful because it is attempted to be carried out in part by the claimants writing to the senators and representatives in

Congress, upon the advice of their attorney. *Herrick v. Barzee*, 96 Oreg. 357, 190 Pac. 141. See also *Winton v. Amos*, 255 U. S. 373, 65 L. ed. 684, 41 Sup. Ct. Rep. 342.

A contract employing an attorney to prosecute a claim against the Federal Government for property seized by Federal authorities during the civil war is not invalid as a lobbying contract on it appearing that the claim was dependent on establishing before the proper committees of the Federal Senate and House of Representatives the fact that the owner of the property had been a loyal citizen. *Pennebaker v. Williams*, 136 Ky. 120, 120 S. W. 321, 123 S. W. 672.

The fact that the manager of a corporation was a member of the legislature which authorized the letting of a certain contract will not prevent the corporation's bidding for it if the manager is not a stockholder, and his pay is in no way affected by the success or failure of the bid. *State v. Rickards*, 16 Mont. 145, 40 Pac. 210, 28 L. R. A. 298, 50 Am. St. 476.

An agreement upon a pecuniary consideration to withdraw opposition to granting of a pardon and to give assistance by solicitation and personal influence in procuring the same is against public policy and void. *Deering & Co. v. Cunningham*, 63 Kan. 174, 65 Pac. 263, 54 L. R. A. 410.

<sup>1</sup> *Adams v. East Boston Co.*, 236 Mass. 121, 127 N. E. 628.

<sup>2</sup> *Hogston v. Bell*, 185 Ind. 536, 112 N. E. 883; *Crichfield v. Bermudez Asphalt Paving Co.*, 174 Ill. 466, 51 N. E. 552, 42 L. R. A. 347; *Gil v.*

other cases, especially the most recent, deny this, and hold that if the services contracted for do not involve lobbying or other questionable methods or immoral conduct, and such methods are not resorted to in their performance, the mere fact of the compensation being contingent will not render the contract void.<sup>1</sup> For proper

Williams, 12 La. Ann. 219, 68 Am. Dec. 767; *Houlton v. Dunn*, 60 Minn. 26, 61 N. W. 898, 51 Am. St. Rep. 493, 30 L. R. A. 737; *Chippewa Valley & S. R. Co. v. Chicago, etc., R. Co.*, 75 Wis. 225, 44 N. W. 17, 6 L. R. A. 601.

"This rule is based on the ground that, when compensation is directly or indirectly contingent on success before the legislative body, it must necessarily encourage and lead to the use of improper means and the exercise of undue influence." *Hogston v. Bell*, 185 Ind. 536, 112 N. E. 883. The rule applies as well to the common council of a city as to the legislature of a State. *Crichfield v. Bermudez Asphalt Paving Co.*, 174 Ill. 466, 51 N. E. 652, 42 L. R. A. 347.

<sup>1</sup> Where one who had a just and meritorious claim against the government which could only be paid by act of Congress, contracted with others who had similar claims, based upon the same situations, to represent them at the same time that he presented his own claim in an effort to secure favorable consideration thereof, his expenses and compensation to be dependent upon his success, where no questionable methods were mentioned, no immoral conduct actually resorted to, and no misrepresentations were necessary in order to engage favorable consideration, and where the agent employed was necessarily known to have a personal interest in the appropriation, it was held that the contracts for contingent compensation were not void as in contravention of public policy. *Stansell v. Roach*, 147 Tenn. 183, 246 S. W. 520, 29 A. L. R. 143. The court said: "It is insisted that any contract the probable tendency of which would be to sully the probity or mislead the judgment of those to whom the high trust of legislation is confided must be pronounced void, and that such tendency must neces-

sarily be inferred from an agreement to pay and to receive contingent compensation. We entirely agree with the soundness of the proposition that a contract which necessarily implies the exercise of an improper or undue influence upon legislation should be declared void and unenforceable out of consideration of a sound public policy, but we are unable to concur in the conclusion that such a situation is inferable from the mere provisions for contingent compensation. The terms of a contract may be broad enough and used in connection with circumstances and in such a way as to imply secret or dishonest services, and such a law falls within the condemnation of public policy. 'But as the law does not presume that a person intends to violate its provisions, the general principle controlling the construction of a contract to influence legislation when the contract itself does not in terms stipulate for improper means seems to be that it will be upheld, unless the use of such means appears by necessary implication. The test is, does the contract, by its terms or necessary implication, require the performance of acts which are of a corrupt character or which have a corrupting tendency.' 6 R. C. L., pp. 732, 733. Numerous cases might be cited where the courts have upheld contracts for services in which compensation was contingent upon success. Reference to a few will suffice to show that the mere fact of contingency does not of itself vitiate the contract." In support of this rule the court cites the following cases. *Wylie v. Cox*, 15 How. 415, 14 L. ed. 753; *Wright v. Tebbitts*, 91 U. S. 252, 23 L. ed. 320; *Stanton v. Embury*, 93 U. S. 548, 23 L. ed. 983; *Taylor v. Bemiss*, 110 U. S. 42, 28 L. ed. 64, 3 Sup. Ct. Rep. 441; *Nutt v. Knut*, 200 U. S. 13, 50 L. ed. 348, 26 Sup. Ct. Rep. 216;

professional services rendered and expenses incurred in promoting legislation that has for its object and effect the rescue of substantial property interests for a class of beneficiaries under a trust of a public nature, it is equitable to impose a charge for reimbursement and compensation upon the interests of those beneficiaries who receive the benefit, just as it would be if a like result had been reached through successful litigation in the courts. In either case there is the same curious analogy to the salvage services of the maritime Law.<sup>1]</sup>

### *The Introduction and Passage of Bills.*<sup>2</sup>

Any member may introduce a bill in the house to which he belongs, in accordance with its rules; and this he may do at any time when the house is in session, unless the constitution, the law, or the rules of the house forbid. The constitution of Michigan provides that no new bill shall be introduced into either house of the legislature after the first fifty days of the session shall have expired;<sup>3</sup> and the Constitution of Maryland provides that no bill shall originate in either house within the last ten days of the session.<sup>4</sup> The purpose of these clauses is to prevent hasty and improvident legislation, and to compel, so far as any previous law can accomplish that result, the careful examination of proposed laws, or at least the affording of opportunity for that purpose; which will not always be done when bills may be introduced up to the very hour of adjournment, and, with the concurrence of the proper majority, put immediately upon their passage. [Where a bill has been introduced within the time limited by the Constitution, an amendment or substituted bill, which is within the general purpose of the original bill, may be intro-

Valdes v. Larrinaga, 233 U. S. 708, 58 L. ed. 1163, 34 Sup. Ct. Rep. 750. See also Barber Asphalt Paving Co. v. Botsford, 56 Kan. 532, 44 Pac. 3; Pennebaker v. Williams, 136 Ky. 120, 120 S. W. 321, 123 S. W. 672; Stroe-mer v. Van Orsdel, 74 Neb. 113, 103 N. W. 1053, 107 N. W. 125, 121 Am. St. Rep. 713, 4 L. R. A. (N. S.) 212, modifying Richardson v. Scotts Bluff County, 50 Neb. 400, 81 N. W. 309, 80 Am. St. Rep. 682, 48 L. R. A. 294; Herrick v. Barzee, 96 Ore. 357, 190 Pac. 141. Compare Hyland v. Oregon Hassam Paving Co., 74 Ore. 1, 144 Pac. 1160, L. R. A. 1915 C, 823, Ann. Cas. 1916 E, 941. But it has been held that a contract which contemplates the procuring of legislative action for

the sole purpose of depreciating the market value of the securities of a corporation and provides that any profit, arising from speculating in such securities by selling them short and covering at the anticipated decline, is to be divided between the parties, is void as against public policy and will not be enforced by the courts. Veazey v. Allen, 173 N. Y. 359, 66 N. E. 103, 62 L. R. A. 362.

<sup>1</sup> Winton v. Amos, 255 U. S. 373, 65 L. ed. 684, 41 Sup. Ct. Rep. 342.

<sup>2</sup> Upon this subject, see note to 11 L. R. A. 491.

<sup>3</sup> Art. 4, § 28.

<sup>4</sup> Art. 3, § 26. In Arkansas there is a similar provision, limiting the time to three days. Art. 5, § 24.

duced after that time has expired.<sup>1</sup> But if, in such case, the amendment or substituted bill presents a measure that has no relation to the bill as originally introduced, it cannot stand, for it is in substance a new measure or bill.<sup>2</sup> A bill introduced within the time limited by the Constitution and enacted after the expiration of that time is not invalidated by the fact that it can be sustained only under an amendment to the Constitution that was adopted after the expiration of the time limited for the introduction of bills.<sup>3</sup>

It is required by the constitutions of several of the States, that no bill shall have the force of law until on three several days it be read in each house, and free discussion allowed thereon; unless, in case of urgency, four-fifths or some other specified majority of the house shall deem it expedient to dispense with this rule.<sup>4</sup> The journals

<sup>1</sup> *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783; *People v. Loomis*, 135 Mich. 556, 98 N. W. 262, 3 Ann. Cas. 751; *State v. Ryan*, 92 Neb. 636, 139 N. W. 235, Ann. Cas. 1914 A, 224.

For a bill to create a township from certain territory may be substituted one to incorporate a city in the same county. *People v. McElroy*, 72 Mich. 446, 40 N. W. 750. A bill to create a township may be amended after fifty days so as to make the same territory a county. *Pack v. Barton*, 47 Mich. 520, 11 N. W. 367.

<sup>2</sup> *People v. Loomis*, 135 Mich. 556, 98 N. W. 262, 3 Ann. Cas. 751.

A practice has sprung up of evading these constitutional provisions by introducing a new bill after the time has expired when it may constitutionally be done, as an amendment to some pending bill, the whole of which, except the enacting clause, is struck out to make way for it. Thus, the member who thinks he may possibly have occasion for the introduction of a new bill after the constitutional period has expired, takes care to introduce sham bills in due season which he can use as stocks to graft upon, and which he uses irrespective of their character or contents. The sham bill is perhaps a bill to incorporate the city of Siam. One of the member's constituents applies to him for legislative permission to construct a dam across the Wild Cat River. Forthwith, by amendment, the bill entitled a bill to

incorporate the city of Siam has all after the enacting clause stricken out, and it is made to provide, as its sole object, that John Doe may construct a dam across the Wild Cat. With this title and in this form it is passed; but the house then considerably amends the title to correspond with the purpose of the bill, and the law is passed and the constitution at the same time saved! This trick is so transparent, and so clearly in violation of the constitution, and the evidence at the same time is so fully spread upon the record, that it is a matter of surprise to find it so often resorted to.

A bill to create the County of L. out of the County of W. cannot be amended so as to make M. County out of X. County. *Re Creation of New Counties*, 9 Col. 624, 21 Pac. 472. See, also, *Hall v. Steele*, 82 Ala. 562, 2 So. 650. A bill substituting K. County for J. County, in a bill creating a board of county auditors for J. County, is a new bill, and, if introduced after the time limited by the Constitution, is void. *People v. Loomis*, 135 Mich. 556, 98 N. W. 262, 3 Ann. Cas. 751.

<sup>3</sup> *Morrison v. Kent*, 135 Mich. 38, 97 N. W. 45, 67 L. R. A. 965.

<sup>4</sup> "The purpose of this provision of the Constitution is to inform legislators and people of legislation proposed by a bill, and to prevent hasty legislation." *Smith v. Mitchell*, 69 W. Va. 481, 72 S. E. 755, Ann. Cas. 1913 B, 588.

which each house keeps of its proceedings ought to show whether this rule is complied with or not; but in case they do not, the passage in the manner provided by the constitution must be presumed, in accordance with the general rule which presumes the proper discharge of official duty.<sup>1</sup> [Failure to show that the rule has been complied with, may be corrected by the same legislature, and, when corrected, the journal will stand as if it was originally so made.<sup>2</sup> The requirement of three readings on different days in each house does not necessarily mean three days in one house, and three different days in the other house. When duplicate bills are introduced in both houses, they may be read in both on the same days, provided there are three readings on different days in each house.<sup>3</sup> Where a bill is amended after its first or second reading it need not

<sup>1</sup> *Supervisors of Schuyler Co. v. People*, 25 Ill. 181; *Miller v. State*, 3 Ohio St. 475.

In *People v. Starne*, 35 Ill. 121, it is said the courts should not enforce a legislative act unless there is record evidence, from the journals of the two houses, that every material requirement of the constitution has been satisfied. And see *Ryan v. Lynch*, 68 Ill. 160. *Contra*, *State v. McConnell*, 3 Lea, 341; *Blessing v. Galveston*, 42 Tex. 641.

The clause in the Constitution of Ohio is: "Every bill shall be fully and distinctly read on three different days, unless, in case of urgency, three-fourths of the house in which it shall be pending shall dispense with this rule;" and in *Miller v. State*, 3 Ohio St. 475, and *Pim v. Nicholson*, 6 Ohio St. 176, this provision was held to be merely directory.

The *distinctness* with which any bill must be read cannot possibly be defined by any law; and it must always, from the necessity of the case, rest with the house to determine finally whether in this particular the Constitution has been complied with or not; but the rule respecting three several readings on different days is specific, and capable of being precisely complied with, and we do not see how, even under the rules applied to statutes, it can be regarded as directory merely, provided it has a purpose beyond the mere regular and orderly transaction of business. That it has such a pur-

pose, that it is designed to prevent hasty and improvident legislation, and is therefore not a mere rule of order, but one of protection to the public interests and to the citizens at large, is very clear; and independent of the question whether definite constitutional principles can be dispensed with in any case on the ground of their being merely directory, we cannot see how this can be treated as anything but mandatory. See *People v. Campbell*, 8 Ill. 466; *McCulloch v. State*, 11 Ind. 424; *Weill v. Kenfield*, 54 Cal. 111; *Chicot Co. v. Davies*, 40 Ark. 200; *Stockton v. Powell*, 29 Fla. 1, 10 So. 688, 15 L. R. A. 42; *Rodman-Heath Cotton Mills v. Waxhaw*, 130 N. C. 293, 41 S. E. 488; *Richmond County Com'rs v. Farmers' Bank*, 152 N. C. 387, 67 S. E. 969, 21 Ann. Cas. 812. Reading twice by title and once at length is sufficient. *People v. McElroy*, 72 Mich. 446, 49 N. W. 750. One reading may be in committee of the whole. *Re Reading of Bills*, 9 Col. 641, 21 Pac. 477.

After bill is amended and passed as amended in the second house, it need not be read three times in first house before amendments are concurred in by that house. *State v. Dillon*, 42 Fla. 95, 28 So. 781.

<sup>2</sup> *Richmond County Com. v. Farmers' Bank*, 152 N. C. 387, 67 S. E. 969, 21 Ann. Cas. 812.

<sup>3</sup> *Smith v. Mitchell*, 69 W. Va. 481, 72 S. E. 755, Ann. Cas. 1913 B, 588.



be again read in its entirety on three different days.<sup>1</sup> Where a bill has been read twice and referred to a committee who have reported a substitute, which is so germane to the original bill as to be a proper substitute, such substitute need not be read three times; a single reading will suffice.<sup>2</sup> A provision of the Constitution that in case of urgency two-thirds of the house in which a bill is pending may dispense with the requirement as to reading, applies to amendments as well as to the original bill, and the reading of amendments on three several days may be dispensed with.<sup>3</sup> In the reading of a bill, it seems to be sufficient to read the written document that is adopted by the two houses; even though something else becomes law in consequence of its passage, and by reason of being referred to in it.<sup>4</sup> Thus, a statute which incorporated a military company by reference to its Constitution and by-laws, was held valid notwithstanding the Constitution and by-laws, which would acquire the force of law by its passage, were not read in the two houses as a part of it.<sup>5</sup> But there cannot be many cases, we should suppose, to which this ruling would be applicable. [One of the readings of a bill may be on Sunday if a reading on that day is not prohibited by Constitution or statute.<sup>6</sup>

Where the laws of the State have been codified, and certain new provisions introduced, the code may be enacted as a whole by a single

<sup>1</sup> *State v. Dillon*, 42 Fla. 96, 28 So. 781; *Cleland v. Anderson*, 66 Neb. 261, 92 N. W. 306, 96 N. W. 212, 98 N. W. 1075, 5 L. R. A. (N. S.) 136; *State v. Ryan*, 92 Neb. 636, 139 N. W. 235, Ann. Cas. 1914 A, 224; *Capito v. Topping*, 65 W. Va. 587, 64 S. E. 845, 22 L. R. A. (N. S.) 1089; *Smith v. Mitchell*, 69 W. Va. 481, 72 S. E. 755, Ann. Cas. 1913 B, 588.

<sup>2</sup> *State v. Akers*, 92 Kan. 169, 140 Pac. 637, Ann. Cas. 1916 B, 543; *Edwards v. Nash County Board*, 183 N. C. 58, 110 S. E. 600; *Southern R. Co. v. Memphis*, 126 Tenn. 267, 148 S. W. 662, 41 L. R. A. (N. S.) 828, Ann. Cas. 1913 E, 153; *Smith v. Mitchell*, 69 W. Va. 481, 72 S. E. 755, Ann. Cas. 1913 B, 588.

Where bills which are the same in tenor and substance in their caption and body are introduced into both houses, and the bill as passed by one house is substituted for the bill in the other house which has passed two read-

ings, a single reading of such substituted bill will comply with the requirement that a bill shall be read in each house on three separate days. *Archibald v. Clark*, 112 Tenn. 532, 82 S. W. 310; *Heiskell v. Knox County*, 132 Tenn. 180, 177 S. W. 483, Ann. Cas. 1916 E, 1281.

<sup>3</sup> *Tarr v. Western Loan, etc., Co.*, 15 Idaho, 741, 99 Pac. 1049, 21 L. R. A. (N. S.) 707.

<sup>4</sup> *Dew v. Cunningham*, 28 Ala. 466. Congress may adopt a law by reference. *District of Columbia v. Washington Gas Light Co.*, 3 Mackey, 343. See, further, *Baird v. State*, 52 Ark. 326, 12 S. W. 556; *Beard v. Wilson*, 52 Ark. 290, 12 S. W. 567; *Titusville Iron Works v. Keystone Oil Co.*, 122 Pa. St. 627, 15 Atl. 917.

<sup>5</sup> *Bibb County Loan Association v. Richards*, 21 Ga. 592. And see *Pulford v. Fire Department*, 31 Mich. 458.

<sup>6</sup> *Ex parte Seward*, 299 Mo. 385, 253 S. W. 356, 31 A. L. R. 665.

statute, and when so done it is sufficient to read the enacting statute. The code need not be read at length.<sup>1]</sup>

It is also provided in the constitutions of some of the States that, on the final passage of every bill, the yeas and nays shall be entered on the journal. Such a provision is designed to serve an important purpose in compelling each member present to assume as well as to feel his due share of responsibility in legislation; and also in furnishing definite and conclusive evidence whether the bill has been passed by the requisite majority or not. "The Constitution prescribes this as the test by which to determine whether the requisite number of members vote in the affirmative. The office of the journal is to record the proceedings of the house, and authenticate and preserve the same. It must appear on the face of the journal that the bill passed by a constitutional majority. These directions are all clearly imperative. They are expressly enjoined by the fundamental law as matters of substance, and cannot be dispensed with by the legislature."<sup>2</sup> [But such a constitutional requirement does not apply to a vote of the house which originated the bill when concurring in amendments of the other house.<sup>3</sup> An entry on the journal that "The bill passed its second reading, ayes 39, noes . . . , as follows:" followed by a list of those voting in the affirmative, without any reference to those voting in the negative, indicates that the

<sup>1</sup> *Central of Georgia R. Co. v. State*, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518.

<sup>2</sup> *Spangler v. Jacoby*, 14 Ill. 297; *Supervisors of Schuyler Co. v. People*, 25 Ill. 183; *Ryan v. Lynch*, 68 Ill. 160; *Steckert v. East Saginaw*, 22 Mich. 104; *People v. Commissioners of Highways*, 54 N. Y. 276; *Post v. Supervisors*, 105 U. S. 667, 26 L. ed. 1204; *Commissioners v. Trust Co.*, 143 N. C. 110, 55 S. E. 442, 118 Am. St. Rep. 791; *Richmond County v. Farmers' Bank*, 152 N. C. 387, 67 S. E. 696, 21 Ann. Cas. 812. For a peculiar case, see *Division of Howard County*, 15 Kan. 194. As to what is sufficient evidence in a journal of such vote, *In re Roberts*, 5 Col. 525.

An act which is invalid because not passed by the requisite number of votes may be validated indirectly by subsequent legislative action recognizing it as valid. *Attorney-General v. Joy*, 55 Mich. 94, 20 N. W. 806.

There have been cases, as we happen

to know, in which several bills have been put on their passage together, the yeas and nays being once called for them all, though the journal is made to state falsely a separate vote on each. We need hardly say that this is a manifest violation of the constitution, which requires separate action in every case; and that, when resorted to, it is usually for the purpose of avoiding another provision of the constitution, which seeks to preclude "log-rolling legislation", by forbidding the incorporation of distinct measures in one and the same statute.

<sup>3</sup> *State v. Corbett*, 61 Ark. 227, 32 S. W. 686; *Mechanics' Bldg. & L. Asso. v. Coffman*, 110 Ark. 269, 162 S. W. 1090; *State v. Crowe*, 130 Ark. 272, 197 S. W. 4, L. R. A. 1918 A, 567, Ann. Cas. 1918 D, 460; *McCulloch v. State*, 11 Ind. 424; *Johnson v. Great Falls*, 38 Mont. 369, 99 Pac. 1059, 16 Ann. Cas. 974; *Hull v. Miller*, 4 Neb. 503.

bill passed by a unanimous vote and that there were no names to be recorded in the negative, and is a compliance with the requirement that the ayes and noes shall be entered on the journals.<sup>1]</sup>

For the vote required in the passage of any particular law the reader is referred to the Constitution of his State. A simple majority of a quorum is sufficient, unless the Constitution establishes some other rule; and where, by the Constitution, a two-thirds or three-fourths vote is made essential to the passage of any particular class of bills, two-thirds or three-fourths of a quorum will be understood, unless the terms employed clearly indicate that this proportion of all the members, or of all those elected, is intended.<sup>2</sup> [A constitutional requirement that the assent of two-thirds of the members elected to each house of the legislature shall be requisite to every bill appropriating the public money or property for local or private purposes, is mandatory, and cannot be evaded by calling a bill a "joint resolution."<sup>3</sup>

Where the Constitution provides that a specified time must elapse after the passage of a bill before the law becomes operative, the time runs from its adoption by the final house and not from the time of its approval by the governor.<sup>4]</sup>

### *The Title of a Statute.*

The title of an act was formerly considered no part of it; and although it might be looked to as a guide to the intent of the law-makers when the body of the statute appeared to be in any respect ambiguous or doubtful,<sup>5</sup> yet it could not enlarge or restrain the pro-

<sup>1</sup> Commissioners v. Trust Co., 143 N. C. 110, 55 S. E. 442, 118 Am. St. Rep. 791, overruling Debnam v. Chitty, 131 N. C. 657, 43 S. E. 3. See also Board of Com'rs v. Tollman, 145 Fed. 753.

<sup>2</sup> Southworth v. Palmyra & Jacksonburg R. R. Co., 2 Mich. 287; State v. McBride, 4 Mo. 303, 29 Am. Dec. 636; Rushville Gas. Co. v. Rushville, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. Rep. 388; State v. Missouri, etc., R. Co., 96 Kan. 609, 152 Pac. 777, Ann. Cas. 1917 A, 612; Osburn v. Staley, 5 W. Va. 85, 13 Am. Rep. 640.

By most of the constitutions either all the laws, or laws on some particular subjects, are required to be adopted by a majority vote, or some other proportion of "all the members elected",

or of "the whole representation." These and similar phrases require all the members to be taken into account whether present or not. Where a majority of all the members *elected* is required in the passage of a law, an ineligible person is not on that account to be excluded in the count. Satterlee v. San Francisco, 22 Cal. 314.

<sup>3</sup> Such a requirement is too clear and too valuable to be thus frittered away. Allen v. Board of State Auditors, 122 Mich. 324, 81 N. W. 113, 80 Am. St. Rep. 573, 47 L. R. A. 117.

<sup>4</sup> State v. Mounts, 36 W. Va. 179, 14 S. E. 407, 15 L. R. A. 243, and note.

<sup>5</sup> United States v. Palmer, 3 Wheat. 610, 4 L. ed. 471; Burgett v. Burgett, 1 Ohio, 469; Mundt v. Sheboygan, &c. R. R. Co., 31 Wis. 451; Eastman v. McAlpin, 1 Ga. 157; Cohen v. Bar-

visions of the act itself,<sup>1</sup> and the latter might therefore be good when it and the title were in conflict. The reason for this was that anciently titles were not prefixed at all, and when afterwards they came to be introduced, they were usually prepared by the clerk of the house in which the bill first passed, and attracted but little attention from the members. They indicated the clerk's understanding of the contents or purpose of the bills, rather than that of the house; and they therefore were justly regarded as furnishing very little insight into the legislative intention. Titles to legislative acts, however, have recently, in some States, come to possess very great importance, by reason of constitutional provisions, which not only require that they shall correctly indicate the purpose of the law, but which absolutely make the title to control, and exclude everything from effect and operation as law which is incorporated in the body of the act, but is not within the purpose indicated by the title. These provisions are given in the note, and it will readily be perceived that they make a very great change in the law.<sup>2</sup>

rett, 5 Call, 195; *Garrigas v. Board of Com'rs*, 39 Ind. 66; *Matter of Middletown*, 82 N. Y. 196; *Tripp v. Goff*, 15 R. I. 299, 3 Atl. 591; *Evernham v. Hulit*, 45 N. J. L. 53. See *Dwarris on Statutes*, 502.

<sup>1</sup> *Hadden v. The Collector*, 5 Wall. 107, 18 L. ed. 518. Compare *United States v. Union Pacific R. R. Co.*, 91 U. S. 72, 23 L. ed. 224.

<sup>2</sup> The Constitutions of Minnesota, Kansas, Maryland, Nebraska, Ohio, South Dakota, Virginia, and Washington provide that "no law shall embrace more than one subject, which shall be expressed in its title." Those of Michigan, New Jersey, and Louisiana are similar, substituting the word *object* for *subject*. The Constitutions of South Carolina, Alabama, Tennessee, Arkansas, and California contain similar provisions.

The Constitution of New Jersey provides that, "to avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

The Constitution of Missouri contains the following provision: "No bill (except general appropriation bills, which may embrace the various sub-

jects and accounts for and on account of which moneys are appropriated, and except bills passed under the third subdivision of section 44 of this article) shall contain more than one subject, which shall be clearly expressed in its title." The exception secondly referred to is to bills for free public-school purposes.

The Constitutions of Idaho, Indiana, Oregon, and Iowa provide that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

The Constitution of West Virginia contains a provision that is substantially similar, except that it substitutes the word *object* for *subject*.

The Constitution of North Dakota provides that "no bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed."

The Constitution of Mississippi provides that "every bill introduced into

the legislature shall have a title, and the title ought to indicate clearly the subject-matter or matters of the proposed legislation."

The Constitution of Kentucky provides that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title."

The Constitution of Georgia provides that "no law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from that expressed in the title thereof."

The Constitution of Florida provides that "each law enacted in the legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title."

The Constitution of Montana provides that "no bill, except general appropriation bills, and bills for the codification and general revision of the laws, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." The Constitutions of New Mexico, Oklahoma and Wyoming contain substantially similar provisions. So does the Constitution of Utah, except that it does not contain the provision that only so much of an act shall be void as shall not be expressed in its title.

The Constitution of Nevada provides that "every law enacted by the legislature shall embrace but one subject, and matters properly connected therewith, which subject shall be briefly expressed in the title."

The Constitutions of New York and Wisconsin provide that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title."

The Constitution of Illinois is similar to that of Ohio, with the addition of the saving clause found in the Constitution of Indiana.

The provision in the Constitution of

Colorado is similar to that of Missouri.

In Pennsylvania the provision is that "no bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title." Const. of 1853.

"The title is in a legal sense a part of every statute and may be considered in determining its construction." *Wheelwright v. Trefry*, 235 Mass. 584, 127 N. E. 523, 37 A. L. R. 920.

Whether the word *object* is to have any different construction from the word *subject*, as used in these constitutional provisions, is a question which may some time require discussion; but as it is evidently employed for precisely the same purpose, it would seem that it ought not to have. Compare *Hingle v. State*, 24 Ind. 28, and *People v. Lawrence*, 36 Barb. 177. The present Texas Constitution substitutes *subject* for *object*, which was in the earlier one, and it is held that the word is less restrictive, and that an act whose subject is the regulation of the liquor traffic is good though several distinct objects are covered, for instance, regulation of liquor shops, collection of revenue, &c. *Fahey v. State*, 27 Tex. App. 146, 11 S. W. 108. But in a Virginia case (the Constitution in that State uses the word "object") the court said: "There is more than one subject dealt with in the statute, but they are all congruous, have a natural connection with, are germane to, and are reasonably necessary for the accomplishment of the one object of the statute. This satisfies the constitutional requirement in question." *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S. E. 141, 12 A. L. R. 1121.

In Michigan this provision does not apply to city ordinances. *People v. Hanrahan*, 75 Mich. 611, 42 N. W. 1124.

The Michigan Constitution requires an enacting clause; when this is omitted from the bill as it comes from the first house, the clerk of the next cannot insert it, but the bill must be sent back for the first house to correct it. *People v. Dettenthaler*, 118 Mich. 595, 77 N. W. 450, 44 L. R. A. 164.

In considering these provisions it is important to regard, —

1. *The evils designed to be remedied.* The Constitution of New Jersey refers to these as “the improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other.” In the language of the Supreme Court of Louisiana, speaking of the former practice: “The title of an act often afforded no clue to its contents. Important general principles were found placed in acts private or local in their operation; provisions concerning matters of practice or judicial proceedings were sometimes included in the same statute with matters entirely foreign to them, the result of which was that on many important subjects the statute law had become almost unintelligible, as they whose duty it has been to examine or act under it can well testify. To prevent any further accumulation to this chaotic mass was the object of the constitutional provision under consideration.”<sup>1</sup> The Supreme Court of Michigan say: “The history and purpose of this constitutional provision are too well understood to require any elucidation at our hands. The practice of bringing together into one bill subjects diverse in their nature and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the State. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly satisfied of its design when required to pass upon it.”<sup>2</sup> The Court of Appeals of New

Any material change in title of an act after passing the legislature and before presentation to the governor, renders the act unconstitutional. *Weis v. Ashley*, 59 Neb. 494, 81 N. W. 318, 80 Am. St. 704.

<sup>1</sup> *Walker v. Caldwell*, 4 La. Ann. 298. See *Fletcher v. Oliver*, 25 Ark.

298; *Albrecht v. State*, 8 Tex. App. 216, 34 Am. Rep. 737.

<sup>2</sup> *People v. Mahaney*, 13 Mich. 481. And see *Board of Supervisors v. Heenan*, 2 Mich. 336; *Davis v. Bank of Fulton*, 31 Ga. 69; *St. Louis v. Tiefel*, 42 Mo. 578; *State v. Losatee*, 9 Baxt. 584; *Bosworth v. State Uni-*

York declare the object of this provision to be "that neither the members of the legislature nor the people should be misled by the title."<sup>1</sup> The Supreme Court of Iowa say: "The intent of this provision of the constitution was, to prevent the union, in the same act, of incongruous matters, and of objects having no connection, no relation. And with this it was designed to prevent surprise in legislation, by having matter of one nature embraced in a bill whose title expressed another."<sup>2</sup> And similar expressions will be found in many other reported cases.<sup>3</sup> It may therefore be assumed as settled that

versity, 166 Ky. 436, 179 S. W. 403, L. R. A. 1917 B, 808; *Somerset County v. Pocomoke Bridge Co.*, 109 Md. 1, 71 Atl. 462, 16 Ann. Cas. 874; *Vernor v. Martindale*, 179 Mich. 157, 146 N. W. 338, Ann. Cas. 1915 D, 128; *Provident L. & T. Co. v. Hammond*, 230 Pa. St. 407, 79 Atl. 628.

The Constitution of Georgia provided that "no law or ordinance shall pass containing any matter different from what is expressed in the title thereof." In *Mayor, &c. of Savannah v. State*, 4 Ga. 38, *Lumpkin, J.*, says: "I would observe that the traditionary history of this clause is that it was inserted in the Constitution of 1798 at the instance of General James Jackson, and that its necessity was suggested by the Yazoo act. That memorable measure of the 17th of January, 1795, as is well known, was smuggled through the legislature under the caption of an act 'for the payment of the late State troops', and a declaration in its title of the right of the State to the unappropriated territory thereof 'for the protection and support of the frontier settlements.'" The Yazoo act made a large grant of lands to a company of speculators. It constituted a prominent subject of controversy in State politics for many years.

<sup>1</sup>*Sun Mutual Insurance Co. v. Mayor, &c. of New York*, 8 N. Y. 239.

<sup>2</sup>*State v. County Judge of Davis Co.*, 2 Iowa, 280. See *State v. Silver*, 9 Nev. 227.

<sup>3</sup>See *Conner v. Mayor, &c. of New York*, 5 N. Y. 293; *Davis v. State*, 7 Md. 151; *Clendaniel v. Conrad*, 3 Boyce (Del.) 549, 83 Atl. 1036, Ann. Cas. 1915 B, 968; *Pioneer Irrigation Dist. v. Bradley*, 8 Idaho, 310, 68 Pac.

295, 101 Am. St. Rep. 201; *State v. Dolan*, 13 Idaho, 693, 92 Pac. 995, 14 L. R. A. (N. S.) 1259; *Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. (N. S.) 215, 3 Ann. Cas. 487; *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; *People v. Chicago*, 256 Ill. 558, 100 N. E. 194, 43 L. R. A. (N. S.) 954, Ann. Cas. 1913 E, 305; *Galpin v. Chicago*, 269 Ill. 27, 109 N. E. 713, L. R. A. 1917 B, 176; *Parks v. State*, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; *Republic Iron, etc., Co. v. State*, 160 Ind. 379, 66 N. E. 1005, 62 L. R. A. 736; *Knight, etc., Co. v. Miller*, 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146; *Moore-Mansfield Constr. Co. v. Indianapolis, etc., R. Co.*, 179 Ind. 356, 101 N. E. 296, 44 L. R. A. (N. S.) 816, Ann. Cas. 1915 D, 917; *Cook v. Marshall County*, 119 Iowa, 384, 93 N. W. 372, 104 Am. St. Rep. 283; *Sisson v. Buena Vista County*, 128 Iowa, 442, 104 N. W. 454, 70 L. R. A. 440; *State v. Hutchinson Ice Cream Co.*, 168 Iowa, 1, 147 N. W. 195, L. R. A. 1917 B, 198; *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; *State v. Brodnax*, 228 Mo. 25, 128 S. W. 177, 137 Am. St. Rep. 613; *State v. McKinney*, 29 Mont. 375, 74 Pac. 1095, 1 Ann. Cas. 579; *People v. Howe*, 177 N. Y. 499, 69 N. E. 1114, 66 L. R. A. 664; *State v. Richardson*, 48 Ore. 309, 85 Pac. 225, 8 L. R. A. (N. S.) 362; *Pierson v. Minnehaha County*, 28 S. D. 534, 134 N. W. 212, 38 L. R. A. (N. S.) 261; *McCormick v. State*, 135 Tenn. 218, 186 S. W. 95, L. R. A. 1916 F, 382.

The Supreme Court of Indiana also

the purpose of these provisions was: *first*, to prevent *hodge-podge* or "log-rolling" legislation; *second*, to prevent surprise or fraud upon the legislature by means of provisions in bills of which the titles gave no intimation, and which might therefore be overlooked and carelessly and unintentionally adopted; and, *third*, to fairly apprise the people, through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon, by petition or otherwise, if they shall so desire.<sup>1</sup>

2. *The particularity required in stating the object.* The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title.<sup>2</sup> To require

understand the provision in the Constitution of that State to be designed, among other things, to assist in the codification of the laws. *Indiana Central Railroad Co. v. Potts*, 7 Ind. 681; *Hingle v. State*, 24 Ind. 28. See *People v. Institution, &c.*, 71 Ill. 229; *State v. Ah Sam*, 15 Nev. 27, 37 Am. Rep. 454; *Harrison v. Supervisors*, 51 Wis. 645, 8 N. W. 731; *Albrecht v. State*, 8 Tex. App. 216, 34 Am. Rep. 737; *Hope v. Mayor, &c.*, 72 Ga. 246; *State v. Ranson*, 73 Mo. 78; *Bumsted v. Govern*, 47 N. J. L. 368, 1 Atl. 135.

The form of the title during any stage of the legislation before it becomes a law is immaterial. *Attorney-General v. Rice*, 64 Mich. 385, 31 N. W. 203; *State v. Ill. Centr. R. R. Co.*, 33 Fed. 730.

These provisions do not apply to a revision of the statutes required by the constitution: *State v. McDaniel*, 19 S. C. 114; *American Indemnity Co. v. Austin*, 112 Tex. 239, 246 S. W. 1019. See also *Cook v. Marshall County*, 119 Iowa, 384, 93 N. W. 372, 104 Am. St. Rep. 283; *Johnson v. Harrison*, 47 Minn. 575, 50 N. W. 923, 28 Am. St. Rep. 382; *State v. Tie-man*, 32 Wash. 294, 73 Pac. 375, 98 Am. St. Rep. 854. Nor to an act antedating the constitution and appearing in a later compilation. *Stewart v. Riopelle*, 48 Mich. 177, 12 N. W. 36.

A statute which refers to more than one subject matter, or contains matter different from what is expressed in its

title, becomes, by incorporation in a code, a valid law. *Parks v. State*, 110 Ga. 760, 36 S. E. 73; *Kennedy v. Meara*, 127 Ga. 68, 56 S. E. 243, 9 Ann. Cas. 396; *Anderson v. Great Northern R. Co.*, 25 Idaho, 433, 138 Pac. 127, Ann. Cas. 1916 C, 191.

<sup>1</sup> *State v. Doherty*, 3 Idaho, 384, 29 Pac. 855; *State v. Dolan*, 13 Idaho, 693, 92 Pac. 995, 14 L. R. A. (N. S.) 1259; *Moore-Mansfield Const. Co. v. Indianapolis, etc., R. Co.*, 179 Ind. 356, 101 N. E. 296, 44 L. R. A. (N. S.) 816, Ann. Cas. 1915 D, 917; *Fout v. Frederick County*, 105 Md. 563, 66 Atl. 488; *Somerset County v. Pocomoke Bridge Co.*, 109 Md. 1, 71 Atl. 462, 16 Ann. Cas. 874; *State v. Hoadley*, 20 Nev. 317, 22 Pac. 99; *State v. Johnson*, 90 Okla. 21, 215 Pac. 945; *State v. Superior Ct.*, 28 Wash. 317, 68 Pac. 957, 92 Am. St. Rep. 831.

Referring to the statement in the text, Justice *Stewart*, in delivering the opinion of the court in *State v. Dolan*, 13 Idaho, 693, 92 Pac. 995, 14 L. R. A. (N. S.) 1259, said: "This text from Judge *Cooley* is recognized by all the leading cases as a correct statement of the purpose and object of this provision of the Constitution."

<sup>2</sup> *Carter County v. Sinton*, 120 U. S. 517, 30 L. ed. 701, 7 Sup. Ct. Rep. 650; *Lindsay v. United States Sav., etc., Ass'n*, 120 Ala. 156, 24 So. 171, 42 L. R. A. 783; *State v. Sloan*, 66 Ark. 575, 53 S. W. 47, 74 Am. St. Rep. 106; *Ex parte Lewinsky*, 66 Fla. 324, 63 So. 577, 50 L. R. A. (N. S.) 1156;



every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible. It has accordingly been held that the title of "an act to establish a police government for the city of Detroit" was not objectionable for its generality, and that all matters properly connected with the establishment and efficiency of such a government, including taxation for its support, and courts for the examination and trial of offenders, might constitutionally be included in the bill under this general title. Under any different ruling it was said, "the police government of a city could not be organized without a distinct act for each specific duty to be devolved upon it, and these could not be passed until a multitude of other statutes had taken the same duties from other officers before performing them. And these several statutes, fragmentary as they must necessarily be, would often fail of the intended object, from the inherent difficulty in expressing the legislative will when restricted to such narrow bounds."<sup>1</sup> The generality of a title is

*Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693, L. R. A. 1918 E, 639; *State v. Dolan*, 13 Idaho, 693, 92 Pac. 995, 14 L. R. A. (N. S.) 1259; *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; *Public Service Co. v. Recktenwald*, 290 Ill. 314, 125 N. E. 271, 8 A. L. R. 466; *Vernor v. Martindale*, 179 Mich. 157, 146 N. W. 338, Ann. Cas. 1915 D, 128; *State v. Firemen's Fund Ins. Co.*, 152 Mo. 1, 52 S. W. 595, 45 L. R. A. 363; *State v. Assurance Co. of America*, 251 Mo. 278, 158 S. W. 640, 46 L. R. A. (N. S.) 955; *Lewis and Clark County v. Industrial Acc. Board*, 52 Mont. 6, 155 Pac. 268, L. R. A. 1916 D, 628; *Schmalz v. Wooley*, 57 N. J. Eq. 303, 41 Atl. 939, 73 Am. St. Rep. 637, 43 L. R. A. 8; *State v. Minneapolis, etc., Elevator Co.*, 17 N. D. 23, 114 N. W. 482, 138 Am. St. Rep. 691; *Oklahoma Light & Power Co. v. Corporation Commission*, 96 Okla. 19, 220 Pac. 54; *Com. v. Fisher*, 213 Pa. St. 48, 62 Atl. 198, 5 Ann. Cas. 92; *Shortall v. Puget Sound Bridge, etc., Co.*, 45 Wash. 290, 88 Pac. 212, 122 Am. St. Rep. 899; *Diana Shooting Club v. Lamoireux*, 114 Wis. 44, 89 N. W. 880, 91 Am. St. Rep. 898.

"The title of the act must be such as to fairly suggest and advise as to the subject intended to be covered by the act. All matters fairly and reasonably connected with the act must be indicated by the title. . . . Anything in an act not germane to the general purpose expressed in the title brings such a statute within this constitutional prohibition." *Oklahoma Light & Power Co. v. Corporation Commission*, 96 Okla. 19, 220 Pac. 54. Neither the reasons for the enactment of a law, nor its purpose, need be stated in its title. *Deyoe v. Superior Ct.*, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73; *Tarantina v. Louisville, etc., R. Co.*, 254 Ill. 624, 98 N. E. 999, Ann. Cas. 1913 B, 1058; *Oklahoma Light & Power Co. v. Corporation Commission*, 96 Okla. 19, 220 Pac. 54; *Bowes v. Aberdeen*, 58 Wash. 535, 109 Pac. 369, 30 L. R. A. (N. S.) 709.

<sup>1</sup> *People v. Mahaney*, 13 Mich. 481, 495. See also *Powell v. Jackson Com. Council*, 51 Mich. 129, 16 N. W. 369; *Morford v. Unger*, 8 Iowa, 82; *Whiting v. Mount Pleasant*, 11 Iowa, 482; *Bright v. McCulloch*, 27 Ind. 223; *Mayor, &c. of Annapolis v. State*, 30 Md. 112; *State v. Union*, 33 N. J. L. 350; *Humboldt County v. Churchill*

therefore no objection to it, so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection.<sup>1</sup> [A title does not contain more than one subject if all its details relate

Co. Commissioners, 6 Nev. 30; *State v. Silver*, 9 Nev. 227; *State v. Ranson*, 73 Mo. 78; *State ex rel. Civello v. New Orleans*, 154 La. 271, 97 So. 440, 33 A. L. R. 260.

<sup>1</sup> *Indiana Central Railroad Co. v. Potts*, 7 Ind. 681; *People v. Briggs*, 50 N. Y. 553; *People v. Wands*, 23 Mich. 385; *Washington Co. v. Franklin R. R. Co.*, 34 Md. 159; *Benz v. Weber*, 81 Ill. 288; *Johnson v. People*, 83 Ill. 431; *Fuller v. People*, 92 Ill. 182; *Donnersberger v. Prendergast*, 128 Ill. 229, 21 N. E. 1; *Kurtz v. People*, 33 Mich. 279; *People v. Haug*, 68 Mich. 549, 37 N. W. 21; *Montclair v. Ramsdell*, 107 U. S. 147, 27 L. ed. 431, 2 Sup. Ct. Rep. 391; *Jonesboro v. Cairo, &c. R. R. Co.*, 110 U. S. 192, 28 L. ed. 116, 4 Sup. Ct. Rep. 67; *Ackley School Dist. v. Hall*, 113 U. S. 135, 28 L. ed. 954, 5 Sup. Ct. Rep. 371; *Carter Co. v. Sinton*, 120 U. S. 517, 30 L. ed. 701, 7 Sup. Ct. Rep. 650; *Daubman v. Smith*, 47 N. J. L. 200; *Clare v. People*, 9 Col. 122, 10 Pac. 799; *Ewing v. Hoblitzelle*, 85 Mo. 64; *Blair v. Chicago*, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427; *Alford v. State*, 170 Ala. 178, 54 So. 213, Ann. Cas. 1912 C, 1093; *Deyoe v. Superior Ct.*, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73; *In re Martin*, 157 Cal. 51, 106 Pac. 235, 26 L. R. A. (N. S.) 242; *Ex parte Yun Quong*, 159 Cal. 508, 114 Pac. 835, Ann. Cas. 1912 C, 969; *In re Schuler*, 167 Cal. 282, 139 Pac. 685, Ann. Cas. 1915 C, 706; *Monaghan v. Lewis*, 5 Penn. (Del.) 218, 59 Atl. 948, 10 Ann. Cas. 1048; *Clendaniel v. Conrad*, 3 Boyce (Del.) 549, 83 Atl. 1036, Ann. Cas. 1915 B, 968; *Banks v. State*, 124 Ga. 15, 52 S. E. 74, 2 L. R. A. (N. S.) 1007; *Pioneer Irrigation Dist. v. Bradley*, 8 Idaho, 310, 68 Pac. 295, 101 Am. St. Rep. 201; *State v. Dolan*, 13 Idaho, 693, 92 Pac. 995, 14 L. R. A. (N. S.) 1259; *People v. People's Gas Light, etc., Co.*, 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244; *People v.*

*McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; *People v. Strassheim*, 240 Ill. 279, 88 N. E. 821, 22 L. R. A. (N. S.) 1135; *People v. Braun*, 246 Ill. 428, 92 N. E. 917, 20 Ann. Cas. 448; *Tarantina v. Louisville, etc., R. Co.*, 254 Ill. 624, 98 N. E. 999, Ann. Cas. 1913 B, 1058; *Parks v. State*, 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; *South East, etc., R. Co. v. Evansville, etc., Electric R. Co.*, 169 Ind. 339, 82 N. E. 765, 13 L. R. A. (N. S.) 916, 14 Ann. Cas. 214; *Knight, etc., Co. v. Miller*, 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146; *Moore-Mansfield Constr. Co. v. Indianapolis, etc., R. Co.*, 179 Ind. 356, 101 N. E. 296, 44 L. R. A. (N. S.) 816; Ann. Cas. 1915 D, 917; *Sisson v. Buena Vista County*, 128 Iowa, 442, 104 N. W. 454, 70 L. R. A. 440; *McGuire v. Chicago, etc., R. Co.*, 131 Iowa, 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706; *State v. Hutchinson Ice Cream Co.*, 168 Iowa, 1, 147 N. W. 195, L. R. A. 1917 B, 198; *State v. Topeka Club*, 82 Kan. 756, 109 Pac. 183, 29 L. R. A. (N. S.) 722, 20 Ann. Cas. 320; *State v. Akers*, 92 Kan. 169, 140 Pac. 637, Ann. Cas. 1916 B, 543; *McGlone v. Womack*, 129 Ky. 274, 111 S. W. 688, 17 L. R. A. (N. S.) 855; *In re Schwartz*, 119 La. 290, 44 So. 20, 121 Am. St. Rep. 516; *Font v. Frederick County*, 105 Md. 545, 66 Atl. 487; *State v. Loden*, 117 Md. 373, 83 Atl. 564, 40 L. R. A. (N. S.) 193, Ann. Cas. 1913 E, 1300; *Crouse v. State*, 130 Md. 364, 100 Atl. 361; *Mogul v. Gaither*, 142 Md. 380, 121 Atl. 32; *State v. Evans*, 154 Minn. 95, 191 N. W. 425, 27 A. L. R. 1165; *State v. Great Western Coffee, etc., Co.*, 171 Mo. 634, 71 S. W. 1011, 94 Am. St. Rep. 802; *St. Louis v. Liessing*, 190 Mo. 464, 89 S. W. 611, 109 Am. St. Rep. 774, 1 L. R. A. (N. S.) 918, 4 Ann. Cas. 112; *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; *Moler v. Whisman*,

243 Mo. 571, 147 S. W. 985, 40 L. R. A. (N. S.) 629, Ann. Cas. 1913 D, 392; *Nalley v. Home Ins. Co.*, 250 Mo. 452, 157 S. W. 769, Ann. Cas. 1915 A, 283; *State v. McKinney*, 29 Mont. 375, 74 Pac. 1095, 1 Ann. Cas. 579; *Wilkinson v. Lord*, 85 Neb. 136, 122 N. W. 699, 24 L. R. A. (N. S.) 1104; *People v. Howe*, 177 N. Y. 499, 69 N. E. 1114, 66 L. R. A. 664; *State Finance Co. v. Mather*, 15 N. D. 386, 109 N. W. 350, 11 Ann. Cas. 1112; *State v. Olson*, 26 N. D. 304, 144 N. W. 661, L. R. A. 1918 B, 975; *Oklahoma Light & Power Co. v. Corporation Commission*, 96 Okla. 19, 220 Pac. 54; *Com. v. Herr*, 229 Pa. St. 132, 78 Atl. 68, Ann. Cas. 1912 A, 422; *Wheeler v. South Dakota Land Settlement Board*, 43 S. D. 551, 181 N. W. 359, 14 A. L. R. 1145; *Samuelson v. State*, 116 Tenn. 470, 95 S. W. 1012, 115 Am. St. Rep. 805; *Stonega Coke, etc., Co. v. Southern Steel Co.*, 123 Tenn. 428, 131 S. W. 988, 31 L. R. A. (N. S.) 278; *State v. Superior Ct.*, 28 Wash. 317, 68 Pac. 957, 92 Am. St. Rep. 831; *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893; *State v. Superior Ct.*, 68 Wash. 572, 123 Pac. 996, 40 L. R. A. (N. S.) 793; *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916 A, 358, Ann. Cas. 1915 D, 154; *McNeeley v. South Penn. Oil Co.*, 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562; *Hood v. Wheeling*, 85 W. Va. 578, 102 S. E. 259.

The title was never intended to be an index to the law. All that is required is that the act shall not include legislation which, by fair intendment, cannot be considered germane to the one subject expressed in the title. The main object of the constitutional provision is to apprise the members of the legislature of the contents of the act, to the end that they may not vote unwarily. If the title is such as to fairly apprise them of the general character of the enactment it is sufficient. *State v. Evans*, 154 Minn. 95, 191 N. W. 425, 27 A. L. R. 1165.

"It is not necessary that the title contain every detail of the entire act. It will be sufficient if it fairly indicates, though in general terms, its scope and purpose. Everything connected with

the main purpose and reasonably adapted to secure the objects indicated by the title may be embraced in the body of the act without violating the constitutional inhibition." *State v. Topeka Club*, 82 Kan. 756, 109 Pac. 183, 29 L. R. A. (N. S.) 722, 20 Ann. Cas. 320. See also *Perkins v. Cook County*, 271 Ill. 449, 111 N. E. 580, Ann. Cas. 1917 A, 27; *Jackson v. State*, (Okla. Crim. Rep.) 211 Pac. 1066.

"The title is not required to be an index to the body of the act, or as comprehensive in matters of detail, but if it fairly indicates the general subject, and reasonably covers all the provisions of the act, and is not calculated to mislead the General Assembly or the people, it is a sufficient compliance with the constitutional requirement. Unless the act contains matters having no proper connection or relation to the title, or the title itself contains subjects having no proper relation to each other, the constitutional provision is not violated. An act having a single general subject, indicated in the title, may contain any number of provisions, no matter how diverse they may be, so long as they are not inconsistent with or foreign to the general subject, and may be considered in furtherance of such subject by providing for the method and means of carrying out the general object." *Public Service Co. v. Rechtenwald*, 290 Ill. 314, 125 N. E. 271, 8 A. L. R. 466.

A title need not disclose the means and instrumentalities provided in the body of the act for accomplishing its purpose. Provisions reasonably necessary for attaining the object of the act expressed in the title are considered as included in the title. *State v. Moore*, 76 Ark. 197, 88 S. W. 881, 70 L. R. A. 671; *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829; *Pioneer Irrigation Dist. v. Bradley*, 8 Idaho, 310, 68 Pac. 295, 101 Am. St. Rep. 201; *People v. Strassheim*, 240 Ill. 279, 88 N. E. 821, 22 L. R. A. (N. S.) 1135; *People v. Joyce*, 246 Ill. 124, 92 N. E. 607, 20 Ann. Cas. 472; *People v. Price*, 257 Ill. 587, 101 N. E. 196,

to the same subject.<sup>1</sup> But the title must be such as to reasonably apprise the public of the interests that are or may be affected by the statute.<sup>2</sup> The legislature must determine for itself how broad and comprehensive shall be the object of a statute, and how much particularity shall be employed in the title in defining it.<sup>3</sup> One thing,

Ann. Cas. 1914 A, 1154; *State v. Cunningham*, 130 La. 749, 58 So. 558, L. R. A. 1915 B, 389; *Louisiana State Board of Agriculture v. Tanzmann*, 140 La. 756, 73 So. 854, L. R. A. 1917 C, 894, Ann. Cas. 1917 E, 217; *State v. Smith*, 233 Mo. 242, 135 S. W. 465, 33 L. R. A. (N. S.) 179; *Nalley v. Home Ins. Co.*, 250 Mo. 452, 157 S. W. 769, Ann. Cas. 1915 A, 283; *Jackson v. State*, (Okla. Crim. Rep.) 211 Pac. 1066; *Rhinehart v. State*, 121 Tenn. 420, 117 S. W. 508, 17 Ann. Cas. 254.

"It is ordinarily not feasible or required, that the title to an act should set forth the nature and character of the penalties for which provision is made in the body of the act." *Jackson v. State*, (Okla. Crim. Rep.) 211 Pac. 1066.

Workmen's compensation acts held not to violate the constitutional requirement. *Shade v. Ash Grove Lime & Portland Cement Co.*, 93 Kan. 257, 144 Pac. 249; *Mackin v. Detroit Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49; *Huyett v. Pennsylvania R. Co.*, 86 N. J. L. 683, 92 Atl. 58; *Peet v. Mills*, 76 Wash. 437, 136 Pac. 685, L. R. A. 1916 A, 358, Ann. Cas. 1915 D, 154, 4 N. C. C. A. 786.

<sup>1</sup> *Upham v. Bramwell*, 105 Oreg. 597, 209 Pac. 100, 25 A. L. R. 919.

<sup>2</sup> *People ex rel. Corscadden v. Howe*, 177 N. Y. 499, 69 N. E. 1114, 66 L. R. A. 664.

"The provisions in the body of the act must be germane to the subject in the title. In other words, they must be closely allied, fit and appropriate, of a similar nature to the subject designated in the title." *State v. Great Western Coffee, etc., Co.*, 171 Mo. 634, 71 S. W. 1011, 94 Am. St. Rep. 802.

In New Jersey it has been held that the object expressed in the title must give notice of the effect of the legislation to one conversant with the exist-

ing state of the law; that the validity of the title is not to be determined by nice distinctions of etymology or definition of words, but by the facts of the case and the history of the legislation. *Sawter v. Shoenthal*, 83 N. J. L. 501, 83 Atl. 1004. See also *Hedden v. Hand*, 90 N. J. Eq. 583, 107 Atl. 285, 5 A. L. R. 1463.

In Maryland it has been held that a title "should not only fairly indicate the general subject of the act, but should be sufficiently comprehensive in its scope to cover, to a reasonable extent, all its provisions, and must not be misleading by what it says or omits to say." *Somerset County v. Pocomoke Bridge Co.*, 109 Md. 1, 71 Atl. 462, 16 Ann. Cas. 874.

<sup>3</sup> *Woodson v. Murdock*, 22 Wall. 351, 22 L. ed. 716; *State v. Rogers*, 107 Ala. 444, 19 So. 909, 32 L. R. A. 520; *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; *State v. McKinney*, 29 Mont. 375, 74 Pac. 1095, 1 Ann. Cas. 579; *People v. Howe*, 177 N. Y. 499, 69 N. E. 1114, 66 L. R. A. 664; *Lovejoy v. Portland*, 95 Oreg. 459, 138 Pac. 207.

"The 'subject' of the act, as that term is used in the Constitution, means the matter or thing forming the groundwork of the act, which may include many parts or things, so long as they are all germane to it and are such that, if traced back, will lead the mind to the subject as the generic head. *People v. Solomon*, 265 Ill. 28, 106 N. E. 458." *Perkins v. Cook County*, 271 Ill. 449, 111 N. E. 580, Ann. Cas. 1917 A, 27. See also *Ex parte Mantell*, 47 Nev. 95, 216 Pac. 509.

In *State v. Bowers*, 14 Ind. 195, an act came under consideration, the title to which was, "An act to amend the first section of an act entitled 'An act concerning licenses to vend foreign merchandise, to exhibit any caravan,

menagerie, circus, rope and wire dancing puppet shows, and legerdemain', approved June 15, 1852, and for the encouragement of agriculture, and concerning the licensing of stock and exchange brokers." It was held that the subject of the act was licenses, and that it was not unconstitutional as containing more than one subject. But it was held also that, as the licenses which it authorized and required were specified in the title, the act could embrace no others, and consequently a provision in the act requiring concerts to be licensed was void.

In *State v. County Judge of Davis County*, 2 Iowa, 280, 284, the act in question was entitled "An act in relation to certain State roads therein named." It contained sixty-six sections, in which it established some forty-six roads, vacated some, and provided for the re-location of others. The court sustained the act. "The object of an act may be broader or narrower, more or less extensive; and the broader it is, the more particulars will it embrace. . . . There is undoubtedly great objection to uniting so many particulars in one act, but so long as they are of the same nature, and come legitimately under one general determination or object, we cannot say that the act is unconstitutional." Upon this subject see *Indiana Central Railroad Co. v. Potts*, 7 Ind. 681, where it is considered at length. Also *Brewster v. Syracuse*, 19 N. Y. 116; *Hall v. Bunte*, 20 Ind. 304; *People v. McCallum*, 1 Neb. 182; *Mauch Chunk v. McGee*, 81 Pa. St. 433; *Monaghan v. Lewis*, 5 Penn. (Del.) 218, 59 Atl. 948, 10 Ann. Cas. 1048; *Clendaniel v. Conrad*, 3 Boyce (Del.) 549, 83 Atl. 1036, Ann. Cas. 1915 B, 968; *People v. People's Gas Light, etc., Co.*, 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244; *Griffin v. Thomas*, 86 Okla. 70, 206 Pac. 604; *Ex parte Abrams*, 56 Tex. Crim. Rep. 465, 120 S. W. 883, 18 Ann. Cas. 45. But a title and act covering four separate objects is bad. *State v. Heywood*, 38 La. Ann. 689.

An act entitled "An act fixing the time and mode of electing State printer, defining his duties, fixing compensation, and repealing all laws com-

ing in conflict with this act", was sustained in *Walker v. Dunham*, 17 Ind. 483.

In *Kurtz v. People*, 33 Mich. 279, the constitutional provision is said to be "a very wise and wholesome provision, intended to prevent legislators from being entrapped into the careless passage of bills on matters foreign to the ostensible purpose of the statute as entitled. But it is not designed to require the body of the bill to be a mere repetition of the title. Neither is it intended to prevent including in the bill such means as are reasonably adapted to secure the objects indicated by the title." And see *Morton v. The Controller*, 4 S. C. 430.

No provision in a statute having natural connection with the subject expressed in the title and not foreign to it is to be deemed within the constitutional inhibition. *Johnson v. Higgins*, 3 Met. (Ky.) 566; *McReynolds v. Smallhouse*, 8 Bush, 477; *Annapolis v. State*, 30 Md. 112; *Tuttle v. Strout*, 7 Minn. 465; *Gunter v. Dale Co.*, 44 Ala. 639; *Ex parte Upshaw*, 45 Ala. 234; *State v. Price*, 50 Ala. 568; *Commonwealth v. Drewry*, 15 Gratt. 1; *People v. Hurlbut*, 24 Mich. 44; *State v. Union*, 33 N. J. L. 350; *State v. Silver*, 9 Nev. 227; *Burke v. Monroe Co.*, 77 Ill. 610; *Blood v. Mercelliott*, 53 Pa. St. 391; *Commonwealth v. Green*, 58 Pa. St. 226; *Walker v. Dunham*, 17 Ind. 483; *Clendaniel v. Conrad*, 3 Boyce (Del.) 549, 83 Atl. 1036, Ann. Cas. 1915 B, 968; *State v. Allen*, 83 Fla. 214, 91 So. 104, 26 A. L. R. 735; *Banks v. State*, 124 Ga. 15, 52 S. E. 74, 2 L. R. A. (N. S.) 1007; *Pioneer Irrigation Dist. v. Bradley*, 8 Idaho, 310, 68 Pac. 295, 101 Am. St. Rep. 201; *State v. Dolan*, 13 Idaho, 693, 92 Pac. 995, 14 L. R. A. (N. S.) 1259; *Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. (N. S.) 215, 3 Ann. Cas. 487; *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; *Public Service Co. v. Recktenwald*, 290 Ill. 314, 125 N. E. 271, 8 A. L. R. 466; *McGuire v. Chicago, etc., R. Co.*, 131 Iowa, 340, 108 N. W. 902, 33 L. R. A. (N. S.) 706; *State v. Topeka Club*, 82 Kan. 756, 109 Pac.

however, is very plain; that the use of the words "other purposes", which has heretofore been so common in the title to acts, with a view to cover any and every thing, whether connected with the main purpose indicated by the title or not, can no longer be of any avail where these provisions exist. As was said by the Supreme Court of New York in a case where these words had been made use of in the title to a local bill: "The words 'for other purposes' must be laid out of consideration. They express nothing, and amount to nothing as a compliance with this constitutional requirement. Nothing which the act could not embrace without them can be brought in by their aid."<sup>1</sup>

3. *What is embraced by the title.* The repeal of a statute on a given subject, it is held, is properly connected with the subject-matter of a new statute on the same subject; and therefore a repealing section in the new statute is valid, notwithstanding the title is silent on that subject.<sup>2</sup> So an act to incorporate a railroad

183, 29 L. R. A. (N. S.) 722, 20 Ann. Cas. 320; Kentucky Live Stock, etc., Ass'n v. Hager, 120 Ky. 125, 85 S. W. 738, 9 Ann. Cas. 50; Bosworth v. State University, 166 Ky. 436, 179 S. W. 403, L. R. A. 1917 B, 808; State v. Cunningham, 130 La. 749, 58 So. 558, L. R. A. 1915 B, 389; State v. Loden, 117 Md. 373, 83 Atl. 564, 40 L. R. A. (N. S.) 193, Ann. Cas. 1913 E, 1300; Jewel Theater Co. v. State Fire Marshal, 178 Mich. 399, 144 N. W. 835, Ann. Cas. 1915 C, 1212; O'Connor v. St. Louis Transit Co., 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; Nalley v. Home Ins. Co., 250 Mo. 452, 157 S. W. 769, Ann. Cas. 1915 A, 283; Wilkinson v. Lord, 85 Neb. 136, 122 N. W. 699, 24 L. R. A. (N. S.) 1104; *In re Lee*, 64 Okla. 310, 168 Pac. 53, L. R. A. 1918 B, 144; Pacific Milling, etc., Co. v. Portland, 65 Oreg. 349, 133 Pac. 72, 46 L. R. A. (N. S.) 363; Pennsylvania R. Co. v. Ewing, 241 Pa. St. 581, 88 Atl. 775, 49 L. R. A. (N. S.) 977, Ann. Cas. 1915 B, 157; Sandel v. State, 115 S. C. 168, 104 S. E. 567, 13 A. L. R. 1268, Samuelson v. State, 116 Tenn. 470, 95 S. W. 1012, 115 Am. St. Rep. 805; Ranson v. Rutherford County, 123 Tenn. 1, 130 S. W. 1057, Ann. Cas. 1912 B, 1356; Borden v. Trespalacios Rice, etc., Co., 98 Tex. 494, 86 S. W. 11, 107 Am. St. Rep. 640; Hurley v.

Hurley, 110 Va. 31, 65 S. E. 472, 18 Ann. Cas. 968; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141, 12 A. L. R. 1121.

<sup>1</sup> Town of Fishkill v. Fishkill & Beekman Plank Road Co., 22 Barb. 634. See, to the same effect, Johnson v. Spicer, 107 N. Y. 185; Ryerson v. Utley, 16 Mich. 269; St. Louis v. Tiefel, 42 Mo. 578.

In a title to punish keepers of games of faro, etc., "etc." does not mean "other purposes", but "and other games." Garvin v. State, 13 Lea, 162. Addition of words "and so forth" to title is worthless. *Ex parte Lacy*, 93 Va. 159, 24 S. E. 930, 31 L. R. A. 822. An act entitled "An act to repeal certain acts therein named", is void. People v. Mellen, 32 Ill. 181.

<sup>2</sup> Gabbert v. Railroad Co., 11 Ind. 365; Timm v. Harrison, 109 Ill. 593. The constitution under which this decision was made required the law to contain but one subject *and matters properly connected therewith* but the same decision was made under the New York Constitution, which omits the words here italicized; and it may well be doubted whether the legal effect of the provision is varied by the addition of those words. See Guilford v. Cornell, 18 Barb. 615; People v. Father Mathew Society, 41 Mich. 67, 1 N. W. 931.

company, it has been held, may authorize counties to subscribe to its stock, or otherwise aid the construction of the road.<sup>1</sup> So an act to incorporate the Firemen's Benevolent Association may lawfully include under this title provisions for levying a tax upon the income of foreign insurance companies at the place of its location, for the benefit of the corporation.<sup>2</sup> So an act to provide a homestead for widows and children was held valid, though what it provided for was the pecuniary means sufficient to purchase a homestead.<sup>3</sup> So an act "to regulate proceedings in the county court" was held to properly embrace a provision giving an appeal to the District Court, and regulating the proceedings therein on the appeal.<sup>4</sup> So an act entitled "An act for the more uniform doing of township business" may properly provide for the organization of townships.<sup>5</sup> So it is held that the changing of the boundaries of existing counties is a matter properly connected with the subject of forming new counties out of those existing.<sup>6</sup> So a provision for the organization and sitting of courts in new counties is properly connected with the subject of the formation of such counties, and may be included in "an act to authorize the formation of new counties, and to change county boundaries."<sup>7</sup> [So an act entitled "an act in relation to gas companies" may include a provision authorizing the consolidation of such companies.<sup>8</sup> Under the title of an act to "regulate the sale of intoxicating liquors", the legislature may prohibit the sale of such liquors to certain classes of citizens needing special

<sup>1</sup> *Supervisors, &c. v. People*, 25 Ill. 181; *Mahomet v. Quackenbush*, 117 U. S. 508, 29 L. ed. 982, 6 Sup. Ct. Rep. 858; *Hope v. Mayor, &c.*, 72 Ga. 246; *Connor v. Green Pond, &c. R. R. Co.*, 23 S. C. 427. So a provision for the costs on appeal from a justice is properly connected with the subject of an act entitled "of the election and qualification of justices of the peace, and defining their jurisdiction, powers, and duties in civil cases." *Robinson v. Skipworth*, 23 Ind. 311.

<sup>2</sup> *Firemen's Association v. Lounsbury*, 21 Ill. 511.

Power to tax for school purposes may be given under an act "to regulate public instruction." *Smith v. Bohler*, 72 Ga. 546.

<sup>3</sup> *Succession of Lanzetti*, 9 La. Ann. 329.

<sup>4</sup> *Murphey v. Menard*, 11 Tex. 673. See *State v. Ah Sam*, 15 Nev. 27, 37 Am. Rep. 454.

<sup>5</sup> *Clinton v. Draper*, 14 Ind. 295.

An act to consolidate the acts as to a city and to define the duty of the Mayor will not allow conferring judicial power on him. *Brown v. State*, 79 Ga. 324, 4 S. E. 861.

<sup>6</sup> *Haggard v. Hawkins*, 14 Ind. 299. And see *Duncombe v. Prindle*, 12 Iowa, 1; *State v. Hoagland*, 51 N. J. L. 62, 16 Atl. 166.

<sup>7</sup> *Brandon v. State*, 16 Ind. 197. In this case, and also in *State v. Bowers*, 14 Ind. 195, it was held that if the title to an original act is sufficient to embrace the matters covered by the provisions of an act amendatory thereof, it is unnecessary to inquire whether the title of an amendatory act would, of itself, be sufficient. And see *Morford v. Unger*, 8 Iowa, 82.

<sup>8</sup> *People v. People's Gas Light, etc., Co.*, 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244.

protection.<sup>1</sup> The title, "An act to prevent fraud in the sale and disposition of stocks, bonds, or other securities", is broad enough to cover legislation affecting investment contracts.<sup>2</sup> Under the title "An act to protect trade and commerce from unlawful restraints and monopolies", a combination to prevent competition in insurance may properly be a subject for legislation.<sup>3</sup> Where the one general subject of the title of a statute was the regulation of State banks, it was held that the granting to savings depositors a preference in the distribution of the assets of an insolvent State bank was germane to that subject.<sup>4</sup> So an "act relating to the teaching of foreign languages" may prohibit the teaching of any other language than English.<sup>5</sup> So a title which evinces the intention to prohibit the manufacture or sale of an article is broad enough to include a prohibition of the manufacture or sale of a substitute for the article which is open to the same objection as the article itself.<sup>6</sup> Many other cases are referred to in the note, which will further illustrate the views of the courts upon this subject. There has been a general disposition to construe the constitutional provision liberally, rather than to embarrass legislation by a construction whose strictness is unnecessary to the accomplishment of the beneficial purposes for which it has been adopted.<sup>7</sup> ["The title must be construed with

<sup>1</sup> *Ex parte Lewinsky*, 66 Fla. 324, 63 So. 577, 50 L. R. A. (N. S.) 1156. See also *Garrigan v. Kennedy*, 19 S. D. 11, 101 N. W. 1081, 117 Am. St. Rep. 927, 8 Ann. Cas. 1125. But in Indiana it has been held that under such title the legislature cannot provide for the punishment of persons found intoxicated. *State v. Young*, 47 Ind. 150.

<sup>2</sup> *State v. Evans*, 154 Minn. 95, 191 N. W. 425, 27 A. L. R. 1165.

<sup>3</sup> *State v. American Surety Co.*, 90 Neb. 154, 91 Neb. 22, 133 N. W. 235, 135 N. W. 365, Ann. Cas. 1913 B, 973, 976.

<sup>4</sup> *Upham v. Bramwell*, 105 Oreg. 597, 209 Pac. 100, 25 A. L. R. 919.

<sup>5</sup> *Nebraska Dist. of Evang. Lutheran Synod v. McKelvie*, 104 Neb. 93, 175 N. W. 531, 7 A. L. R. 1688.

<sup>6</sup> *State v. Olson*, 26 N. D. 304, 144 N. W. 661, L. R. A. 1918 B, 975.

<sup>7</sup> *Green v. Mayor, &c., R. M. Charl.* 368; *Martin v. Broach*, 6 Ga. 21; *Protho v. Orr*, 12 Ga. 36; *Wheeler v. State*, 23 Ga. 9; *Hill v. Commissioners*, 22 Ga. 203; *Jones v. Columbus*, 25

Ga. 610; *Denham v. Holeman*, 26 Ga. 182; *Allen v. Tison*, 50 Ga. 374; *Ex parte Conner*, 51 Ga. 571; *Brieswick v. Mayor, &c. of Brunswick*, 51 Ga. 639; *Howell v. State*, 71 Ga. 224; *People v. McCann*, 16 N. Y. 58; *Williams v. People*, 24 N. Y. 405; *People v. Allen*, 42 N. Y. 404; *Huber v. People*, 49 N. Y. 132; *People v. Rochester*, 50 N. Y. 525; *Wenzler v. People*, 58 N. Y. 516; *People v. Dudley*, 58 N. Y. 323; *People v. Quigg*, 59 N. Y. 83; *Harris v. People*, 59 N. Y. 599; *In re Flatbush*, 60 N. Y. 398; *People v. Willsea*, 60 N. Y. 507; *Matter of Met. Gas Light Co.*, 85 N. Y. 526; *People v. Whitlock*, 92 N. Y. 191; *Ensign v. Barse*, 107 N. Y. 329, 14 N. E. 400, 15 N. E. 401; *Railroad Co. v. Whiteneck*, 8 Ind. 217; *Wilkins v. Miller*, 9 Ind. 100; *Foley v. State*, 9 Ind. 363; *Gillespie v. State*, 9 Ind. 380; *Mewherter v. Price*, 11 Ind. 199; *Reed v. State*, 12 Ind. 641; *Henry v. Henry*, 13 Ind. 250; *Igoe v. State*, 14 Ind. 239; *Sturgeon v. Hitchens*, 22 Ind. 107; *Lauer v. State*, 22 Ind. 461; *Central Plank Road Co. v. Hannaman*,



22 Ind. 484; *Garrigus v. Board of Commissioners*, 39 Ind. 66; *McCaslin v. State*, 44 Ind. 151; *Williams v. State*, 48 Ind. 306; *Jackson v. Reeves*, 53 Ind. 231; *Railroad Co. v. Gregory*, 15 Ill. 20; *Firemen's Association v. Lounsbury*, 21 Ill. 511; *Ottawa v. People*, 48 Ill. 233; *Prescott v. City of Chicago*, 60 Ill. 121; *People v. Brislin*, 80 Ill. 423; *McAunich v. Mississippi, &c. R. R. Co.*, 20 Iowa, 338; *State v. Squires*, 26 Iowa, 340; *Chiles v. Drake*, 2 Met. (Ky.) 146; *Phillips v. Bridge Co.*, 2 Met. (Ky.) 219; *Louisville, &c. Co. v. Ballard*, 2 Met. (Ky.) 177; *Phillips v. Covington, &c. Co.*, 2 Met. (Ky.) 219; *Chiles v. Monroe*, 4 Met. (Ky.) 72; *Hind v. Rice*, 10 Bush, 528; *Cannon v. Hemphill*, 7 Tex. 184; *Battle v. Howard*, 13 Tex. 345; *Robinson v. State*, 15 Tex. 311; *Antonio v. Gould*, 34 Tex. 49; *Ex parte Hogg*, 36 Tex. 14; *State v. Shadle*, 41 Tex. 404; *State v. McCracken*, 42 Tex. 383; *Laefon v. Dufoe*, 9 La. Ann. 329; *State v. Harrison*, 11 La. Ann. 722; *Bossier v. Steele*, 13 La. Ann. 433; *Williams v. Payson*, 14 La. Ann. 7; *Wisners v. Monroe*, 25 La. Ann. 598; *Whited v. Lewis*, 25 La. Ann. 568; *State v. Lafayette County Court*, 41 Mo. 221; *State v. Miller*, 45 Mo. 495; *State v. Gut*, 13 Minn. 341; *Stuart v. Kinsella*, 14 Minn. 524; *Mills v. Charleton*, 29 Wis. 400; *Evans v. Sharpe*, 29 Wis. 564; *Single v. Supervisors of Marathon*, 38 Wis. 363; *Harrison v. Supervisors*, 51 Wis. 645; 8 N. W. 731; *People v. McCallum*, 1 Neb. 182; *Smalls v. White*, 4 Neb. 353; *Cutlip v. The Sheriff*, 3 W. Va. 588; *Shields v. Bennett*, 8 W. Va. 74; *Tuscaloosa Bridge Co. v. Olmstead*, 41 Ala. 9; *Weaver v. Lapsely*, 43 Ala. 224; *Ex parte Upshaw*, 45 Ala. 234; *Lockhart v. Troy*, 48 Ala. 579; *Walker v. State*, 49 Ala. 329; *Simpson v. Bailey*, 3 Oreg. 515; *Pope v. Phifer*, 3 Heisk. 682; *Cannon v. Mathes*, 8 Heisk. 504; *State v. Newark*, 34 N. J. L. 264; *Gifford v. R. R. Co.*, 10 N. J. L. Eq. 171; *Keller v. State*, 11 Md. 525; *Parkinson v. State*, 14 Md. 184; *Ryerson v. Utley*, 16 Mich. 269; *People v. Denahy*, 20 Mich. 349; *People v. Hurlbut*, 24 Mich. 44; *Kurtz v. People*, 33 Mich. 279; *Hathaway v. New Balti-*

*more*, 48 Mich. 251, 12 N. W. 186; *Attorney-General v. Joy*, 55 Mich. 94, 20 N. W. 806; *Dorsey's Appeal*, 72 Pa. St. 192; *Allegheny County Home's Case*, 77 Pa. St. 77; *Morton v. Comptroller-General*, 4 S. C. 430; *State v. Gurney*, 4 S. C. 520; *Norman v. Curry*, 27 Ark. 440; *Division of Howard County*, 15 Kan. 194; *Simpson v. Bailey*, 3 Oreg. 515; *Ex parte Wells*, 21 Fla. 280; *Read v. Plattsmouth*, 107 U. S. 568, 27 L. ed. 414, 2 Sup. Ct. Rep. 208; *Otoe Co. v. Baldwin*, 111 U. S. 1, 28 L. ed. 331, 4 Sup. Ct. Rep. 265; *Mobile Dry-Docks Co. v. Mobile*, 146 Ala. 198, 40 So. 205, 3 L. R. A. (N. S.) 822, 9 Ann. Cas. 1229; *Beauvoir Club v. State*, 148 Ala. 643, 42 So. 1040, 121 Am. St. Rep. 82; *Letcher v. State*, 159 Ala. 59, 48 So. 805, 17 Ann. Cas. 716; *Robinson v. Kerrigan*, 151 Cal. 40, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas. 829; *Graves v. People*, 32 Colo. 127, 75 Pac. 412, 2 Ann. Cas. 6; *Monaghan v. Lewis*, 5 Penn. (Del.) 218, 59 Atl. 948, 10 Ann. Cas. 1048; *State ex rel. Bonsteel v. Allen*, 83 Fla. 214, 91 So. 104, 26 A. L. R. 735; *Fitts v. Atlanta*, 121 Ga. 567, 49 S. E. 793, 67 L. R. A. 803, 104 Am. St. Rep. 167; *Cartersville v. McGinnis*, 142 Ga. 71, 82 S. E. 487, Ann. Cas. 1915 D, 1067; *State v. Dolan*, 13 Idaho, 693, 92 Pac. 995, 14 L. R. A. (N. S.) 1259; *People v. People's Gaslight, etc., Co.*, 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244; *Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215; *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; *People v. William Henning Co.*, 260 Ill. 554, 103 N. E. 530, 49 L. R. A. (N. S.) 1206; *Public Service Co. v. Recktenwald*, 290 Ill. 314, 125 N. E. 271, 8 A. L. R. 466; *Booth v. State*, 179 Ind. 405, 100 N. E. 563, L. R. A. 1915 B, 420, Ann. Cas. 1915 D, 987; *Camoras v. Sioux City*, 192 Iowa, 372, 184 N. W. 821; *State v. Topeka Club*, 82 Kan. 756, 109 Pac. 183, 29 L. R. A. (N. S.) 722, 20 Ann. Cas. 320; *Smith v. Com.*, 175 Ky. 286, 194 S. W. 367; *State v. Cunningham*, 130 La. 749, 58 So. 558, L. R. A. 1915 B, 389; *State v. Fontenot*, 132 La. 481, 61 So. 534, Ann. Cas. 1915 A, 76;

*Mitchell v. State*, 115 Md. 360, 80 Atl. 1020; *Mogul v. Gaither*, 142 Md. 380, 121 Atl. 32; *Vernor v. Secretary of State*, 179 Mich. 157, 146 N. W. 338, Ann. Cas. 1915 D, 128; *Jasnowski v. Board of Assessors*, 191 Mich. 287, 157 N. W. 891; *Elwell v. Comstock*, 99 Minn. 261, 109 N. W. 113, 698, 7 L. R. A. (N. S.) 621, 9 Ann. Cas. 270; *State v. Bridgeman, etc., Co.*, 117 Minn. 186, 134 N. W. 496, Ann. Cas. 1913 D, 41; *State v. Houghton*, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159, 8 A. L. R. 585; *State v. Evans*, 154 Minn. 95, 191 N. W. 425, 27 A. L. R. 1165; *State v. Great Western Coffee, etc., Co.*, 171 Mo. 634, 71 S. W. 1011, 94 Am. St. Rep. 802; *O'Connor v. St. Louis Transit Co.*, 198 Mo. 622, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; *State v. Weber*, 205 Mo. 36, 102 S. W. 955, 120 Am. St. Rep. 715, 10 L. R. A. (N. S.) 1155, 12 Ann. Cas. 382; *State v. Peyton*, 234 Mo. 517, 137 S. W. 979, Ann. Cas. 1912 D, 154; *State v. Ross*, 245 Mo. 36, 149 S. W. 451, Ann. Cas. 1913 E, 978; *State v. McKinney*, 29 Mont. 375, 74 Pac. 1095, 1 Ann. Cas. 579; *Worthington v. District Ct.*, 37 Nev. 212, 142 Pac. 230, L. R. A. 1916 A, 696, Ann. Cas. 1916 E, 1097; *State v. Ingalls*, 18 N. M. 211, 135 Pac. 1177; *State v. Minneapolis, etc., Elevator Co.*, 17 N. D. 23, 114 N. W. 482, 138 Am. St. Rep. 691; *State v. Blaisdell*, 18 N. D. 55, 118 N. W. 141, 138 Am. St. Rep. 741, 24 L. R. A. (N. S.) 465; *State v. Fargo Bottling Works Co.*, 19 N. D. 396, 124 N. W. 387, 26 L. R. A. (N. S.) 872; *State v. Briggs*, 45 Ore. 366, 77 Pac. 750, 78 Pac. 361, 2 Ann. Cas. 424; *State v. Richardson*, 48 Ore. 309, 85 Pac. 225, 8 L. R. A. (N. S.) 362; *Lovejoy v. Portland*, 95 Ore. 459, 188 Pac. 207; *Upham v. Bramwell*, 105 Ore. 597, 209 Pac. 100, 25 A. L. R. 919; *Stehle v. Jaeger Automatic Mach. Co.*, 225 Pa. St. 348, 74 Atl. 215, 133 Am. St. Rep. 884; *Com. ex rel. Bell v. Powell*, 249 Pa. St. 144, 94 Atl. 746; *Guppy v. Moltrup*, 281 Pa. St. 343, 126 Atl. 766; *Riley v. Charleston Union Station Co.*, 71 S. C. 457, 51 S. E. 485, 110 Am. St. Rep. 579; *Wheelon v. South Dakota Land Settlement Board*, 43 S. D. 551,

181 N. W. 359, 14 A. L. R. 1145; *State v. Co-operative Store Co.*, 123 Tenn. 399, 131 S. W. 867, Ann. Cas. 1912 C, 248; *McCormick v. State*, 135 Tenn. 218, 186 S. W. 95, L. R. A. 1916 F, 382; *Wilson v. State*, 143 Tenn. 55, 224 S. W. 168; *Ex parte Allison*, 99 Tex. 455, 90 S. W. 870, 2 L. R. A. (N. S.) 1111, 122 Am. St. Rep. 653; *Ex parte Abrams*, 56 Tex. Crim. Rep. 465, 120 S. W. 883, 18 Ann. Cas. 45; *De Silvia v. State*, 88 Tex. Crim. Rep. 634, 229 S. W. 542; *Hurley v. Hurley*, 110 Va. 31, 65 S. E. 472, 18 Ann. Cas. 968; *Hathaway v. McDonald*, 27 Wash. 659, 68 Pac. 376, 91 Am. St. Rep. 889; *Shortall v. Puget Sound Bridge, etc., Co.*, 45 Wash. 290, 88 Pac. 212, 122 Am. St. Rep. 899; *State v. Snohomish County Superior Ct.*, 68 Wash. 572, 123 Pac. 996, 40 L. R. A. (N. S.) 793; *McNeeley v. South Penn. Oil Co.*, 52 W. Va. 616, 44 S. E. 508, 62 L. R. A. 562; *Hood v. Wheeling*, 85 W. Va. 578, 102 S. E. 259.

In *Davis v. Woolnough*, 9 Iowa, 104, an act entitled "An act for revising and consolidating the laws incorporating the city of Dubuque, and to establish a city court therein", was held to express by its title but one object, which was, the revising and consolidating the laws incorporating the city; and the city court, not being an unusual tribunal in such a municipality, might be provided for by the act, whether mentioned in the title or not.

"An act to enable the supervisors of the city and county of New York to raise money by tax", provided for raising money to pay judgments then existing, and also any thereafter to be recovered; and it also contained the further provision, that whenever the comptroller of the city should have reason to believe that any judgment then of record or thereafter obtained had been obtained by collusion, or was founded in fraud, he should take the proper and necessary means to open and reverse the same, &c. This provision was held constitutional, as properly connected with the subject indicated by the title, and necessary to confine the payments of the tax to the objects for which the moneys were

intended to be raised. *Sharp v. Mayor, &c. of New York*, 31 Barb. 572.

In *O'Leary v. Cook Co.*, 28 Ill. 534, it was held that a clause in an act incorporating a college, prohibiting the sale of ardent spirits within a distance of four miles, was so germane to the primary object of the charter as to be properly included within it.

By the first section of "an act for the relief of the creditors of the Lockport and Niagara Falls Railroad Company", it was made the duty of the president of the corporation, or one of the directors to be appointed by the president, to advertise and sell the real and personal estate, including the franchise of the company, at public auction, to the highest bidder. It was then declared that the sale should be absolute, and that it should vest in the purchaser or purchasers of the property, real or personal, of the company, all the franchise, rights, and privileges of the corporation, as fully and as absolutely as the same were then possessed by the company. The money arising from the sale, after paying costs, was to be applied, first, to the payment of a certain judgment, and then to other liens according to priority; and the surplus, if any, was to be divided ratably among the other creditors, and then, if there should be an overplus, it was to be divided ratably among the then stockholders. By the second section of the act, it was declared that the purchaser or purchasers should have the right to sell and distribute stock to the full amount which was authorized by the act of incorporation, and the several amendments thereto; and to appoint an election, choose directors, and organize a corporation anew, with the same powers as the existing company. There was then a proviso, that nothing in the act should impair or affect the subscriptions for new stock, or the obligations or liabilities of the company, which had been made or incurred in the extension of the road from Lockport to Rochester, &c. The whole act was held to be constitutional. *Mosier v. Hilton*, 15 Barb. 657.

An act for the relief of the village of Clinton covers curative provisions

relative to the action of commissioners for village water-supply. *Board Water Commissioners v. Dwight*, 101 N. Y. 9.

An act to regulate foreclosure of real estate covers provisions for sales on execution as well as mortgage. *Gillitt v. McCarthy*, 34 Minn. 318, 25 N. W. 637. One to prohibit sale of liquor covers civil damage provisions. *Du-rein v. Pontious*, 34 Kan. 353, 8 Pac. 428. And see *Mills v. Charleton*, 29 Wis. 400, — a very liberal case; *Erlinger v. Boneau*, 51 Ill. 94; *State v. Newark*, 34 N. J. L. 236; *Smith v. Commonwealth*, 8 Bush, 108; *State v. St. Louis Cathedral*, 23 La. Ann. 730; *Simpson v. Bailey*, 3 Oreg. 515; *Neifing v. Pontiac*, 56 Ill. 172.

An act, having for its sole object to legalize certain proceedings of the Common Council of Janesville, but entitled merely "An act to legalize and authorize the assessment of street improvements and assessments", was held not to express the subject, because failing to specify the locality. *Durkee v. Janesville*, 26 Wis. 697.

A title, "An Act to Facilitate the Carriage of Passengers and Property by Railroad Companies" is insufficient to cover a restriction upon the powers of eminent domain possessed by certain railroad companies. *Thomas v. Wabash, St. L. & P. R. Co.*, 40 Fed. 126, 7 L. R. A. 145.

And an amendment to "An Act for the Incorporation of Manufacturing Companies", which makes it include mercantile companies without changing the title, is void. *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102.

Word "purchase" does not include expropriation by eminent domain. *Enterprise v. Smith*, 62 Kan. 815, 62 Pac. 324.

A title, "An Act to Revise the Code of Civil Procedure of the State of California" does not comply with the constitutional provision that "every act shall embrace but one subject, which subject shall be expressed in the title", where the act deals with a vast variety of subjects, many of which are totally distinct from each other, and some of which have no relation to civil

reference to the language used in it alone, and not in the light of what the body of the act contains." <sup>1]</sup>

4. *The effect if the title embrace more than one object.* Perhaps in those States where this constitutional provision is limited in its operation to private and local bills, it might be held that an act was not void for embracing two or more objects which were indicated by its title, provided one of them only was of a private and local nature. It has been held in New York that a local bill was not void because embracing general provisions also; <sup>2</sup> and if they may constitutionally be embraced in the act, it is presumed they may also be constitutionally embraced in the title. [And plurality of title is not an objection to an act which deals with but one subject. If there is but one subject in the act, and the title expresses more than one, the subject expressed in the title and not embraced in the act will be regarded as surplusage.<sup>3]</sup> But if the title to the act actually indicates, and the act itself actually embraces, two distinct objects, when the constitution says it shall embrace but one, the whole act must be treated as void, from the manifest impossibility in the court choosing between the two, and holding the act valid as to the one and void as to the other.<sup>4</sup> [The requirement, however, that no act shall embrace more than one subject does not mean that it shall contain only one provision. Its purpose is to prevent the joining in one act of incongruous and unrelated matters, and an act may contain any number of provisions which tend to further its purpose.<sup>5]</sup>

5. *The effect where the act is broader than the title.* But if the act is broader than the title, it may happen that one part of it can stand because indicated by the title, while as to the object not indicated by the title it must fail. Some of the State constitutions, it will be perceived, have declared that this shall be the rule; but the declaration was unnecessary; as the general rule, that so much

procedure. *Lewis Adm'x of Lewis v. Dunne*, 134 Cal. 291, 66 Pac. 478, 55 L. R. A. 833, 86 Am. St. 257.

<sup>1</sup> *People v. Joyce*, 246 Ill. 124, 92 N. E. 607, 20 Ann. Cas. 472.

<sup>2</sup> *People v. McCann*, 16 N. Y. 58.

An act as to paving Eighth Avenue cannot provide for changing the grade of intersecting streets. *In re Blodgett*, 89 N. Y. 392.

<sup>3</sup> *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994.

<sup>4</sup> *Antonio v. Gould*, 34 Tex. 49; *State v. McCracken*, 42 Tex. 383;

*Pioneer Irrigation Dist. v. Bradley*, 8 Idaho, 310, 68 Pac. 295, 101 Am. St. Rep. 201; *Public Service Co. v. Recktenwald*, 290 Ill. 314, 125 N. E. 271, 8 A. L. R. 466. All the cases recognize this doctrine. *State v. Ferguson*, 104 La. 249, 28 So. 917, 81 Am. St. 123, furnishes a recent instance. For a valuable discussion and collection of cases upon questions growing out of titles to enactments, see 79 Am. St. 456-486.

<sup>5</sup> *Stewart v. Brady*, 300 Ill. 425, 133 N. E. 310.

of the act as is not in conflict with the Constitution must be sustained, would have required the same declaration from the courts. If, by striking from the act all that relates to the object not indicated by the title, that which is left is complete in itself, sensible, capable of being executed, and wholly independent of that which is rejected, it must be sustained as constitutional. The principal questions in each case will therefore be, whether the act is in truth broader than the title; and if so, then whether the other objects in the act are so intimately connected with the one indicated by the title that the portion of the act relating to them cannot be rejected, and leave a complete and sensible enactment which is capable of being executed.<sup>1</sup>

<sup>1</sup> *People v. Briggs*, 50 N. Y. 553. See *Van Riper v. North Plainfield*, 43 N. J. L. 349; *Central, &c. R. R. Co. v. People*, 5 Col. 39; *Foley v. State*, 9 Ind. 363; *Kuhns v. Kramis*, 20 Ind. 490; *Grubbs v. State*, 24 Ind. 295; *State v. Young*, 47 Ind. 150; *Robinson v. Bank of Darien*, 18 Ga. 65; *Williams v. Payson*, 14 La. Ann. 7; *Weaver v. Lapsley*, 43 Ala. 224; *Walker v. State*, 49 Ala. 329; *Boyd v. State*, 53 Ala. 601; *Ex parte Moore*, 62 Ala. 471; *State v. Miller*, 45 Mo. 495; *Wisners v. Monroe*, 25 La. Ann. 598; *Dorsey's Appeal*, 72 Pa. St. 192; *Allegheny County Home's Case*, 77 Pa. St. 77; *Tecumseh v. Phillips*, 5 Neb. 305; *State v. Lancaster Co.*, 17 Neb. 85, 22 N. W. 228; *Matter of Van Antwerp*, 56 N. Y. 261; *People v. O'Brien*, 38 N. Y. 193; *Matter of Metropolitan Gas. Co.*, 85 N. Y. 526; *Lockport v. Gaylord*, 61 Ill. 276; *Middleport v. Insurance Co.*, 82 Ill. 562; *Welch v. Post*, 99 Ill. 471; *Donnersberger v. Prendergast*, 128 Ill. 229, 21 N. E. 1; *Davis v. State*, 7 Md. 151; *Stiefel v. Maryland Inst.*, 61 Md. 144; *State v. Banker's, &c. Assn.*, 23 Kan. 499; *Rader v. Union*, 39 N. J. L. 509; *Evernham v. Hulit*, 45 N. J. L. 53; *Miss., &c. Boom Co. v. Prince*, 34 Minn. 79, 24 N. W. 344; *State v. Palmes*, 23 Fla. 620, 3 So. 171; *Jones v. Thompson*, 12 Bush, 394; *Equit. G. Trust Co. v. Donahoe*, 3 Penn. (Del.) 191, 49 Atl. 372; *Harris v. State*, 110 Ga. 887, 36 S. E. 232; *State v. McDonald*, 25 Wash. 122, 64 Pac. 912; *Re Werner*, 129 Cal. 567, 62 Pac. 97;

*Howard v. Schneider*, 10 Kan. App. 137, 62 Pac. 435; *People v. Curry*, 130 Cal. 82, 62 Pac. 516; *State v. Cornell*, 60 Neb. 276, 694, 83 N. W. 72; *State v. Davis*, 130 Ala. 148, 30 So. 344, 89 Am. St. Rep. 23; *Ex parte Knight*, 52 Fla. 144, 41 So. 786, 120 Am. St. Rep. 191; *Fleming v. Greener*, 173 Ind. 260, 90 N. E. 72, 73, 140 Am. St. Rep. 254, 21 Ann. Cas. 959; *Bosworth v. State University*, 166 Ky. 436, 179 S. W. 403, L. R. A. 1917 B, 808; *Somerset County v. Pocomoke Bridge Co.*, 109 Md. 1, 71 Atl. 462, 16 Ann. Cas. 874; *Vernor v. Martindale*, 179 Mich. 157, 146 N. W. 338, Ann. Cas. 1915 D, 128; *State v. Candelaria*, 28 N. M. 573, 215 Pac. 816; *Rowe v. Richards*, 32 S. D. 66, 142 N. W. 664, L. R. A. 1915 E, 1069.

In Illinois, by express constitutional provision, if any subject embraced in an act is not expressed in the title, the act will be void only as to so much thereof as is not so expressed. *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; *Perkins v. Cook County*, 271 Ill. 449, 111 N. E. 580, Ann. Cas. 1917 A, 27. But in Tennessee and West Virginia it has been held that if an act embraces two or more subjects, only one of which is expressed in the title, the whole act will be void. *Cannan v. Mathes*, 8 Heisk. 504; *State v. McCann*, 4 Lea, 1; *Murphy v. State*, 9 Lea, 379; *Ragio v. State*, 86 Tenn. 275, 6 S. W. 401; *Cole Manufacturing Co. v. Falls*, 90 Tenn. 482, 16 S. W. 1045; *State v. Yardley*, 95 Tenn. 546,

As the legislature may make the title to an act as restrictive as they please, it is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might with entire propriety have been embraced in one enactment with the matters indicated by the title, but which must now be excluded because the title has been made unnecessarily restrictive. The courts cannot enlarge the scope of the title; they are vested with no dispensing power; the constitution has made the title the conclusive index to the legislative intent as to what shall have operation; it is no answer to say that the title might have been made more comprehensive, if in fact the legislature have not seen fit to make it so.<sup>1</sup> Thus, "an act concerning promissory notes and bills of exchange" provided that all promissory notes, bills of exchange, or other instruments in writing, for the payment of money, or for the delivery of specific articles, or to convey property, or to perform any other stipulation therein mentioned, should be negotiable, and assignees of the same might sue thereon in their own names. It was held that this act was void, as to all the instruments mentioned therein except promissory notes and bills of exchange;<sup>2</sup> though it is obvious that it would have been easy to frame a title to the act which would have embraced them all, and which would have been unobjectionable. It has also been held that an act for the preservation of the Muskegon River Improvement could not lawfully provide for the levy and collection of tolls for the payment of the expense of constructing the improvement, as the operation of the act was carefully

32 S. W. 481, 34 L. R. A. 656; *State ex rel. Astor v. Schlitz Brewing Co.*, 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941; *Cutlip v. Sheriff*, 3 W. Va. 588.

"None of the provisions of a statute should be regarded as unconstitutional where they all relate, directly or indirectly, to the same subject, have a natural connection, and are not foreign to the subject expressed in the title." *Phillips v. Bridge Co.*, 2 Met. (Ky.) 219, approved, *Smith v. Commonwealth*, 8 Bush, 112. See *Ex parte Upshaw*, 45 Ala. 234; *Stewart v. Father Matthew Society*, 41 Mich. 67, 1 N. W. 931.

In determining whether provisions contained in a legislative act are embraced in one subject and matter properly connected therewith, the subject to be considered is the one expressed in the title of the act, and

every fair intendment and reasonable doubt should be yielded in favor of the validity of the provision; but when an act contains provisions which, after yielding all fair intendments and reasonable doubts, are clearly not embraced in the subject of the act as expressed in the title, or in matter properly connected with that subject, such provisions are inoperative and without effect. *Ex parte Knight*, 52 Fla. 144, 41 So. 786, 120 Am. St. Rep. 191.

<sup>1</sup> *Ex parte Knight*, 52 Fla. 144, 41 So. 786, 120 Am. St. Rep. 191.

<sup>2</sup> *Mewherter v. Price*, 11 Ind. 199. See also *State v. Young*, 47 Ind. 150; *Jones v. Thompson*, 12 Bush, 394; *Rushing v. Sebree*, 12 Bush, 198; *State v. Kinsella*, 14 Minn. 524; *Grover v. Trustees Ocean Grove*, 45 N. J. L. 399.

limited by its title to the future.<sup>1</sup> So also it has been held that "an act to limit the numbers of grand jurors, and to point out the mode of their selection, defining their jurisdiction, and repealing all laws inconsistent therewith", could not constitutionally contain provisions which should authorize a defendant in a criminal case, on a trial for any offense, to be found guilty of any lesser offense necessarily included therein.<sup>2</sup> These cases must suffice upon this point; though the cases before referred to will furnish many similar illustrations.

In all we have said upon this subject we have assumed the constitutional provision to be mandatory. Such has been the view of the courts almost without exception.<sup>3</sup> In California, formerly, a different view was taken, the court saying: "We regard this section of the Constitution as merely directory; and, if we were inclined to a different opinion, would be careful how we lent ourselves to a construction which must in effect obliterate almost every law

<sup>1</sup> *Ryerson v. Utey*, 16 Mich. 269. See further *Weaver v. Lapsley*, 43 Ala. 224; *Tuscaloosa Bridge Co. v. Olmstead*, 41 Ala. 9; *Stuart v. Kinsella*, 14 Minn. 524; *Rogers v. Manuf. Imp. Co.*, 109 Pa. St. 109.

<sup>2</sup> *Foley v. State*, 9 Ind. 363; *Gillespie v. State*, 9 Ind. 380. See also *Indiana Cent. Railroad Co. v. Potts*, 7 Ind. 681; *State v. Squires*, 26 Iowa, 340; *State v. Lafayette Co. Court*, 41 Mo. 39; *People v. Denahy*, 20 Mich. 349.

Prohibitory enactments are not covered by a title to "regulate" liquor selling. *Miller v. Jones*, 80 Ala. 89; *People v. Gadway*, 61 Mich. 285, 28 N. W. 101; *People v. Hauck*, 70 Mich. 396, 38 N. W. 269; *Cantril v. Sainer*, 59 Iowa, 26, 12 N. W. 753. See *State v. Circuit Court*, 50 N. J. L. 585, 15 Atl. 272.

Provision for building a court house cannot be included in "an act to incorporate the town of Luverne." *Thompson v. Luverne*, 128 Ala. 567, 29 So. 326.

For further illustration of provisions held bad because not within the title, see *Ragio v. State*, 86 Tenn. 272, 6 S. W. 401; *In re Paul*, 94 N. Y. 497, 20 N. W. 549; *Anderson v. Hill*, 54 Mich. 477; *Northwestern Mfg. Co. v. Wayne Cir. Judge*, 58 Mich. 381, 25 N. W. 371; *Sewickley v. Sholes*, 118

Pa. St. 165, 12 Atl. 302; *Jersey City v. Elmendorf*, 47 N. J. L. 283; *Savannah, F. & W. Ry. Co. v. Geiger*, 22 Fla. 669; *Ex parte Knight*, 52 Fla. 144, 41 So. 786, 120 Am. St. Rep. 191.

<sup>3</sup> *Mobile Dry-Docks Co. v. Mobile*, 146 Ala. 198, 40 So. 205, 3 L. R. A. (N. S.) 822, 9 Ann. Cas. 1229; *Galpin v. Chicago*, 269 Ill. 27, 109 N. E. 713, L. R. A. 1917 B, 176; *State v. Haun*, 61 Kan. 146, 59 Pac. 340, 47 L. R. A. 369; *State v. Burgdoerfer*, 107 Mo. 1, 17 S. W. 646, 14 L. R. A. 846; *State v. Tibbets*, 52 Neb. 228, 71 N. W. 990, 66 Am. St. Rep. 492; *Bell v. First Judicial District Court*, 28 Nev. 280, 81 Pac. 875, 113 Am. St. Rep. 854, 1 L. R. A. (N. S.) 843, 6 Ann. Cas. 982; *Worthington v. District Ct.*, 37 Nev. 212, 142 Pac. 230, L. R. A. 1916 A, 696, Ann. Cas. 1916 E, 1097; *State v. Johnson*, 90 Okla. 21, 215 Pac. 945; *Garrigan v. Kennedy*, 19 S. D. 11, 101 N. W. 1081, 117 Am. St. Rep. 927, 8 Ann. Cas. 1125; *Rowe v. Richards*, 32 S. D. 66, 142 N. W. 664, L. R. A. 1915 E, 1069; *State v. Burrow*, 119 Tenn. 376, 104 S. W. 526, 14 Ann. Cas. 809; *Acklen v. Thompson*, 122 Tenn. 43, 126 S. W. 730, 135 Am. St. Rep. 851; *State v. Superior Ct.*, 28 Wash. 317, 68 Pac. 957, 92 Am. St. Rep. 831; *Sims v. Sawyers*, 85 W. Va. 245, 101 S. E. 467, overruling *Shields v. Bennett*, 8 W. Va. 74.

from the statute-book, unhinge the business and destroy the labor of the last three years. The first legislature that met under the Constitution seems to have considered this section as directory; and almost every act of that and the subsequent sessions would be obnoxious to this objection. The contemporaneous exposition of the first legislature, adopted or acquiesced in by every subsequent legislature, and tacitly assented to by the courts, taken in connection with the fact that rights have grown up under it, so that it has become a rule of property, must govern our decision.”<sup>1</sup> [But since this decision a constitutional provision has been adopted which declares the provisions of the Constitution to be “mandatory and prohibitory” unless expressly declared to be otherwise, and, under it, the provision in question has been held to be mandatory.<sup>2</sup>] Views similar to those expressed by the California court have also been expressed in the State of Ohio.<sup>3</sup> [In Mississippi a like conclusion has been reached as to the provision of the Constitution of that State, but the determination has relation to the peculiar phraseology of that provision.<sup>4</sup>] These cases, and especially what is said by the California court, bring forcibly before our minds a fact, which cannot be kept out of view in considering this subject, and which has a very important bearing upon the precise point which these decisions cover. The fact is this: that whatever constitutional provision can be looked upon as directory merely is very likely to be treated by the legislature as if it was devoid even of moral obligation, and to be therefore habitually disregarded. To say that a provision is directory, seems, with many persons, to be equivalent to saying that it is not law at all. That this ought not to be so must be conceded; that it is so we have abundant reason and good authority for saying. If, therefore, a constitutional provision is to be enforced at all, it must be treated as mandatory. And if the legislature habitually disregard it, it seems to us that there is all the more urgent necessity that the courts should enforce it. And it also seems to us that there are few evils which can be inflicted by a strict adherence to the law, so great as that which is done by the

<sup>1</sup> *Washington v. Page*, 4 Cal. 388. See *Pierpont v. Crouch*, 10 Cal. 315; *Matter of Boston Mining, &c. Co.*, 51 Cal. 624; *Weill v. Kenfield*, 54 Cal. 111.

<sup>2</sup> *Lewis v. Dunne*, 134 Cal. 291, 66 Pac. 478, 86 Am. St. Rep. 257, 55 L. R. A. 833.

<sup>3</sup> *Miller v. State*, 3 Ohio St. 475; *Pim v. Nicholson*, 6 Ohio St. 177; *State v. Covington*, 29 Ohio St. 102.

<sup>4</sup> The provision of the Constitution of Mississippi held to be merely directory, declares that the title of a statute “ought” to indicate clearly its subject matter. *Jackson v. State*, 102 Miss. 663, 59 So. 873, Ann. Cas. 1915 A, 1213; *Mississippi University v. Waugh*, 105 Miss. 623, 62 So. 827, L. R. A. 1915 D, 588; *State v. Phillips*, 109 Miss. 22, 67 So. 651, L. R. A. 1915 D, 530.



habitual disregard, by any department of the government, of a plain requirement of that instrument from which it derives its authority, and which ought, therefore, to be scrupulously observed and obeyed. Upon this subject we need only refer here to what we have said concerning it in another place.<sup>1</sup>

### *Amendatory Statutes.*

It has also been deemed important, in some of the States, to provide by their constitutions, that "no act shall ever be revised or amended by mere reference to its title; but the act revised or section amended shall be set forth and published at full length."<sup>2</sup> [If this requirement is not complied with the amendatory act will be

<sup>1</sup> *Ante*, p. 149 *et seq.* See *State v. Tuffy*, 19 Nev. 391.

<sup>2</sup> This is the provision as it is found in the Constitutions of Indiana, Nevada, Oregon, Texas, and Virginia. In Illinois, Kansas, New Jersey, Ohio, Michigan, Louisiana, Wisconsin, Utah, Missouri, and Maryland there are provisions of similar import.

In Tennessee the provision is: "All acts which revive, repeal, or amend former laws, shall recite, in their caption or otherwise, the title or substance of the law repealed, revived, or amended." Art. 1, § 17. See *State v. Gaines*, 1 Lea, 734; *McGhee v. State*, 2 Lea, 622.

The Constitution of Montana provides: "No law shall be revised or amended, or the provisions thereof extended by reference to its title only, but so much thereof as is revised, amended or extended shall be re-enacted and published at length." Art. 5 § 25. See *Palatine Ins. Co. v. Northern Pacific R. Co.*, 34 Mont. 268, 85 Pac. 1032, 9 Ann. Cas. 579.

The Constitution of Georgia provides: "No law, or section of the code, shall be amended or repealed by mere reference to its title, or to the number of the section of the Code, but the amending or repealing act shall distinctly describe the law to be amended or repealed, as well as the alteration to be made." Art. 3, § 7, par. 17. This provision has no reference to a legislative proposal to amend the Constitution. *Cooney v. Foote*,

142 Ga. 647, 83 S. E. 537, Ann. Cas. 1916 B, 1001.

The provision in Nebraska (Const. of 1875) is peculiar. "No law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." Art. 3 § 11. Under a like provision that any section amended is thereby repealed, it is held in Alabama that an amendment to an amended statute is valid. *State v. Warford*, 84 Ala. 15, 3 So. 911. So where the amendment impliedly repealed the original act, an amendment to the amended act was held valid, as the mistake in referring to a repealed statute should not defeat the intention of the legislature. *Com. v. Kenneson*, 143 Mass. 418, 9 N. E. 761. See also *State v. Blake*, 241 Mo. 100, 144 S. W. 1094, Ann. Cas. 1913 C, 1283; *Worthington v. District Ct.*, 37 Nev. 212, 142 Pac. 230, L. R. A. 1916 A, 696, Ann. Cas. 1916 E, 1097. But see *Lampkin v. Pike*, 115 Ga. 827, 42 S. E. 213, 90 Am. St. Rep. 153.

Under provisions forbidding enactments by reference a law complete in itself may provide for carrying out its purposes by reference to procedure established by other acts. *Campbell v. Board, &c.*, 47 N. J. L. 347; *De Camp v. Hibernia R. R. Co.*, *id.* 43. But the act must be complete in all essentials. *Christie v. Bayonne*, 48 N. J. L. 407, 5 Atl. 805; *Donohugh v. Roberts*, 15 Phila. 144.

In Texas it appears to be held that

void.<sup>1</sup>] Upon this provision an important query arises. Does it mean that the act or section revised or amended shall be set forth and published at full length as it stood before, or does it mean only that it shall be set forth and published at full length as amended or revised? Upon this question perhaps a consideration of the purpose of the provision may throw some light. "The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effects, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to, but not published, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for the express purpose. Endless confusion was thus introduced into the law, and the Constitution wisely prohibited such legislation."<sup>2</sup> If this is a correct view of the purpose of the provision, it does not seem to be at all important to its accomplishment that the old law should be republished, if the law as amended is given in full, with such reference to the old law as will show for what the new law is substituted. Nevertheless, it has been decided in Louisiana that the constitution requires the old law to be set forth and published;<sup>3</sup>

the legislature may repeal a definite portion of a section without the re-enactment of the section with such portion omitted. *Chambers v. State*, 25 Tex. 307. But *quære* of this.

Where the provisions of an act applying to a certain city are made to apply to another, this is not an amendment of the original act. *Phoenix Fire Assurance Co. v. Montgomery Fire Dept.*, 117 Ala. 631, 23 So. 843, 42 L. R. A. 468.

Further on this subject see *Blake-more v. Dolan*, 50 Ind. 194; *People v. Wright*, 70 Ill. 388; *Jones v. Davis*, 6 Neb. 33; *Sovereign v. State*, 7 Neb. 409; *Gordon v. People*, 44 Mich. 485, 7 N. W. 69; *State v. Gerger*, 65 Mo. 306; *Van Riper v. Parsons*, 40 N. J. L. 123, 29 Am. Rep. 210; *Fleishner v. Chadwick*, 5 Oreg. 152; *State v. Cain*, 8 W. Va. 720; *State v. Henderson*, 32 La. Ann. 779; *Colwell v. Chamberlin*, 43 N. J. L. 387; *State v. Beddo*, 22 Utah, 432, 63 Pac. 96.

<sup>1</sup> *People v. Election Com'rs*, 221 Ill.

9, 77 N. E. 321, 5 Ann. Cas. 562; *Horkey v. Kendall*, 53 Neb. 522, 73 N. W. 953, 68 Am. St. Rep. 623; *Beale v. Pankey*, 107 Va. 215, 57 S. E. 661, 12 Ann. Cas. 1134; *Copland v. Pirie*, 26 Wash. 481, 67 Pac. 227, 90 Am. St. Rep. 769.

In Wisconsin it has been held that any portion of a section amended which is not contained in the amendatory section as set forth and published is repealed. *State v. Ingersoll*, 17 Wis. 631.

<sup>2</sup> *People v. Mahaney*, 13 Mich. 497. See *Mok v. Detroit, &c. Association*, 30 Mich. 511; *Bush v. Indianapolis*, 120 Ind. 476, 22 N. E. 422.

<sup>3</sup> *Walker v. Caldwell*, 4 La. Ann. 297; *Heirs of Duverge v. Salter*, 5 La. Ann. 94.

The provision in the Constitution of Louisiana has been amended and now provides: "No law shall be revived or amended by reference to its title, but in such cases the act revived, or section as amended, shall be re-enacted

and the courts of Indiana, assuming the provision in their own Constitution to be taken from that of Louisiana after the decisions referred to had been made; at one time adopted and followed them as precedents.<sup>1</sup> It is believed, however, that the general understanding of the provision in question is different, and that it is fully complied with in letter and spirit, if the act or section revised or amended is set forth and published as revised or amended, and that anything more only tends to render the statute unnecessarily cumbersome.<sup>2</sup> It should be observed that statutes which amend others by implication are not within this provision; and it is not essential that they even refer to the acts or sections which by implication they amend.<sup>3</sup> [And the constitutional "requirement does not apply to

and published at length." Art. 3, § 17. Under this provision it has been held that the re-enactment of the law to be amended is not required, but only the re-enactment and publication of the law "as amended." *Murphy v. St. Mary Parish Police Jury*, 118 La. 401, 42 So. 979.

<sup>1</sup> *Langdon v. Applegate*, 5 Ind. 327; *Rogers v. State*, 6 Ind. 31. These cases were overruled in *Greencastle, &c. Co. v. State*, 28 Ind. 382.

<sup>2</sup> See *Tuscaloosa Bridge Co. v. Olmstead*, 41 Ala. 9; *People v. Pritchard*, 21 Mich. 236; *People v. McCallum*, 1 Neb. 182; *State v. Draper*, 47 Mo. 29; *Boonville v. Trigg*, 46 Mo. 288; *State v. Powder Mfg. Co.*, 50 N. J. L. 75, 11 Atl. 127; *Thornton v. Bramlett*, 155 Ala. 417, 46 So. 577; *Sanchez v. Fordyce*, 141 Cal. 427, 76 Pac. 56; *State v. Jones*, 9 Idaho, 693, 75 Pac. 819; *Murphy v. St. Mary Parish Police Jury*, 118 La. 401, 42 So. 979; *Wayland v. Herring*, 208 Mo. 708, 106 S. W. 984; *Johnson v. School Dist.*, 102 Neb. 347, 167 N. W. 210; *State ex rel. Stockwell v. Berryman*, 102 Neb. 553, 167 N. W. 790; *State v. Lawson*, 40 Wash. 455, 82 Pac. 750.

A whole act need be set out only when all its sections are amended. *State v. Thruston*, 92 Mo. 325, 4 S. W. 930. Under such a constitutional provision where a statute simply repeals others it is not necessary to set them out. *Falconer v. Robinson*, 46 Ala. 340. Compare *Bird v. Wasco County*, 3 Oreg. 282. In *Lewis, Adm'r of Lewis, v. Dunne*, 134 Cal.

291, 66 Pac. 478, 55 L. R. A. 833, 86 Am. St. 257, an act for the revision of the code of Civil Procedure of the State was held unconstitutional which did not provide for republication where the act amended over 400 sections, repealed nearly 100, and added many new ones. There is a valuable note to this case upon the power of the legislature to enact a code or compilation of laws or make extended amendments to a system of laws by a single statute. 55 L. R. A. 833.

<sup>3</sup> *Spencer v. State*, 5 Ind. 41; *Branham v. Lange*, 16 Ind. 497; *People v. Mahaney*, 13 Mich. 481; *Lehman v. McBride*, 15 Ohio St. 573; *Shields v. Bennett*, 8 W. Va. 74; *Baum v. Raphael*, 57 Cal. 361; *Home Ins. Co. v. Taxing District*, 4 Lea, 644; *Swartwout v. Railroad Co.*, 24 Mich. 389; *Scales v. State*, 47 Ark. 476, 1 S. W. 769; *Denver Circle R. Co. v. Nestor*, 10 Col. 403, 15 Pac. 714; *State v. Cross*, 38 Kan. 696, 17 Pac. 190; *Everham v. Hulit*, 45 N. J. L. 53; *Sheridan v. Salem*, 14 Oreg. 328, 12 Pac. 925; *Cartersville v. McGinnis*, 142 Ga. 71, 82 S. E. 487, Ann. Cas. 1915 D, 1067; *Berry v. State*, 153 Ga. 169, 111 S. E. 669, 35 A. L. R. 370; *Erford v. Peoria*, 229 Ill. 546, 82 N. E. 374; *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; *Scown v. Czarnecki*, 264 Ill. 305, 106 N. E. 276, L. R. A. 1915 B, 247, Ann. Cas. 1915 A, 772; *Galpin v. Chicago*, 269 Ill. 27, 109 N. E. 713, L. R. A. 1917 B, 176; *State v. Cunningham*, 130 La. 749, 58 So. 558,

supplemental acts not in any way modifying or altering the original act, nor to those merely adding new sections to an existing act." <sup>1</sup> But repeals by implication are not favored; and the repugnancy between two statutes should be very clear to warrant a court in holding that the later in time repeals the other, when it does not in terms purport to do so.<sup>2</sup> This rule has peculiar force in the case of laws of

L. R. A. 1915 B, 389; *Weston v. Ryan*, 70 Neb. 211, 97 N. W. 347, 6 Ann. Cas. 922; *Cram v. Chicago, etc., R. Co.*, 84 Neb. 607, 122 N. W. 31, 26 L. R. A. (N. S.) 1022; *Wilkinson v. Lord*, 85 Neb. 136, 122 N. W. 699, 24 L. R. A. (N. S.) 1104; *Dinuzzo v. State*, 85 Neb. 351, 123 N. W. 309, 29 L. R. A. (N. S.) 417; *State v. Fargo Bottling Works Co.*, 19 N. D. 396, 124 N. W. 387, 26 L. R. A. (N. S.) 872; *In re Lee*, 64 Okla. 310, 168 Pac. 53, L. R. A. 1918 B, 144; *Southern R. Co. v. Memphis*, 126 Tenn. 267, 148 S. W. 662, 41 L. R. A. (N. S.) 828, Ann. Cas. 1913 E, 153; *Will v. Brown*, 31 Utah, 473, 88 Pac. 609, 120 Am. St. Rep. 935; *Copland v. Pirie*, 26 Wash. 481, 67 Pac. 227, 90 Am. St. Rep. 769; *Northern Pacific R. Co. v. Pierce County*, 51 Wash. 12, 97 Pac. 1099, 23 L. R. A. (N. S.) 286; *State v. Tausick*, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802. Compare *State v. Wright*, 14 Oreg. 365, 12 Pac. 708.

But if an act "is not complete in itself, and is clearly amendatory of a former statute, it falls within the constitutional inhibition, whether or not it purports on its face to be amendatory or an independent act." *Copland v. Pirie*, 26 Wash. 481, 67 Pac. 227, 90 Am. St. Rep. 769. See also *Sovereign v. State*, 7 Neb. 409; *Stricklett v. State*, 31 Neb. 674, 48 N. W. 820; *Aurora Bd. of Education v. Moses*, 51 Neb. 288, 70 N. W. 946; *Titusville Iron-Works v. Keystone Oil Co.*, 122 Pa. St. 627, 15 Atl. 917, 1 L. R. A. 361. And "even though an act professes to be an independent act and does not purport to amend any prior act, still if, in fact, it makes changes in an existing act by adding new provisions and mingling the new with the old on the same subject so as to make of the old and the new a connected piece of legislation covering the

same subject, the latter act must be considered an amendment of the former and as within the constitutional prohibition." *Galpin v. Chicago*, 269 Ill. 27, 109 N. E. 713, L. R. A. 1917 B, 176. See also *Badenoch v. Chicago*, 222 Ill. 71, 78 N. E. 31; *Brooks v. Hatch*, 261 Ill. 179, 103 N. E. 745.

<sup>1</sup> *Copland v. Pirie*, 26 Wash. 481, 67 Pac. 227, 90 Am. St. Rep. 769. See also *Berry v. Kansas City, etc., R. Co.*, 52 Kan. 759, 34 Pac. 805; 39 Am. St. Rep. 371; *State v. Ginney*, 55 Kan. 532, 40 Pac. 926.

<sup>2</sup> See cases cited in n. 3 on p. 315; also *Towle v. Marrett*, 3 Me. 22, 14 Am. Dec. 206; *Naylor v. Field*, 29 N. J. L. 287; *State v. Berry*, 12 Iowa, 58; *Attorney-General v. Brown*, 1 Wis. 513; *Dodge v. Gridley*, 10 Ohio, 173; *Hirn v. State*, 1 Ohio St. 20; *Saul v. Creditors*, 5 Mart. (N. S.) 569, 16 Am. Dec. 212; *New Orleans v. Southern Bank*, 15 La. Ann. 89; *Blain v. Bailey*, 25 Ind. 165; *Water Works Co. v. Burkhardt*, 41 Ind. 364; *Swann v. Buck*, 40 Miss. 268; *Davis v. State*, 7 Md. 151; *State v. The Treasurer*, 41 Mo. 16; *Somerset & Stoystown Road*, 74 Pa. St. 61; *Kilgore v. Commonwealth*, 94 Pa. St. 495; *McCool v. Smith*, 1 Black, 459, 17 L. ed. 218; *State v. Cain*, 8 W. Va. 720; *Fleischner v. Chadwick*, 5 Oreg. 152; *Covington v. East St. Louis*, 78 Ill. 548; *East St. Louis v. Maxwell*, 99 Ill. 439; *In re Ryan*, 45 Mich. 173, 7 N. W. 819; *Connors v. Carp River Iron Co.*, 54 Mich. 168, 19 N. W. 938; *Parker v. Hubbard*, 64 Ala. 203; *Iverson v. State*, 52 Ala. 170; *Gohen v. Texas Pacific R. R. Co.*, 2 Woods, 346; *State v. Commissioner*, 37 N. J. L. 240; *Attorney-General v. Railroad Companies*, 35 Wis. 425; *Rounds v. Waymart*, 81 Pa. St. 395; *Greeley v. Jacksonville*, 17 Fla. 174; *State v. Smith*,

44 Tex. 443; *Henderson's Tobacco*, 11 Wall. 652, 20 L. ed. 235; *Cape Girardeau Co. Ct. v. Hill*, 118 U. S. 68, 30 L. ed. 73, 6 Sup. Ct. Rep. 951; *Petri v. F. E. Creelman Lumber Co.*, 199 U. S. 487, 50 L. ed. 281, 26 Sup. Ct. Rep. 133; *Ex parte Webb*, 225 U. S. 663, 56 L. ed. 1248, 32 Sup. Ct. Rep. 769; *Washington v. Miller*, 235 U. S. 422, 59 L. ed. 295, 35 Sup. Ct. Rep. 119; *Lewis v. United States*, 244 U. S. 134, 61 L. ed. 1039, 37 Sup. Ct. Rep. 570; *United States v. Yugmovich*, 256 U. S. 450, 65 L. ed. 1043, 41 Sup. Ct. Rep. 551; *Ex parte Sohcke*, 148 Cal. 262, 82 Pac. 956, 113 Am. St. Rep. 236, 2 L. R. A. (N. S.) 813, 7 Ann. Cas. 475; *Navajo County Bank v. Dolson*, 163 Cal. 485, 126 Pac. 153, 41 L. R. A. (N. S.) 787; *People v. Martin*, 188 Cal. 281, 205 Pac. 121, 21 A. L. R. 1399; *Hartford F. Ins. Co. v. Redding*, 47 Fla. 228, 37 So. 62, 110 Am. St. Rep. 118, 67 L. R. A. 518; *Chicago, etc., R. Co. v. Doyle*, 258 Ill. 624, 102 N. E. 260, Ann. Cas. 1914 B, 385; *State v. Leich*, 166 Ind. 680, 78 N. E. 189, 9 Ann. Cas. 302; *State v. Iowa Telephone Co.*, 175 Iowa, 607, 154 N. W. 678, Ann. Cas. 1917 E, 539; *State v. Hammond Packing Co.*, 110 La. 180, 34 So. 368, 98 Am. St. Rep. 459; *People v. Marxhausen*, 204 Mich. 559, 171 N. W. 557, 3 A. L. R. 1505; *Schmitz v. Zeh*, 91 Minn. 290, 97 N. W. 1049, 1 Ann. Cas. 322; *State v. Perkins*, 141 N. C. 797, 53 S. E. 735, 9 L. R. A. (N. S.) 165; *Kearney v. Vann*, 154 N. C. 311, 70 S. E. 747, Ann. Cas. 1912 B, 1189; *State v. Wetz*, 40 N. D. 299, 168 N. W. 835, 5 A. L. R. 731; *Huston v. Scott*, 20 Okla. 142, 94 Pac. 512, 35 L. R. A. (N. S.) 721; *Kuchler v. Weaver*, 23 Okla. 420, 100 Pac. 915, 18 Ann. Cas. 462; *Ex parte Morgan*, 57 Tex. Crim. Rep. 551, 124 S. W. 99, 136 Am. St. Rep. 996; *Lavagnino v. Uhlig*, 26 Utah, 1, 71 Pac. 1046, 99 Am. St. Rep. 808; *Utah University v. Richards*, 20 Utah, 457, 59 Pac. 96, 77 Am. St. Rep. 928; *Lambert v. Barrett*, 115 Va. 136, 78 S. E. 586, Ann. Cas. 1914 D, 1226; *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092, 48 L. R. A. (N. S.) 917; *Woodyard v. Sayre*, 90 W. Va. 295, 110 S. E. 689, 24 A. L. R. 1497; *In re Masonic Tem-*

*ple Soc.*, 90 W. Va. 441, 111 S. E. 637, 22 A. L. R. 892; *Hay v. Baraboo*, 127 Wis. 1, 105 N. W. 654, 115 Am. St. Rep. 977, 3 L. R. A. (N. S.) 84; *State v. Milwaukee Electric R. etc., Co.*, 144 Wis. 386, 129 N. W. 623, 140 Am. St. Rep. 1025; *Madison v. Southern Wisconsin R. Co.*, 156 Wis. 352, 146 N. W. 492, 10 A. L. R. 910; *Krueck v. Phoenix Chair Co.*, 157 Wis. 266, 147 N. W. 41, Ann. Cas. 1916 B, 291.

If the two are repugnant in part, the earlier is *pro tanto* repealed. *Hearn v. Brogan*, 64 Miss. 334; *Jeffersonville, &c. R. R. Co. v. Dunlap*, 112 Ind. 93, 13 N. E. 403.

A law which merely re-enacts a former one does not repeal an intermediate act qualifying such former act. The new is qualified like the old. *Gaston v. Merriam*, 33 Minn. 271, 22 N. W. 614; *Powell v. King*, 78 Minn. 83, 80 N. W. 850; *Hall v. Dunn*, 52 Ore. 475, 97 Pac. 811, 25 L. R. A. (N. S.) 193. This principle, however, is a mere canon of construction, or aid to the ascertainment of legislative intent, and must yield to the latter. *State ex rel. Stearns County v. Klasen*, 123 Minn. 382, 143 N. W. 984, 49 L. R. A. (N. S.) 597.

It is a familiar rule that when a new statute is evidently intended to cover the whole subject to which it relates, it will by implication repeal all prior statutes on that subject. See *United States v. Barr*, 4 Sawyer, 254; *United States v. Claffin*, 97 U. S. 546, 24 L. ed. 1082; *Red Rock v. Henry*, 106 U. S. 596, 27 L. ed. 251, 1 Sup. Ct. Rep. 434; *Dowdell v. State*, 58 Ind. 333; *State v. Rogers*, 10 Nev. 319; *Tafuya v. Garcia*, 1 New Mex. 480; *Campbell's Case*, 1 Dak. 17, 46 N. W. 504; *Andrews v. People*, 75 Ill. 605; *Clay Co. v. Chickasaw Co.*, 64 Miss. 534, 1 So. 753; *Lyddy v. Long Island City*, 104 N. Y. 218; *Stingle v. Nevel*, 9 Ore. 62; *State v. Studt*, 31 Kan. 245, 1 Pac. 635; *Boston Ice Co. v. Boston, etc., R. Co.*, 77 N. H. 6, 86 Atl. 356, 45 L. R. A. (N. S.) 835, Ann. Cas. 1914 A, 1090; *Pratt Institute v. New York*, 183 N. Y. 151, 75 N. E. 1119, 5 Ann. Cas. 198; *State ex rel. Milwaukee v. Milwaukee Electric R. etc., Co.*, 144 Wis. 386, 129 N. W. 623, 140 Am. St.

special and local application, which are never to be deemed repealed by general legislation except upon the most unequivocal manifestation of intent to that effect.<sup>1</sup>

It was a parliamentary rule that a statute should not be repealed at the same session of its enactment, unless a clause permitting it was inserted in the statute itself;<sup>2</sup> but this rule did not apply to repeals by implication,<sup>3</sup> and it is possibly not recognized in this country at all, except where it is incorporated in the State Constitution.<sup>4</sup>

[Under the title of an amendatory act nothing can be enacted but what amends the old law. Matter which might have come under the title of the original act, but did not, cannot be introduced.<sup>5</sup> In amending an act, it may be designated by its title or chapter in

Rep. 1025. But a local option law merely suspends, does not repeal a former liquor law, and after its adoption offenses against the latter while in force may be prosecuted. *Winterton v. State*, 65 Miss. 238, 3 So. 735.

A statute cannot be repealed by non-user. *Homer v. Com.*, 106 Pa. St. 221; *Pearson v. Int. Distill. Co.*, 72 Iowa, 348, 34 N. W. 1.

<sup>1</sup> *Cass v. Dillon*, 2 Ohio St. 607; *Fosdick v. Perrysburg*, 14 Ohio St. 472; *People v. Quigg*, 59 N. Y. 83; *McKenna v. Edmundstone*, 91 N. Y. 231; *Clark v. Davenport*, 14 Iowa, 494; *Oleson v. Green Bay, &c. R. R. Co.*, 36 Wis. 383; *Covington v. East St. Louis*, 78 Ill. 548; *Chesapeake, &c. Co. v. Hoard*, 16 W. Va. 270; *Rounds v. Waymart*, 81 Pa. St. 395; *Ex parte Schmidt*, 24 S. C. 363; *New Brunswick v. Williamson*, 44 N. J. L. 165; *McGruder v. State*, 83 Ga. 616, 10 S. E. 281; *Petri v. F. E. Creelman Lumber Co.*, 199 U. S. 487, 50 L. ed. 281, 26 Sup. Ct. Rep. 133; *Ex parte United States*, 226 U. S. 420, 57 L. ed. 281, 33 Sup. Ct. Rep. 170; *United States v. Winslow*, 227 U. S. 202, 57 L. ed. 481, 33 Sup. Ct. Rep. 253; *Washington v. Miller*, 235 U. S. 422, 59 L. ed. 295, 35 Sup. Ct. Rep. 119; *Abbate v. United States*, 270 Fed. 735; *Norwich v. Johnson*, 86 Conn. 151, 84 Atl. 727, 41 L. R. A. (N. S.) 1024; *Howard v. Hulbert*, 63 Kan. 793, 66 Pac. 1041, 88 Am. St. Rep. 267; *State v. Hammond Packing Co.*, 110 La. 180, 34 So. 368, 98 Am. St.

Rep. 459; *Jersey City v. Hall*, 79 N. J. L. 559, 76 Atl. 1058, Ann. Cas. 1912 A, 696; *State v. Wetz*, 40 N. D. 299, 168 N. W. 835, 5 A. L. R. 731; *Kuchler v. Weaver*, 23 Okla. 420, 100 Pac. 915, 18 Ann. Cas. 462; *Key v. Harris*, 116 Tenn. 161, 92 S. W. 235, 8 Ann. Cas. 200.

<sup>2</sup> *Dwarris on Statutes*, Vol I. p. 269; *Sedgw. on Stat. and Const. Law*, 122; *Smith on Stat. and Const. Construction*, 908.

<sup>3</sup> *Ibid.* And see *Spencer v. State*, 5 Ind. 41.

<sup>4</sup> *Spencer v. State*, 5 Ind. 41; *Attorney-General v. Brown*, 1 Wis. 513; *Smith on Stat. and Const. Construction*, 908; *Mobile & Ohio Railroad Co. v. State*, 29 Ala. 573; *Strauss v. Heiss*, 48 Md. 292.

The later of two acts passed at the same session controls when they are inconsistent. *Thomas v. Collins*, 58 Mich. 64, 24 N. W. 553; *Watson v. Kent*, 78 Ala. 602. But the fact of later publication when action is taken at the same time will not work a repeal. *In re Hall*, 38 Kan. 670, 17 Pac. 649.

Where acts passed on different days are approved on the same day, the presumption is that the one passed last was signed last. *State v. Davis*, 70 Md. 237, 16 Atl. 529.

<sup>5</sup> *State v. Smith*, 35 Minn. 257, 28 N. W. 241. See also *State v. Walker*, 105 La. 492, 29 So. 973; *Armstrong v. Mayer*, 60 Neb. 423, 83 N. W. 401.

an authorized compilation of statutes.<sup>1</sup> Where an amendment is plain, and can be carried out, it may be held valid, even though the section numbers of the original act and of the amendment are in confusion.<sup>2</sup> That the title of an amendatory act is, of itself, insufficient, is immaterial, if the title of the original act is sufficient to embrace the provision contained in the amendatory act.<sup>3]</sup>

### *Signing of Bills.*

When a bill has passed the two houses, it is engrossed for the signatures of the presiding officers. This is a constitutional requirement in most of the States, and therefore cannot be dispensed with;<sup>4</sup> though, in the absence of any such requirement, it would

<sup>1</sup> *People v. Howard*, 73 Mich. 10, 40 N. W. 789; *Dagge v. State*, 17 Neb. 140, 22 N. W. 348; *State v. Berka*, 20 Neb. 375, 30 N. W. 267. But see *Feibleman v. State*, 98 Ind. 516.

<sup>2</sup> *People ex rel. Comstock v. Judge of Superior Court*, 39 Mich. 195. See also *State v. Babcock*, 23 Neb. 128, 36 N. W. 348; *Fenton v. Yule*, 27 Neb. 758, 43 N. W. 1140.

<sup>3</sup> *Brandon v. State*, 16 Ind. 197; *St. Louis v. Tiefel*, 42 Mo. 590; *State v. Ranson*, 73 Mo. 78; *State v. Algood*, 87 Tenn. 163, 10 S. W. 310.

<sup>4</sup> *Moody v. State*, 48 Ala. 115, 17 Am. Rep. 28; *State v. Mead*, 71 Mo. 266; *Burritt v. Com'rs*, 120 Ill. 322, 11 N. E. 180; *State v. Kiesewetter*, 45 Ohio St. 254, 12 N. E. 807; *Hunt v. State*, 22 Tex. App. 396, 3 S. W. 233; *Monroe v. Green*, 71 Ark. 527, 76 S. W. 199; *Amos v. Gunn*, 84 Fla. 285, 94 So. 615; *Lynch v. Hutchinson*, 219 Ill. 193, 76 N. E. 370, 4 Ann. Cas. 904; *State v. Lynch*, 169 Iowa, 148, 151 N. W. 81, L. R. A. 1915 D, 119; *State v. Mickey*, 73 Neb. 281, 102 N. W. 679, 119 Am. St. Rep. 894.

The requirement must be complied with while the legislature is in session. *Amos v. Gunn*, 84 Fla. 285, 94 So. 615. A law cannot be established by the certificates of the clerical officers of the two houses, made after the adjournment of the legislature *sine die*. *State ex rel. McClay v. Mickey*, 73 Neb. 281, 102 N. W. 679, 119 Am. St. Rep. 894.

Signature by presiding officers and assistant secretary is enough. *State v. Glenn*, 18 Nev. 34, 1 Pac. 186. In Nebraska it has been held that a bill which is not authenticated by the signature of the presiding officer of either branch of the legislature cannot become a law. *State ex rel. McClay v. Mickey*, 73 Neb. 281, 102 N. W. 679, 119 Am. St. Rep. 894. But in the same State it has been held that the failure of the presiding officer of the Senate to sign a bill, which was afterwards approved by the governor, and which the Journal of the Senate shows passed the Senate by the constitutional majority, does not affect the validity of the act. *Cottrell v. State*, 9 Neb. 125, 1 N. W. 1008; *Taylor v. Wilson*, 17 Neb. 88, 22 N. W. 119; *State ex rel. Nebraska State Ry. Commission v. Missouri Pacific R. Co.*, 100 Neb. 700, 161 N. W. 270, L. R. A. 1918 E, 346. In Kansas it has been held that failure of the presiding officers to sign a bill does not defeat it, nor in any manner impair its validity, if it be thereafter duly authenticated and approved by the governor. *Aikman v. Edwards*, 55 Kan. 751, 42 Pac. 366, 30 L. R. A. 149.

After an act has been passed over a veto, it need not be again certified. *State v. Denny*, 118 Ind. 449, 21 N. E. 274.

The bill as signed must be the same as it passed the two houses. *People v. Platt*, 2 S. C. 150; *Legg v. Annap-*

seem not to be essential.<sup>1</sup> And if, by the Constitution of the State, the governor is a component part of the legislature, the bill is then presented to him for his approval.<sup>2</sup>

### *Approval of Laws.*

The qualified veto power of the governor is regulated by the constitutions of those States which allow it, and little need be said here beyond referring to the constitutional provisions for information concerning them. It has been held that if the governor, by statute, was entitled to one day, previous to the adjournment of the legislature, for the examination and approval of laws, this is to be understood as a full day of twenty-four hours, before the hour of the final adjournment.<sup>3</sup> It has also been held that, in the ap-

olis, 42 Md. 203; *Brady v. West*, 50 Miss. 68. But a clerical error that would not mislead is to be overlooked. *People v. Supervisor of Onondaga*, 16 Mich. 254. Compare *Smith v. Hoyt*, 14 Wis. 252, where the error was in publication. And so should accidental and immaterial changes in the transmission of the bill from one house to the other. *Larrison v. Railroad Co.*, 77 Ill. 11; *Walnut v. Wade*, 103 U. S. 683, 26 L. ed. 526. See *Wenner v. Thornton*, 98 Ill. 156. But in Arkansas when a mistake in enrolment made an approval void, signatures and approval on a correct roll after the adjournment were held to make the act valid. *Dow v. Beidelman*, 49 Ark. 325, 5 S. W. 297. In Maryland the governor may refuse to consider any bill sent him not authenticated by the Great Seal. *Hamilton v. State*, 61 Md. 14. In Nevada where the governor vetoes an act after the adjournment of the legislature, the next legislature may pass it over his veto. Upon such passage, the presiding officers of the two houses must thereupon sign it. *State v. Howell*, 26 Nev. 93, 64 Pac. 466.

<sup>1</sup> *Speer v. Plank Road Co.*, 22 Pa. St. 376.

<sup>2</sup> The constitutional requirement that a bill shall, before becoming a law, be presented to the governor, is mandatory and requires the presentation to be made while the legislature is in session. *Amos v. Gunn*, 84 Fla. 285, 94

So. 615. The bill presented must be that which passed the legislature. Any change after passage and before signature by the governor prevents the bill becoming a law. *State v. Wendler*, 94 Wis. 369, 68 N. W. 759. See also *State v. Green*, 36 Fla. 154, 18 So. 334; *Weis v. Ashley*, 59 Neb. 494, 81 N. W. 318, 80 Am. St. Rep. 704.

<sup>3</sup> *Hyde v. White*, 24 Tex. 137. See also *Carter v. Henry*, 87 Miss. 411, 39 So. 690, 6 Ann. Cas. 715.

In computing the days allowed the governor within which to return a bill the day on which the bill was presented to him should be excluded and the last day of the specified period included. *State ex rel. Dawson v. Sessions*, 84 Kan. 856, 115 Pac. 641, Ann. Cas. 1912 A, 796; *Carter v. Henry*, 87 Miss. 411, 39 So. 690, 6 Ann. Cas. 715; *Beaudeau v. Cape Girardeau*, 71 Mo. 392; *Opinions of Judges*, 45 N. H. 607; *Iron Mountain Co. v. Haight*, 39 Cal. 540; *In re Senate Resolution*, 9 Col. 632, 21 Pac. 475. But if the last day falls on Sunday he may return the bill on Monday. *In re Senate Resolution*, 9 Colo. 632, 21 Pac. 475.

Under the Constitution of Kansas which allows the governor "three days (Sundays excepted)" within which to return a bill, he has three full working days to consider and act upon a bill. *State ex rel. Dawson v. Sessions*, 84 Kan. 856, 115 Pac. 641, Ann. Cas. 1912 A, 796.



proval of laws, the governor is a component part of the legislature, and that unless the Constitution allows further time for the purpose, he must exercise his power of approval before the two houses adjourn, or his act will be void.<sup>1</sup> [Where a Constitution provides that

Where a Constitution provides that a bill shall become a law, as if signed by the governor, if it is not returned by him within six days after it is presented, Sundays excepted, the time during which the governor may consider a bill without its becoming a law is measured by calendar days. *State ex rel. Crenshaw v. Joseph*, 175 Ala. 579, 57 So. 942, Ann. Cas. 1914 D, 248.

Under the Constitution of Connecticut which requires a bill to be returned by the governor within three days, Sundays excepted, after it has been presented to him, in order to prevent its becoming a law without his signature, the three days is not necessarily confined to the three secular days next after the presentation of the bill, but includes three days during each of which there is an opportunity to return the bill to the house in which it originated, while such house is in actual session. *State ex rel. Corbett v. South Norwalk*, 77 Conn. 257, 58 Atl. 759.

The five days allowed in New Hampshire for the governor to return bills which have not received his assent, include days on which the legislature is not in session, if it has not finally adjourned. *Opinions of Judges*, 45 N. H. 607.

Neither house can, without the consent of the other, recall a bill after its transmission to the governor. *People v. Devlin*, 33 N. Y. 269. In Colorado the legislature may request the return of a bill in the governor's hands, but he may respond or not as he likes. If he sends back the bill, it may be reconsidered and amended. *Re Recalling Bills*, 9 Col. 630, 21 Pac. 474. But in Virginia no such recall is authorized. *Wolfe v. McCaull*, 76 Va. 876.

In a West Virginia case, *Smith v. Mitchell*, 69 W. Va. 481, 72 S. E. 755, Ann. Cas. 1913 B, 588, the court said: "After a bill has passed both branches (of the legislature) and gone to the governor for his action, it cannot be

reconsidered or recalled by the legislature, for the reason that it has ended its function and lost control and possession."

Upon power to withdraw the bill from the governor before he has acted on it and before the expiration of the time given him in which to act upon it, see *McKenzie v. Moore*, 92 Ky. 216, 17 S. W. 483, 14 L. R. A. 251, and note.

The delivery of a bill passed by the two houses to the secretary of the Commonwealth according to custom, is not a presentation to the governor for his approval, within the meaning of the constitutional clause which limits him to a certain number of days after the presentation of the bill to veto it. *Opinions of the Justices*, 99 Mass. 636.

<sup>1</sup> *Fowler v. Peirce*, 2 Cal. 165. The court also held in this case that, notwithstanding an act purported to have been approved before the actual adjournment, it was competent to show by parol evidence that the actual approval was not until the next day. In support of this ruling, *People v. Purdy*, 2 Hill, 31, was cited, where it was held that the court might go behind the statute-book and inquire whether an act to which a two-thirds vote was essential had constitutionally passed. That, however, would not be in direct contradiction of the record, but it would be inquiring into a fact concerning which the statute was silent, and other records supplied the needed information.

In Indiana it is held that the courts cannot look beyond the enrolled act to ascertain whether there has been compliance with the requirement of the Constitution that no bill shall be presented to the governor within two days next previous to the final adjournment. *Bender v. State*, 53 Ind. 254.

In Maryland a bill may be signed within six days after it is submitted, although the legislature may have adjourned. The bill may even be

if any bill is not returned by the governor within a prescribed number of days after it is presented to him, it shall become a law as if he had signed it, unless the legislature, by its adjournment, prevents its return, the adjournment meant is a final adjournment and not a mere recess.<sup>1</sup>] Under a provision of the Constitution of Minnesota, that the governor may approve and sign "within three days of the adjournment of the legislature any act passed during the last three days of the session", it has been held that Sundays were not to be included as a part of the prescribed time;<sup>2</sup> and under the Constitution of New York, which provided that, "if any bill shall not be returned by the governor within ten days, Sundays excepted, after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislature shall, by their adjournment, prevent its return, in which case it shall not be a law",<sup>3</sup> it was held that the governor might sign a bill after the adjournment, at any time within the ten days.<sup>4</sup> [Where

presented after the adjournment. *Lankford v. Somerset Co.*, 73 Md. 105, 20 Atl. 1017, 22 Atl. 412, 11 L. R. A. 491. See upon this question, paper of E. D. Renick and cases cited in it, 32 Am. Law Rev. 208.

As to the power of the governor, derived from long usage, to approve and sign bills after the adjournment of the legislature, see *Solomon v. Cartersville*, 41 Ga. 157.

If in approving a bill the governor signs in the wrong place, he may sign again after adjournment. *Nat. Land and Loan Co. v. Mead*, 60 Vt. 257, 14 Atl. 689.

<sup>1</sup> *State ex rel. Crenshaw v. Joseph*, 175 Ala. 579, 57 So. 942, Ann. Cas. 1914 D, 248.

<sup>2</sup> *Stinson v. Smith*, 8 Minn. 366. See also *Corwin v. Comptroller*, 6 Rich. 390.

The Constitution of Michigan contains a provision similar to that of Minnesota above quoted, except that it provides five days instead of three. Held, that such provision makes a signature good that is attached within the required ten days after passage of bill and not later than five days after adjournment. The question arose in regard to a bill passed less than ten days and more than five days before adjournment, and signed after adjournment, but within ten days after passage

of bill. *Detroit v. Chapin*, 108 Mich. 136, 66 N. W. 587, 37 L. R. A. 391; and upon right of executive to sign bills after adjournment of legislature, see note to this case in L. R. A.

In Nevada, upon bills sent to him during last five days of session, governor may act within ten days after adjournment. *State v. Howell*, 26 Nev. 93, 64 Pac. 466.

In South Carolina a bill sent to the governor on the last day of the first session may be signed by him on the first day of the next regular session, notwithstanding an adjourned session has intervened. *Arnold v. McKellur*, 9 S. C. 335.

In Mississippi if a bill is presented within ten days of the adjournment, it may be approved at any time before the third day of the next session. *State v. Coahoma Co.*, 64 Miss. 358, 11 So. 501.

<sup>3</sup> See *McNeil v. Com.*, 12 Bush, 727.

<sup>4</sup> *People v. Bowen*, 30 Barb. 24, and 21 N. Y. 517. See also *State v. Fagan*, 22 La. Ann. 545; *Solomon v. Commissioners*, 41 Ga. 157; *Darling v. Boesch*, 67 Iowa, 702, 25 N. W. 887; *Seven Hickory v. Ellery*, 103 U. S. 423, 26 L. ed. 435.

It seems that in Nebraska, in a similar provision, by "adjournment" is meant the final adjournment; and if the same session is adjourned for a

the governor at the request of the legislature or of either house thereof has returned a bill before acting upon it, and the bill is again presented to him for his approval or rejection, he has the full period allowed by the Constitution for the return of bills to consider and act upon it.<sup>1</sup> The governor's approval is not complete until the bill has passed beyond his control by the constitutional and customary mode of legislation; and at any time prior to that he may reconsider and retract any approval previously made.<sup>2</sup>

time — in this case two months — the governor must act upon the bill within the specified number of days. *Miller v. Hurford*, 11 Neb. 377, 9 N. W. 477.

Where on the tenth day the governor sent a bill with his objections to the house with which it originated, but the messenger, finding the house had adjourned for the day, returned it to the governor, who retained it, it was held that to prevent the bill becoming a law it should have been left with the proper officer of the house instead of being retained by the governor. *Harpending v. Haight*, 39 Cal. 189.

In response to an unauthorized request, the governor returned a bill without objections. The constitution provided that a bill, if not returned in five days, became law without his signature. Held, that his return was not covered by the provision, and that the bill became a law notwithstanding. *Wolfe v. McCaull*, 76 Va. 876.

<sup>1</sup> *State v. Sessions*, 84 Kan. 856, 115 Pac. 641, Ann. Cas. 1912 A, 796.

<sup>2</sup> *People v. Hatch*, 19 Ill. 283. An act apportioning the representatives was passed by the legislature and transmitted to the governor, who signed his approval thereon by mistake, supposing at the time that he was subscribing one of several other bills then lying before him, and claiming his official attention; his private secretary thereupon reported the bill to the legislature as approved, not by the special direction of the governor, nor with his knowledge or special assent, but merely in his usual routine of customary duty, the governor not being conscious that he had placed his signature to the bill until after information was brought to him of its having

been reported approved; whereupon he sent a message to the speaker of the house to which it was reported, stating that it had been inadvertently signed and not approved, and on the same day completed a veto message of the bill, which was partially written at the time of signing his approval, and transmitted it to the house where the bill originated, having first erased his signature and approval. It was held that the bill had not become a law. It had never passed out of the governor's possession after it was received by him until after he had erased his signature and approval; and the court was of opinion that it did not pass from his control until it had become a law by the lapse of ten days under the Constitution, or by his depositing it with his approval in the office of the secretary of State. It had long been the practice of the governor to report, formerly through the secretary of State, but recently through his private secretary, to the house where bills originated, his approval of them; but this was only a matter of formal courtesy, and not a proceeding necessary to the making or imparting vitality to the law. By it no act could become a law which without it would not be a law. Had the governor returned the bill itself to the house, with his message of approval, it would have passed beyond his control, and the approval could not have been retracted, unless the bill had been withdrawn by consent of the house; and the same result would have followed his filing the bill with the secretary of state with his approval subscribed. See also *Alleghany County v. Warfield*, 100 Md. 516, 60 Atl. 599, 108 Am. St. Rep. 446.

After the governor has delivered a bill to the secretary of state he has lost

His disapproval of a bill is communicated to the house in which it originated, with his reasons; and it is there reconsidered, and may be again passed over the veto by such vote as the Constitution prescribes.<sup>1</sup> [A constitutional provision requiring the governor, if he desires to effect the veto of a bill, to file the bill, with his objections thereto, in the office of the secretary of State, within a pre-

power of recall. *People v. McCullough*, 210 Ill. 488, 71 N. E. 602; *Smith v. Mitchell*, 69 W. Va. 481, 72 S. E. 755, Ann. Cas. 1913 B, 588.

In Arkansas it has been held that the time allowed the governor for the consideration of bills is a matter of privilege, which he may waive; that he may at any time within the period allowed validly sign a bill or return it to the legislature with a communication stating that it may become a law without his signature. *Hunt v. State*, 72 Ark. 241, 79 S. W. 769, 105 Am. St. Rep. 34, 65 L. R. A. 71, 2 Ann. Cas. 33; *Powell v. Hays*, 83 Ark. 448, 104 S. W. 177, 13 Ann. Cas. 220. And that when he signs a bill with the intent of approving it in the manner provided by the Constitution to make it effective, it becomes the law, and his approval cannot be revoked by him or his successor, though the bill remains in the governor's office, and the time fixed by the Constitution for acting upon it has not expired. *Powell v. Hays*, 83 Ark. 448, 104 S. W. 177, 13 Ann. Cas. 220.

The Constitution of Indiana provides (art. 5, § 14) that, "if any bill shall not be returned by the governor within three days, Sundays excepted, after it shall have been presented to him, it shall be a law without his signature, unless the general adjournment shall prevent its return; in which case it shall be a law unless the governor, within five days next after the adjournment, shall file such bill, with his objections thereto, in the office of the secretary of state", &c. Under this provision it was held that where the governor, on the day of the final adjournment of the legislature, and after the adjournment, filed a bill received that day, in the office of the secretary of state, without approval or objections thereto, it thereby became

a law, and he could not file objections afterwards. *Tarleton v. Peggs*, 18 Ind. 24. See *State v. Whisner*, 35 Kan. 271, 10 Pac. 852.

<sup>1</sup> A bill which, as approved and signed, differs in important particulars from the one signed, is no law. *Jones v. Hutchinson*, 43 Ala. 721.

If the governor sends back a bill which has been submitted to him, stating that he cannot act upon it because of some supposed informality in its passage, this is in effect an objection to the bill, and it can only become a law by further action of the legislature, even though the governor may have been mistaken as to the supposed informality. *Birdsall v. Carrick*, 3 Nev. 154.

If an act passed over a veto is duly authenticated otherwise, the absence of the governor's signature will not vitiate it. *Hovey v. State*, 119 Ind. 395, 21 N. E. 21.

In practice the veto power, although very great and exceedingly important in this country, is obsolete in Great Britain, and no king now ventures to resort to it. As the Ministry must at all times be in accord with the House of Commons, — except where the responsibility is taken of dissolving the Parliament and appealing to the people, — it must follow that any bill which the two houses have passed must be approved by the monarch. The approval has become a matter of course, and the governing power in Great Britain is substantially in the House of Commons. 1 Bl. Com. 184-185, and notes.

After the bill has been vetoed it is dead unless repassed by the constitutional majorities, even though it received those majorities on its first passage. *State v. Crounse*, 36 Neb. 835, 55 N. W. 246, 20 L. R. A. 265.

scribed period after the adjournment of the legislature, is mandatory, in respect to both the time and the manner of exercising the power.<sup>1]</sup>

### *Other Powers of the Governor.*

The power of the governor as a branch of the legislative department is almost exclusively confined to the approval of bills. As executive, he communicates to the two houses information concerning the condition of the State, and may recommend measures to their consideration, but he cannot originate or introduce bills. He may convene the legislature in extra session whenever extraordinary occasion seems to have arisen; but their powers when convened are not confined to a consideration of the subjects to which their attention is called by his proclamation or his message, and they may legislate on any subject as at the regular sessions.<sup>2</sup> An exception to this statement exists in those States where, by the express terms of the Constitution, it is provided that when convened in extra session the legislature shall consider no subject except that for which they were specially called together, or which may have been submitted to them by special message of the governor.<sup>3</sup> [Such a requirement is mandatory, and limits the power of the legislature to

<sup>1</sup> *Capito v. Topping*, 65 W. Va. 587, 64 S. E. 845, 22 L. R. A. (N. S.) 1089.

In computing the period after adjournment allowed by the Constitution for the exercise of the power of executive disapproval, a Sunday occurring within the period is to be excluded. *Capito v. Topping*, 65 W. Va. 587, 64 S. E. 845, 22 L. R. A. (N. S.) 1089.

<sup>2</sup> *Long v. State*, 58 Tex. Crim. Rep. 209, 127 S. W. 208, 21 Ann. Cas. 405; *State v. Fair*, 35 Wash. 127, 76 Pac. 731, 102 Am. St. Rep. 897.

The Constitution of Iowa, art. 4, § 11, provides that the governor "may, on extraordinary occasions, convene the General Assembly by proclamation, and shall state to both houses, when assembled, the purpose for which they have been convened." It was held in *Morford v. Unger*, 8 Iowa, 82, that the General Assembly, when thus convened, were not confined in their legislation to the purposes specified in the message. "When lawfully convened, whether in virtue of the provision in the Constitution or the governor's proclamation, it is the

'General Assembly' of the State, in which the full and exclusive legislative authority of the State is vested. Where its business at such session is not restricted by some constitutional provision, the General Assembly may enact any law at a special or extra session that it might at a regular session. Its powers, not being derived from the governor's proclamation, are not confined to the special purpose for which it may have been convened by him."

The Constitution of Washington, Art. 3, § 7, authorizing the governor to call an extra session of the legislature for a particular purpose, which shall be stated in the call, does not restrict legislative action at such session to that purpose, nor has the governor power to do so. *State v. Fair*, 35 Wash. 127, 76 Pac. 731, 102 Am. St. Rep. 897.

<sup>3</sup> Provisions to this effect will be found in the Constitutions of Illinois, Michigan, Missouri, and Nevada; perhaps in some others.

the enactment of such laws as relate to the object stated in the governor's proclamation or message.<sup>1</sup> But the limitation should be strictly construed, and should not be given effect as against the general power of the legislature, unless it clearly inhibits the act in question.<sup>2]</sup>

*When Acts are to take Effect.*

The old rule was that statutes, unless otherwise ordered, took effect from the first day of the session on which they were passed;<sup>3</sup> but this rule was purely arbitrary, based upon no good reason, and frequently working very serious injustice. The present rule is that an act takes effect from the time when the formalities of enactment are actually complete under the Constitution, unless it is otherwise ordered, or unless there is some constitutional or statutory rule on the subject which prescribes otherwise.<sup>4</sup> By the Constitu-

<sup>1</sup> *McClintock v. Phoenix*, 24 Ariz. 155, 207 Pac. 611; *Jones v. State*, 154 Ark. 288, 242 S. W. 377; *Jones v. State*, 151 Ga. 502, 107 S. E. 765; *Wells v. Missouri Pac. R. Co.*, 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847; *Long v. State*, 58 Tex. Crim. Rep. 209, 127 S. W. 208, 21 Ann. Cas. 405.

As to what matters are held embraced in the governor's proclamation or message, see *State v. Shores*, 31 W. Va. 491, 7 S. E. 413; *Baldwin v. State*, 21 Tex. App. 591, 3 S. W. 109; *Wells v. Mo. Pac. R. Co.*, 110 Mo. 286, 19 S. W. 530, 15 L. R. A. 847; *Chicago, B. & Q. R. Co. v. Wolfe*, 61 Neb. 502, 86 N. W. 441; *People v. Curry*, 130 Cal. 82, 62 Pac. 516; *McClintock v. Phoenix*, 24 Ariz. 155, 207 Pac. 611; *Jones v. State*, 154 Ark. 288, 242 S. W. 377; *Jones v. State*, 151 Ga. 502, 107 S. E. 765; *State v. Woolen*, 128 Tenn. 456, 161 S. W. 1006, Ann. Cas. 1915 C, 465; *Long v. State*, 58 Tex. Crim. Rep. 209, 127 S. W. 208, 21 Ann. Cas. 405.

<sup>2</sup> *State v. Woolen*, 128 Tenn. 456, 161 S. W. 1006, Ann. Cas. 1915 C, 465; *Long v. State*, 58 Tex. Crim. Rep. 209, 127 S. W. 208, 21 Ann. Cas. 405.

Confirmation of appointment by the Senate may be made. The limitation is upon legislation. *People v. Blanding*, 63 Cal. 333.

<sup>3</sup> 1 Lev. 91; *Latless v. Holmes*, 4 T. R. 660; *Smith v. Smith*, Mart.

(N. C.) 26; *Hamlet v. Taylor*, 5 Jones L. 36; *Floyd County v. Salmon*, 151 Ga. 313, 106 S. E. 280; *Butts County v. Strahan*, 151 Ga. 417, 107 S. E. 163; *Duffy v. Cook*, 239 Pa. St. 427, 86 Atl. 1076, Ann. Cas. 1915 A, 550. This is changed by 33 Geo. III. c. 13, by which statutes since passed take effect from the day when they receive the royal assent, unless otherwise ordered therein.

<sup>4</sup> *Matthews v. Zane*, 7 Wheat. 164, 5 L. ed. 425; *Rathbone v. Bradford*, 1 Ala. 312; *Branch Bank of Mobile v. Murphy*, 8 Ala. 119; *Heard v. Heard*, 8 Ga. 380; *Goodsell v. Boynton*, 2 Ill. 555; *Dyer v. State*, Meigs, 237; *Parkinson v. State*, 14 Md. 184; *Freeman v. Gaither*, 76 Ga. 741; *Gay v. Engelbretson*, 158 Cal. 21, 109 Pac. 876, 139 Am. St. Rep. 67.

An early Virginia case decides that "from and after the passing of this act" would exclude the day on which it was passed. *King v. Moore*, Jefferson, 9. Same ruling in *Parkinson v. Brandenburg*, 35 Minn. 294, 28 N. W. 919. On the other hand, it is held in some cases that a statute which takes effect from and after its passage, has relation to the first moment of that day. *In re Welman*, 20 Vt. 653; *Mallory v. Hiles*, 4 Met. (Ky.) 53; *Wood v. Fort*, 42 Ala. 641; *Hill v. State*, 5 Lea, 725.

In a North Carolina case it was said: "While a court will hear evidence and

tion of Mississippi,<sup>1</sup> "no law of a general nature, unless otherwise provided, shall be enforced until sixty days after the passage thereof." By the Constitution of Illinois,<sup>2</sup> no act of the General Assembly shall take effect until the first day of July next after its passage, unless in case of emergency (which emergency shall be expressed in the preamble or body of the act) the General Assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct. By the Constitution of Michigan,<sup>3</sup> no public act shall take effect, or be in force, until the expiration of ninety days from the end of the session at which the same is passed, unless the legislature shall otherwise direct by a two-thirds vote of the members elected to each house. These and similar provisions are designed to secure, as far as possible, the public promulgation of the law before parties are bound to take notice of and act under it, and to obviate the injustice of a rule which should compel parties at their peril to know and obey a law of which, in the nature of things, they could not possibly have heard; they give to all parties the full constitutional period in which to become acquainted with the terms of the statutes which are passed, except when the legislature has otherwise directed; and no one is bound to govern his conduct by

determine the precise moment of time when a statute was enacted, whenever this becomes necessary to prevent a wrong or to assert a meritorious right, in the absence of any such evidence or means of proof the statute will be held effective from the first moment of the day of its enactment." *Lloyd v. North Carolina R. Co.*, 151 N. C. 536, 66 S. E. 604, 45 L. R. A. (N. S.) 378. See also *Arnold v. United States*, 9 Cranch, 104, 3 L. ed. 671; *Lapeyre v. United States*, 17 Wall. 191, 21 L. ed. 606; *Kennedy v. Palmer*, 6 Gray, 316; *United States v. Norton*, 97 U. S. 164, 24 L. ed. 907; *Burgess v. Salmon*, 97 U. S. 381, 24 L. ed. 1104; *Louisville v. Savings Bank*, 104 U. S. 469, 26 L. ed. 775; *Arrow v. Hamering*, 39 Ohio St. 573.

Other cases hold that a statute which takes effect from and after its passage has effect from the moment of its approval by the governor. *People v. Clark*, 1 Cal. 406. See *In re Wynne*, Chase Dec. 227.

An act of the legislature takes effect when the governor signs it, unless the Constitution contains some different provision. *Hill v. State*, 5 Lea, 725.

"The general rule followed in the United States is that, in the absence of constitutional or general statutory provision governing the matter, the statute becomes effective on the day of its passage; that is to say, on the day of its approval by the chief executive, or its passage over his veto, or by his nonaction within the time specified in the Constitution for the return of the bill to the legislature, unless the time for the going into effect of the statute is fixed by the statute itself. It is elementary that the statute itself may fix the day or time when it shall take effect." *Floyd County v. Salmon*, 151 Ga. 313, 106 S. E. 280; *Butts County v. Strahan*, 151 Ga. 417, 107 S. E. 163.

<sup>1</sup> Art. 7, § 6. See *State v. Coahoma Co.*, 64 Miss. 358.

<sup>2</sup> Art. 3, § 23. The intention that an act shall take effect sooner must be expressed clearly and unequivocally; it is not to be gathered by intendment and inference. *Wheeler v. Chubbuck*, 16 Ill. 361. See *Hendrickson v. Hendrickson*, 7 Ind. 13.

<sup>3</sup> Art. 4, § 20.

the new law until that period has elapsed.<sup>1</sup> And the fact that, by the terms of the statute, something is to be done under it before the expiration of the constitutional period for it to take effect, will not amount to a legislative direction that the act shall take effect at that time, if the act itself is silent as to the period when it shall go into operation.<sup>2</sup>

[A statute providing that it shall take effect from and after a day named takes effect on the day following the day named.<sup>3</sup>] The Constitution of Indiana provides<sup>4</sup> that "no act shall take effect until the same shall have been published and circulated in the several counties of this State, by authority, except in case of emergency; which emergency shall be declared in the preamble, or in the body of the law." Unless the emergency is thus declared, it is plain that the act cannot take earlier effect.<sup>5</sup> But the courts will not inquire too nicely into the mode of publication. If the laws are distributed in bound volumes, in a manner and shape not substantially contrary to the statute on that subject, and by the proper

<sup>1</sup> *Price v. Hopkin*, 13 Mich. 318.

A provision that "subsequent to the passage of this act" the law should be as declared, does not come into force till after ninety days. *Andrews v. St. Louis Tunnel Co.*, 16 Mo. App. 299. See, however, *Smith v. Morrison*, 22 Pick. 430; *Stine v. Bennett*, 13 Minn. 153. Compare *State v. Bond*, 4 Jones (N. C.), 9.

<sup>2</sup> *Supervisors of Iroquois Co. v. Keady*, 34 Ill. 293. An act for the removal of a county seat provided for taking the vote of the electors of the county upon it on the 17th of March, 1863, at which time the legislature had not adjourned. It was not expressly declared in the act at what time it should take effect, and it was therefore held that it would not take effect until sixty days from the end of the session, and a vote of the electors taken on the 17th of March was void. See also *Rice v. Ruddiman*, 10 Mich. 125; *Rogers v. Vass*, 6 Iowa, 405. And it was also held in the case first named, and in *Wheeler v. Chubbuck*, 16 Ill. 361, that "the direction must be made in a clear, distinct, and unequivocal provision, and could not be helped out by any sort of intendment or implication", and that the act must all take effect at once, and not by piecemeal.

<sup>3</sup> *State ex rel. Harness v. Roney*, 82

*Ohio St.* 376, 92 N. E. 486, 19 Ann. Cas. 918. See also *Floyd County v. Salmon*, 151 Ga. 313, 106 S. E. 280.

<sup>4</sup> Art. 4, § 28.

<sup>5</sup> *Carpenter v. Montgomery*, 7 Blackf. 415; *Hendrickson v. Hendrickson*, 7 Ind. 13; *Mark v. State*, 15 Ind. 98; *State v. Williams*, 173 Ind. 414, 90 N. E. 754, 140 Am. St. Rep. 261, 21 Ann. Cas. 986. The legislature must necessarily in these cases be judge of the existence of the emergency. *Carpenter v. Montgomery*, *supra*.

The Constitution of Tennessee provides that "No law of a general nature shall take effect until forty days after its passage, unless the same, or the caption, shall state that the public welfare requires that it should take effect sooner." Art. 1, § 20.

Where a law has failed to take effect for want of publication, all parties are chargeable with notice of that fact. *Clark v. Janesville*, 10 Wis. 136.

Where an act is by its express terms to take effect after publication in a specified newspaper, every one is bound to take notice of this fact; and if before such publication negotiable paper is issued under it, the purchasers of such paper can acquire no rights thereby. *McClure v. Oxford*, 94 U. S. 429, 24 L. ed. 129; following *George v. Oxford*, 16 Kan. 72.



authority, it will be held sufficient, notwithstanding a failure to comply with some of the directory provisions of the statute on the subject of publication.<sup>1</sup> The Constitution of Wisconsin, on the other hand, provides<sup>2</sup> that "no general law shall be in force until published"; thus leaving the time when it should take effect to depend, not alone upon the legislative direction, but upon the further fact of publication. But what shall be the mode of publication seems to be left to the legislative determination. It has been held, however, that a general law was to be regarded as *published* although printed in the volume of private laws, instead of the volume of public laws, as the statute of the State would require.<sup>3</sup> But an unauthorized publication — as, for example, of an act for the incorporation of a city, in two local papers instead of the State paper — is no publication in the constitutional sense.<sup>4</sup> The Constitution of Louisiana provides that "No law passed by the General Assembly, except the general appropriation act, or act appropriating money for the expenses of the General Assembly, shall take effect until promulgated. A law shall be considered promulgated at the place where the State journal is published, the day after the publication of such law in the State journal, and in all other parts of the State twenty days after such publication." Under similar provisions in the Civil Code, before the adoption of this Constitution, it was held that "the promulgation of laws is an executive function. The mode of promulgation may be prescribed by the legislature, and differs in different countries and at different times. . . . Promulgation is the extrinsic act which gives a law, perfect in itself, executory force. Unless the law prescribes that it shall be executory from its passage, or from a certain date, it is presumed to be executory only from its promulgation."<sup>5</sup> But it is competent for the legislature to provide in an act that it shall take effect from and after its passage; and the act will have operation accordingly, though not published in the official gazette.<sup>6</sup> In Pennsylvania,

<sup>1</sup> *State v. Bailey*, 16 Ind. 46. See further, as to this constitutional provision, *Jones v. Cavins*, 4 Ind. 305.

<sup>2</sup> Art. 7, § 21.

<sup>3</sup> *Matter of Boyle*, 9 Wis. 264.

Under this provision it has been decided that a law establishing a municipal court in a city is a general law. *Matter of Boyle*, *supra*. See *Eitel v. State*, 33 Ind. 201. Also a statute for the removal of a county seat. *State v. Lean*, 9 Wis. 279. Also a statute incorporating a municipality, or authorizing it to issue bonds in aid of

a railroad. *Clark v. Janesville*, 10 Wis. 136. And see *Scott v. Clark*, 1 Iowa, 70.

An inaccuracy in the publication of a statute, which does not change its substance or legal effect, will not invalidate the publication. *Smith v. Hoyt*, 14 Wis. 252.

<sup>4</sup> *Clark v. Janesville*, 10 Wis. 136. See, further, *Mills v. Jefferson*, 20 Wis. 50.

<sup>5</sup> *State v. Ellis*, 17 La. Ann. 390, 392.

<sup>6</sup> *State v. Judge*, 14 La. Ann. 486; *Thomas v. Scott*, 23 La. Ann. 689.

whose Constitution then in force also failed to require publication of laws, the publication was nevertheless held to be necessary before the act could come into operation; but as the doings of the legislature were public, and the journals published regularly, it was held that every enactment must be deemed to be published in the sense necessary, and the neglect to publish one in the pamphlet edition of the laws would not destroy its validity.<sup>1</sup>

The Constitution of Iowa provides that "no law of the General Assembly, passed at a regular session, of a public nature, shall take effect until the fourth day of July next after the passage thereof. Laws passed at a special session shall take effect ninety days after the adjournment of the General Assembly by which they were passed. If the General Assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the State."<sup>2</sup> Under this section it is not competent for the legislature to confer upon the governor the discretionary power which the Constitution gives to that body, to fix an earlier day for the law to take effect.<sup>3</sup>

[The mere commencement of a suit to determine the constitutionality of a statute will not preclude it from going into effect at the time fixed by the Constitution, and this is so whether it has or has not an emergency clause.<sup>4</sup>

Where a State Constitution reserves to the people the initiative power, a law proposed by the initiative will become effective upon the date of its approval by the people, if the Constitution does not otherwise provide, and the legislature is powerless to postpone the time of its taking effect.<sup>5</sup> Though repealing and saving clauses are expressed in the present tense they will take effect at the same time as the rest of the act.<sup>6</sup> Where a Constitution prescribes the time when statutes shall go into effect, a statute is not invalid as a whole because it contains an invalid emergency clause putting it into immediate effect. In such case the statute will go into effect at the time fixed by the Constitution.<sup>7</sup> The declaration in a statute

In Maryland a similar conclusion is reached. *Parkinson v. State*, 14 Md. 184.

<sup>1</sup> *Peterman v. Huling*, 31 Pa. St. 432.

A joint resolution of a general nature requires the same publication as any other law. *State v. School Board Fund*, 4 Kan. 261.

<sup>2</sup> Art. 3, § 26. See *Hunt v. Murray*, 17 Iowa, 313.

<sup>3</sup> *Scott v. Clark*, 1 Iowa, 70; *Pilkey v. Gleason*, 1 Iowa, 522.

<sup>4</sup> *State v. Whisman*, 36 S. D. 260, 154 N. W. 707, L. R. A. 1917 B, 1.

<sup>5</sup> *Bradley v. Union Bridge, etc., Co.*, 185 Fed. 544.

<sup>6</sup> *State v. Williams*, 173 Ind. 414, 90 N. E. 754, 140 Am. St. Rep. 261, 21 Ann. Cas. 986.

<sup>7</sup> *State ex rel. Richards v. Whisman*, 36 S. D. 260, 154 N. W. 707, L. R. A. 1917 B, 1.

An act which merely provides "this act shall take effect on and after its

of immediate emergency existing at the date of its enactment, followed by a provision that it shall take effect thirty days thereafter, is not such a contradiction in terms as to make invalid the emergency provision.<sup>1]</sup>

passage and approval" does not express an emergency under the constitutional requirement that an emergency shall be expressed in the preamble or body of an act, and the act will take effect at the time prescribed by the Constitution. *State v. Pacific Express Co.*, 80 Neb. 823, 115

N. W. 619, 18 L. R. A. (N. S.) 664. See also *Graham v. Dye*, 308 Ill. 283, 139 N. E. 390; *Payne v. Graham*, 118 Me. 251, 107 Atl. 709, 7 A. L. R. 516.

<sup>1</sup> *State ex rel. Case v. Howell*, 85 Wash. 294, 147 Pac. 1159, Ann. Cas. 1916 A, 1231.

## CHAPTER VII

### OF THE CIRCUMSTANCES UNDER WHICH A LEGISLATIVE ENACTMENT MAY BE DECLARED UNCONSTITUTIONAL.

IN the preceding chapters we have examined somewhat briefly the legislative power of the State, and the bounds which expressly or by implication are set to it, and also some of the conditions necessary to its proper and valid exercise. In so doing it has been made apparent that, under some circumstances, it may become the duty of the courts to declare that what the legislature has assumed to enact is void, either from want of constitutional power to enact it, or because the constitutional forms or conditions have not been observed. In the further examination of our subject, it will be important to consider what the circumstances are under which the courts will feel impelled to exercise this high prerogative, and what precautions should be observed before assuming to do so.<sup>1</sup>

It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility. The legislative and judicial are co-ordinate departments of the government, of equal dignity; each is alike supreme in the exercise of its proper functions, and cannot directly or indirectly, while acting within the limits of its authority, be subjected to the control or supervision of the other, without an unwarrantable assumption by that other of power which, by the Constitution, is not conferred upon it. The Constitution apportions the powers of government, but it does not make any one of the three departments subordinate to another, when exercising the

<sup>1</sup> For a very learned discussion of the origin and scope of the American doctrine of constitutional law treating of the power of the courts to declare statutes void because in conflict with the constitution, see a paper by the late Professor James B. Thayer read before the Congress on Jurisprudence and Law Reform, and published in

the October, 1893, number of the "Harvard Law Review." 7 Harv. L. Rev. 129. Other views of this subject are presented by Mr. Richard C. McMurtrie in 33 Am. Law Register (N. S.) 506; by Governor Pennoyer in 28 Am. Law Review, 550 and 856, and by Mr. Allen in the same volume at page 847.

trust committed to it.<sup>1</sup> The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the Constitution as the paramount law, whenever a legislative enactment comes in conflict with it.<sup>2</sup> But the courts sit, not to review or revise the legislative action, but

<sup>1</sup> *Bates v. Kimball*, 2 Chip. 77; *Bailey v. Philadelphia, &c. R. R. Co.*, 4 Harr. 389; *Whittington v. Polk*, 1 H. & J. 236; *Hawkins v. Governor*, 1 Ark. 570; *People v. Governor*, 29 Mich. 320, 18 Am. Rep. 89.

<sup>2</sup> *Rice v. State*, 7 Ind. 332; *Bloodgood v. Mohawk & Hudson Railroad Co.*, 18 Wend. 9; *Mulnix v. Mutual Ben. L. Ins. Co.*, 23 Col. 71, 46 Pac. 123, 33 L. R. A. 827; *Adkins v. Children's Hospital*, 261 U. S. 525, 67 L. ed. 785, 43 Sup. Ct. Rep. 394, 24 A. L. R. 1238; *Chicago, etc., R. Co. v. Gildersleeve*, 219 Mo. 170, 118 S. W. 86, 16 Ann. Cas. 749; *Tuberculosis Hospital Dist. v. Peter*, 253 Mo. 520, 161 S. W. 1155, Ann. Cas. 1915 C, 310; *State v. Taylor*, 33 N. D. 76, 156 N. W. 561, L. R. A. 1918 B, 156, Ann. Cas. 1918 A, 583; *Rio Grande Lumber Co. v. Darke*, 50 Utah, 114, 167 Pac. 241, L. R. A. 1918 A, 1193.

In *Adkins v. Children's Hospital*, 261 U. S. 525, 67 L. ed. 785, 43 Sup. Ct. Rep. 394, 24 A. L. R. 1238, the court said: "This court by an unbroken line of decisions from Chief Justice *Marshall* to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt. But if, by clear and indubitable demonstration, a statute be opposed to the Constitution, we have no choice but to say so. The Constitution, by its own terms, is the supreme law of the land, emanating from the people, the repository of ultimate sovereignty under our form of government. A congressional statute, on the other hand, is the act of an agency of this sovereign authority, and, if it conflict with the Constitution, must fall; for that which

is not supreme must yield to that which is. To hold it invalid (if it be invalid) is a plain exercise of the judicial power, — that power vested in courts to enable them to administer justice according to law. From the authority to ascertain and determine the law in a given case there necessarily results, in case of conflict, the duty to declare and enforce the rule of the supreme law and reject that of an inferior act of legislation which, transcending the Constitution, is of no effect, and binding on no one. This is not the exercise of a substantive power to review and nullify acts of Congress, for no such substantive power exists. It is simply a necessary concomitant of the power to hear and dispose of a case or controversy properly before the court, to the determination of which must be brought the test and measure of the law."

A trial judge in a State court is bound by the mandate of the Federal Constitution to apply that instrument upon all proper occasions and to hold it to be the supreme law of the land, anything in the Constitution or laws of the State to the contrary notwithstanding. *People v. Western Union Telegraph Co.*, 70 Colo. 90, 198 Pac. 146, 15 A. L. R. 326; *People v. Max*, 70 Colo. 100, 198 Pac. 150.

A provision of a State Constitution declaring that decisions of the court of last resort of the State upon constitutional questions may be reviewed by popular vote of the citizens of the State or of one of its municipalities, is void, so far as it relates to decisions upon Federal constitutional questions. *People v. Western Union Telegraph Co.*, 70 Colo. 90, 198 Pac. 146, 15 A. L. R. 326.

to enforce the legislative will; and it is only where they find that the legislature has failed to keep within its constitutional limits, that they are at liberty to disregard its action; and in doing so, they only do what every private citizen may do in respect to the mandates of the courts when the judges assume to act and to render judgments or decrees without jurisdiction. "In exercising this high authority, the judges claim no judicial supremacy; they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the Constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law."<sup>1</sup>

Nevertheless, in declaring a law unconstitutional, a court must necessarily cover the same ground which has already been covered by the legislative department in deciding upon the propriety of enacting the law, and they must indirectly overrule the decision of that co-ordinate department. The task is therefore a delicate one, and only to be entered upon with reluctance and hesitation.<sup>2</sup> It is a solemn act in any case to declare that that body of men to whom the people have committed the sovereign function of making the laws for the commonwealth have deliberately disregarded the limitations imposed upon this delegated authority, and usurped power which the people have been careful to withhold; and it is almost equally so when the act which is adjudged to be unconstitutional appears to be chargeable rather to careless and improvident action, or error in judgment, than to intentional disregard of obligation. But the duty to do this in a proper case, though at one time doubted, and by some persons persistently denied, it is now generally agreed that the courts cannot properly decline,<sup>3</sup> and in its performance

<sup>1</sup> *Lindsay v. Commissioners, &c.*, 2 Bay, 38, 61; *People v. Rucker*, 5 Col. 5; *Russ v. Com.*, 210 Pa. St. 544, 60 Atl. 169, 1 L. R. A. (N. S.) 409, 105 Am. St. Rep. 825.

<sup>2</sup> *Jacksonville v. Bowden*, 67 Fla. 181, 64 So. 769, L. R. A. 1916 D, 913, Ann. Cas. 1915 D, 99; *Atlantic Coast Line R. Co. v. State*, 135 Ga. 545, 69 S. E. 725, 32 L. R. A. (N. S.) 20; *Laughlin v. Portland*, 111 Me. 486, 90 Atl. 318, 51 L. R. A. (N. S.) 1143, Ann. Cas. 1916 C, 734; *Mt. Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine, etc., Ins. Co.*, 111 Md. 561, 75 Atl. 105, 134 Am. St. Rep. 636; *Fenster-*

*wald v. Burk*, 129 Md. 131, 98 Atl. 358, 3 A. L. R. 1562; *Tuberculosis Hospital Dist. v. Peter*, 253 Mo. 520, 161 S. W. 1155, Ann. Cas. 1915 C, 310; *People v. Beakes Dairy Co.*, 222 N. Y. 416, 119 N. E. 115, 3 A. L. R. 1260; *State v. Wetz*, 40 N. D. 299, 168 N. W. 835, 5 A. L. R. 731; *Rio Grande Lumber Co. v. Darke*, 50 Utah, 114, 167 Pac. 241, L. R. A. 1918 A, 1193; *Willis v. Kalmbach*, 109 Va. 475, 64 S. E. 342, 21 L. R. A. (N. S.) 1009; *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917 A, 1244.

<sup>3</sup> *Champion v. Ames*, 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321;

they seldom fail of proper support if they proceed with due caution and circumspection, and under a proper sense as well of their own responsibility, as of the respect due to the action and judgment of the law-makers.<sup>1</sup>

I. In view of the considerations which have been suggested, the rule which is adopted by some courts, that they will not decide a

*Rogers v. Alabama*, 192 U. S. 226, 48 L. ed. 417, 24 Sup. Ct. Rep. 257; *State v. Joseph*, 175 Ala. 519, 57 So. 942, Ann. Cas. 1914 D, 248; *People v. Western Union Telegraph Co.*, 70 Colo. 90, 198 Pac. 146, 15 A. L. R. 326; *Seaboard Air Line R. Co. v. Simon*, 56 Fla. 545, 47 So. 1001, 16 Ann. Cas. 1234, 20 L. R. A. (N. s.) 126; *Davis v. Florida Power Co.*, 64 Fla. 246, 60 So. 759, Ann. Cas. 1914 B, 965; *Jacksonville v. Bowden*, 67 Fla. 181, 64 So. 769, L. R. A. 1916 D, 913, Ann. Cas. 1915 D, 99; *State v. Philips*, 70 Fla. 340, 70 So. 376, Ann. Cas. 1918 A, 138; *Wilkerson v. Rome*, 152 Ga. 762, 110 S. E. 895, 20 A. L. R. 1334; *People v. Wm. Henning Co.*, 260 Ill. 554, 103 N. E. 530, 49 L. R. A. (N. s.) 1206; *Scown v. Czarnecki*, 264 Ill. 305, 106 N. E. 276, L. R. A. 1915 B, 247, Ann. Cas. 1915 A, 772; *People v. Love*, 298 Ill. 304, 131 N. E. 809, 16 A. L. R. 703; *McGuire v. Chicago, etc., R. Co.*, 131 Iowa, 340, 108 N. W. 902, 33 L. R. A. (N. s.) 706; *Salisbury Land & Imp. Co. v. Com.*, 215 Mass. 371, 102 N. E. 619, 46 L. R. A. (N. s.) 1196; *State v. Houghton*, 134 Minn. 226, 158 N. W. 1017, L. R. A. 1917 F, 1050; *Shohoney v. Quincy, etc. R. Co.*, 231 Mo. 131, 132 S. W. 1059, Ann. Cas. 1912 A, 1143; *State v. Williams*, 146 N. C. 618, 61 S. E. 61, 17 L. R. A. (N. s.) 299, 14 Ann. Cas. 562; *Bickett v. Knight*, 169 N. C. 333, 85 S. E. 418, L. R. A. 1915 F, 898, Ann. Cas. 1917 D, 517; *Cass County v. Nixon*, 35 N. D. 601, 161 N. W. 204, L. R. A. 1917 C, 897; *State v. Miller*, 87 Ohio St. 12, 99 N. E. 1078, 44 L. R. A. (N. s.) 712, Ann. Cas. 1913 E, 761; *St. Louis Southwestern R. Co. v. Griffin*, 106 Tex. 477, 171 S. W. 703, L. R. A. 1917 B, 1108; *State v. Howell*, 85 Wash. 294, 147 Pac. 1159, Ann. Cas. 1916 A, 1231; *Bonnett v. Vallier*, 136 Wis. 193, 116 N. W. 885,

128 Am. St. Rep. 1061, 17 L. R. A. (N. s.) 486; *Thoe v. Chicago, etc., R. Co.*, 181 Wis. 456, 195 N. W. 407, 29 A. L. R. 1280.

<sup>1</sup> There are at least two cases in American judicial history where judges have been impeached as criminals for refusing to enforce unconstitutional enactments. One of these — the case of *Trevett v. Weedon*, decided by the Superior Court of Rhode Island in 1786 — is particularly interesting as being the first well-authenticated case in which a legislative enactment was held to be void because of conflict with the State constitution. Mr. Arnold, in his history of Rhode Island, Vol. II. c. 24, gives an account of this case; and the printed brief in opposition to the law, and in defence of the impeached judges, is in possession of the present writer. The act in question was one which imposed a heavy penalty on any one who should refuse to receive on the same terms as specie the bills of a bank chartered by the State, or who should in any way discourage the circulation of such bills. The penalty was made collectible on summary conviction, without jury trial; and the act was held void on the ground that jury trial was expressly given by the colonial charter, which then constituted the constitution of the State. Although the judges were not removed on impeachment, the legislature refused to re-elect them when their terms expired at the end of the year, and supplanted them by more pliant tools, by whose assistance the paper money was forced into circulation, and public and private debts extinguished by means of it. Concerning the other case, we copy from the *Western Law Monthly*, "Sketch of Hon. Calvin Pease", Vol. V. p. 3, June, 1863: "The first session of the Supreme Court [of Ohio] under the

constitution was held at Warren, Trumbull County, on the first Tuesday of June, 1803. The State was divided into three circuits. . . . The Third Circuit of the State was composed of the counties of Washington, Belmont, Jefferson, Columbiana, and Trumbull. At this session of the legislature, Mr. Pease was appointed President Judge of the Third Circuit in April, 1808, and though nearly twenty-seven years old, he was very youthful in his appearance. He held the office until March 4, 1810, when he sent his resignation to Governor Huntingdon. . . . During his term of service upon the bench many interesting questions were presented for decision, and among them the constitutionality of some portion of the act of 1805, defining the duties of justices of the peace; and he decided that so much of the fifth section as gave justices of the peace jurisdiction exceeding \$20, and so much of the twenty-ninth section as prevented plaintiffs from recovering costs in actions commenced by original writs in the Court of Common Pleas, for sums between \$20 and \$50, were repugnant to the Constitution of the United States and of the State of Ohio, and therefore null and void. . . . The clamor and abuse to which this decision gave rise was not in the least mitigated or diminished by the circumstance that it was concurred in by a majority of the judges of the Supreme Court, Messrs. Huntingdon and Tod. . . . At the session of the legislature of 1807-8, steps were taken to impeach him and the judges of the Supreme Court who concurred with him; but the resolutions introduced into the House were not acted upon during the session. But the scheme was not abandoned. At an early day of the next session, and with almost indecent haste, a committee was appointed to inquire into the conduct of the offending judges, and with leave to exhibit articles of impeachment, or report otherwise, as the facts might justify. The committee without delay reported articles of impeachment against Messrs. Pease and Tod, but not against Huntingdon, who in the mean time had been elected governor of the State. . . .

The articles of impeachment were preferred by the House of Representatives on the 23d day of December, 1808. He was summoned at once to appear before the senate as a high court of impeachment, and he promptly obeyed the summons. The managers of the prosecution on the part of the House were Thomas Morris, afterwards senator in Congress from Ohio, Joseph Sharp, James Pritchard, Samuel Marrett, and Othniel Tooker. . . . Several days were consumed in the investigation, but the trial resulted in the acquittal of the respondent." Sketch of Hon. George Tod, August number of same volume: "At the session of the legislature of 1808-9, he was impeached for concurring in decisions made by Judge Pease, in the counties of Trumbull and Jefferson, that certain provisions of the act of the legislature, passed in 1805, defining the duties of justices of the peace, were in conflict with the Constitution of the United States and of the State of Ohio, and therefore void. These decisions of the courts of Common Pleas and of the Supreme Court, it was insisted, were not only an assault upon the wisdom and dignity, but also upon the supremacy of the legislature, which passed the act in question. This could not be endured; and the popular fury against the judges rose to a very high pitch, and the senator from the county of Trumbull in the legislature at that time, Calvin Cone, Esq., took no pains to soothe the offended dignity of the members of that body, or their sympathizing constituents, but pressed a contrary line of conduct. The judges must be brought to justice, he insisted vehemently, and be punished, so that others might be terrified by the example, and deterred from committing similar offences in the future. The charges against Mr. Tod were substantially the same as those against Mr. Pease. Mr. Tod was first tried, and acquitted. The managers of the impeachment, as well as the result, were the same in both cases."

In *State ex rel. Nuveen v. Greer*, 88 Fla. 249, 102 So. 739, 37 A. L. R. 1298, the court said: "Where, in adjudicat-



legislative act to be unconstitutional by a majority of a bare quorum of the judges only, — less than a majority of all, — but will instead postpone the argument until the bench is full, seems a very prudent and proper precaution to be observed before entering upon questions so delicate and so important. The benefit of the wisdom and deliberation of every judge ought to be had under circumstances so grave. Something more than private rights are involved; the fundamental law of the State is in question, as well as the correctness of legislative action; and considerations of courtesy, as well as the importance of the question involved, should lead the court to decline to act at all, where they cannot sustain the legislative action, until a full bench has been consulted, and its deliberate opinion is found to be against it. But this is a rule of propriety, not of constitutional obligation; and though generally adopted and observed, each court will regulate, in its own discretion, its practice in this particular.<sup>1</sup>

ing litigated rights under a statute, it appears beyond all reasonable doubt that the statute is in conflict with some express or implied provision of the Constitution, it is then within the power and duty of the court, in order to give effect to the controlling law, to adjudicate the existence of the conflict between the statute and the organic law, whereupon the Constitution, by its own superior force and authority, eliminates the statute or the portion thereof that conflicts with organic law, and renders it inoperative *ab initio*, so that the Constitution, and not the statute, will be applied by the court in determining the litigated rights."

*In re Thornburgh*, 72 Misc. Rep. 619, 132 N. Y. Supp. 268, Surrogate Fowler, who delivered the opinion of the court, said: "The transcendent power of declaring an act of the Legislature unconstitutional should never in my opinion be assumed by a court of first instance, except possibly in rare cases involving life or liberty, and where the invalidity of the legislative act is apparent on its face. The exercise of a judicial power to declare acts of the legislature void should, I think, be reserved to the graver courts of the State in solemn session *in banc*, or held for the final review of such great questions. Otherwise the pro-

cesses of the government may be disorganized by the action of a single judicial officer possessed of a little brief authority. Such an individual exercise of power tends to bring into contempt with the people an historic jurisdiction, approved by the wisdom of the greatest of mankind — a jurisdiction of fundamental importance to constitutional government when well exercised, and of most evil import when lightly exercised by a single judge animated, perhaps, by some theory squaring with his own conceptions of government or polity. Doubtless the ultimate power to test the validity of legislative enactments by a solemn comparison with delegated constitutional powers is of supreme importance and the keystone of our political fabric. But the power and exercise of the power are distinct." But see *People ex rel. Wogan v. Rafferty*, 77 Misc. Rep. 258, 136 N. Y. Supp. 4; *People v. Pray*, 87 Misc. Rep. 464, 150 N. Y. Supp. 1061; *Syracuse, etc., R. Co. v. Syracuse*, 113 Misc. Rep. 28, 183 N. Y. Supp. 757.

<sup>1</sup> *Briscoe v. Commonwealth Bank of Kentucky*, 8 Pet. 118, 8 L. ed. 887.

It has been intimated that inferior courts should not presume to pass upon constitutional questions, but ought in all cases to treat statutes as

II. Neither will a court, as a general rule, pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. "While courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extra-judicial disquisition is entitled."<sup>1</sup> In any case,

valid. *Ortman v. Greenman*, 4 Mich. 291. But no tribunal can exercise judicial power unless it is to decide according to its judgment; and it is difficult to discover any principle of justice which can require a magistrate to enter upon the execution of a statute when he believes it to be invalid, especially when he must thereby subject himself to prosecution, without any indemnity in the law if it proves to be invalid. Undoubtedly when the highest courts in the land hesitate to declare a law unconstitutional, and allow much weight to the legislative judgment, the inferior courts should be still more reluctant to exercise this power, and a becoming modesty would at least be expected of those judicial officers who have not been trained to the investigation of legal and constitutional questions. But in any case a judge or justice, being free from doubt in his own mind, and unfettered by any judicial decision properly binding upon him, must follow his own sense of duty upon constitutional as well as upon any other questions. See *Miller v. State*, 3 Ohio St. 475; *Pim v. Nicholson*, 6 Ohio St. 176; *Mayberry v. Kelly*, 1 Kan. 116. In *Mayberry v. Kelly*, 1 Kan. 116, it is said: "It is claimed by counsel for the plaintiff in error, that the point raised by the instruction is, that inferior courts and ministerial officers have no right to judge of the constitutionality of a law passed by a legislature. But is this law? If so, a court created to interpret the law must disregard the constitution in forming its opinions. The constitu-

tion is law, — the fundamental law, — and must as much be taken into consideration by a justice of the peace as by any other tribunal. When two laws apparently conflict, it is the duty of all courts to construe them. If the conflict is irreconcilable, they must decide which is to prevail; and the constitution is not an exception to this rule of construction. If a law were passed in open, flagrant violation of the constitution, should a justice of the peace regard the law, and pay no attention to the constitutional provision? If that is his duty in a plain case, is it less so when the construction becomes more difficult?"

<sup>1</sup> *Hoover v. Wood*, 9 Ind. 286, 287; *Ireland v. Turnpike Co.*, 19 Ohio St. 369; *Smith v. Speed*, 50 Ala. 276; *Allor v. Auditors*, 43 Mich. 76, 4 N. W. 492; *Board of Education v. Mayor of Brunswick*, 72 Ga. 353; *Texas v. Interstate Commerce Commission*, 258 U. S. 158, 66 L. ed. 531, 42 Sup. Ct. Rep. 261; *State ex rel. Atlantic Coast Line Railroad Co. v. State Board of Equalizers*, 84 Fla. 592, 94 So. 681, 30 A. L. R. 362; *Ordelheide v. Modern Brotherhood of America*, 226 Mo. 203, 125 S. W. 1105, 32 L. R. A. (N. S.) 965; *McCoy v. Davis*, 38 N. D. 328, 164 N. W. 951; *Olson v. Ross*, 39 N. D. 372, 167 N. W. 385; *Threadgill v. Cross*, 26 Okla. 403, 109 Pac. 558, 138 Am. St. Rep. 964; *Winslow v. Fleischer*, 112 Ore. 23, 228 Pac. 101, 34 A. L. R. 826; *St. Louis S. W. R. Co. v. State*, 113 Tex. 570, 261 S. W. 996, 33 A. L. R. 367. See *People v. Kenney* 96 N. Y. 294.

therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision upon such question will be unavoidable.<sup>1</sup>

III. Nor will a court listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it.<sup>2</sup> On this ground it

<sup>1</sup> *Ex parte* Randolph, 2 Brock. 447; *Frees v. Ford*, 6 N. Y. 176, 178; *Cumberland, &c. R. R. Co. v. County Court*, 10 Bush, 564; *White v. Scott*, 4 Barb. 56; *Mobile & Ohio Railroad Co. v. State*, 29 Ala. 573; *Kansas City v. Union P. Ry. Co.*, 59 Kan. 427, 53 Pac. 468, 52 L. R. A. 321, aff. *sub nom.* *Clark v. Kansas City* in 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; *Berea College v. Kentucky*, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; *Siler v. Louisville, etc., R. Co.*, 213 U. S. 175, 53 L. ed. 753, 29 Sup. Ct. Rep. 451; *Light v. United States*, 220 U. S. 523, 55 L. ed. 570, 31 Sup. Ct. Rep. 485; *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 65 L. ed. 516, 41 Sup. Ct. Rep. 298, 14 A. L. R. 1045; *Adkins v. Children's Hospital*, 261 U. S. 525, 67 L. ed. 785, 43 Sup. Ct. Rep. 394, 24 A. L. R. 1238; *Pensacola Electric Co. v. Soderlind*, 60 Fla. 164, 53 So. 722, Ann. Cas. 1912 B, 1251; *Rhinehart v. State*, 121 Tenn. 420, 117 S. W. 508, 17 Ann. Cas. 254.

The constitutional question may be first raised in the court of review. *Monticello D. Co. v. Mayor of Baltimore*, 90 Md. 416, 45 Atl. 210. For the contrary doctrine, see *Chimgay v. People*, 78 Ill. 570; *Hopper v. Chicago, &c. Ry. Co.*, 91 Iowa, 639, 60 N. W. 487; *Delaney v. Brett*, 51 N. Y. 78.

<sup>2</sup> *People v. Rensselaer, &c. R. R. Co.*, 15 Wend. 113, 30 Am. Dec. 33; *Smith v. Inge*, 80 Ala. 283; *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; *Albany County Super's. v. Stanley*, 105 U. S. 305, 26

L. ed. 1044; *Brown v. Ohio Valley R. Co.*, 79 Fed. 176; *Pittsburg, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 71 Am. St. 301; *Hooker v. Burr*, 194 U. S. 415, 48 L. ed. 1046, 24 Sup. Ct. Rep. 706; *District of Columbia v. Brooke*, 214 U. S. 138, 53 L. ed. 941, 29 Sup. Ct. Rep. 560; *Citizens National Bank v. Kentucky*, 217 U. S. 443, 54 L. ed. 832, 30 Sup. Ct. Rep. 532; *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 54 L. ed. 883, 30 Sup. Ct. Rep. 578; *Louisville, etc., R. Co. v. Finn*, 235 U. S. 601, 59 L. ed. 379, 35 Sup. Ct. Rep. 146; *Rail, etc., Coal Co. v. Yapple*, 236 U. S. 338, 59 L. ed. 607, 35 Sup. Ct. Rep. 359; *Buchanan v. Warley*, 245 U. S. 60, 62 L. ed. 149, 38 Sup. Ct. Rep. 16, 14 A. L. R. 1918 C, 210, Ann. Cas. 1918 A, 1201; *Heald v. District of Columbia*, 259 U. S. 114, 66 L. ed. 852, 42 Sup. Ct. Rep. 434; *Board of Trade v. Olsen*, 262 U. S. 1, 67 L. ed. 839, 43 Sup. Ct. Rep. 470; *Massachusetts v. Mellon*, 262 U. S. 447, 67 L. ed. 1078, 43 Sup. Ct. Rep. 597; *State v. Sinchuk*, 96 Conn. 605, 115 Atl. 33, 20 A. L. R. 1515; *State v. Philips*, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918 A, 138; *State ex rel. Atlantic Coast Line Railroad Co. v. State Board of Equalizers*, 84 Fla. 592, 94 So. 681, 30 A. L. R. 362; *Cooper v. Rollins*, 152 Ga. 588, 110 S. E. 726, 20 A. L. R. 1105; *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; *State Public Utilities Commission v. Chicago, etc., R. Co.*, 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917 C, 50; *Knight, etc., Co. v. Miller*, 172 Ind. 27, 87 N. E. 823, 18

has been held that the objection that a legislative act was unconstitutional, because divesting the rights of remainder-men against their will, could not be successfully urged by the owner of the particular estate, and could only be made on behalf of the remainder-men themselves.<sup>1</sup> And a party who has assented to his property being taken under a statute cannot afterwards object that the statute is in violation of a provision in the Constitution designed for the protection of private property.<sup>2</sup> The statute is assumed to be valid, until some one complains whose rights it invades. "*Prima facie*, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation, and calls in the aid of the judicial power to pronounce it void, as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well-established

Ann. Cas. 1146; *Hunter v. Colfax Consol. Coal Co.*, 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917 D, 15, Ann. Cas. 1917 E, 803; *Iowa Life Ins. Co. v. Board of Supervisors*, 190 Iowa, 777, 180 N. W. 721; *State v. McClellan*, 155 La. 37, 98 So. 748, 31 A. L. R. 527; *New York Life Ins. Co. v. Hardison*, 199 Mass. 190, 85 N. E. 410, 127 Am. St. Rep. 478; *Wiles v. Williams*, 232 Mo. 56, 133 S. W. 1, 34 L. R. A. (N. S.) 1060; *State v. Blake*, 241 Mo. 100, 144 S. W. 1094, Ann. Cas. 1913 C, 1283; *Greene County v. Lydy*, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917 C, 274; *Cram v. Chicago, etc., R. Co.*, 84 Neb. 607, 122 N. W. 31, 21 L. R. A. (N. S.) 1022; *Urbach v. Omaha*, 101 Neb. 314, 163 N. W. 397, L. R. A. 1917 E, 1163; *Gay v. District Ct.*, 41 Nev. 330, 171 Pac. 156, 3 A. L. R. 224; *People v. Beakes Dairy Co.*, 222 N. Y. 416, 119 N. E. 115, 3 A. L. R. 1260; *People v. La Fetra*, 230 N. Y. 429, 130 N. E. 601, 16 A. L. R. 152; *American Exchange National Bank v. Lacy*, 188 N. C. 25, 123 S. E. 475, 36 A. L. R. 680; *State v. Taylor*, 33 N. D. 76, 156 N. W. 561, L. R. A. 1918 B, 156, Ann. Cas. 1918 A, 583; *State v. Packard*, 35 N. D. 298, 160 N. W. 150, L. R. A. 1917 B, 710; *Olson v. Ross*, 39 N. D. 372, 167 N. W. 385; *Prentiss v. Dittmer*, 93 Ohio St. 314, 112 N. E. 1021 L. R. A. 1917 B, 191;

*Com. v. Dollar Sav. Bank*, 259 Pa. St. 138, 102 Atl. 569, 1 A. L. R. 1048; *Pugh v. Pugh*, 25 S. D. 7, 124 N. W. 959, 32 L. R. A. (N. S.) 954; *State v. Candland*, 36 Utah, 406, 104 Pac. 285, 140 Am. St. Rep. 834; *State v. Haskell*, 84 Vt. 429, 79 Atl. 852, 34 L. R. A. (N. S.) 286; *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S. E. 141, 12 A. L. R. 1121; *State v. Bowen*, 86 Wash. 23, 149 Pac. 330, Ann. Cas. 1917 B, 625; *State v. Bonham*, 93 Wash. 489, 161 Pac. 377, L. R. A. 1917 D. 996. See also *Kansas City v. Clark*, 59 Kan. 427, 53 Pac. 468, 52 L. R. A. 321.

"A litigant can be heard to question the validity of a statute only when and in so far as it is applied to his disadvantage." *Rindge Co. v. Los Angeles County*, 262 U. S. 700, 67 L. ed. 1186, 43 Sup. Ct. Rep. 689, citing *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, 289, 66 L. ed. 239, 42 Sup. Ct. Rep. 106.

<sup>1</sup> *Sinclair v. Jackson*, 8 Cow. 543. See also *Smith v. McCarthy*, 56 Pa. St. 359; *Antoni v. Wright*, 22 Gratt. 857; *Marshall v. Donovan*, 10 Bush, 681.

<sup>2</sup> *Embury v. Conner*, 3 N. Y. 511; *Baker v. Braman*, 6 Hill, 47; *Mobile & Ohio Railroad Co. v. State*, 29 Ala. 586; *Haskell v. New Bedford*, 108 Mass. 208.

principles of law in the conclusion that such an act is not void, but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers. To this extent only is it necessary to go, in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose."<sup>1</sup>

IV. Nor can a court declare a statute unconstitutional and void, solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution.<sup>2</sup> It is true there are some reported cases, in which judges have been understood to intimate a doctrine different from what is here asserted;

<sup>1</sup> *Wellington, Petitioner*, 16 Pick. 87, 96. And see *Hingham, &c. Turnpike Co. v. Norfolk Co.*, 6 Allen, 353; *De Jarnette v. Haynes*, 23 Miss. 600; *Sinclair v. Jackson*, 8 Cow. 543, 579; *Heyward v. Mayor, &c. of New York*, 8 Barb. 486; *Matter of Albany St.*, 11 Wend. 149; *Williamson v. Carlton*, 51 Me. 449; *State v. Rich*, 20 Miss. 393; *Jones v. Black*, 48 Ala. 540; *Com. v. Wright*, 79 Ky. 22; *Burnside v. Lincoln Co. Ct.*, 86 Ky. 423, 6 S. W. 276.

In *New York v. Reardon*, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, the court said: "Unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all." See also *Mohall Farmers' Elevator Co. v. Hall*, 44 N. D. 430, 167 N. W. 131.

<sup>2</sup> See *State v. Harrington*, 68 Vt. 622, 35 Atl. 515, 34 L. R. A. 100; *Com. v. Moir*, 199 Pa. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. 801; *Champion v. Ames*, 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321; *McCray*

*v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; *Hirth-Krause Co. v. Cohen*, 177 Ind. 1, 97 N. E. 1, Ann. Cas. 1914 C, 708; *Schmitt v. F. W. Cook Brewing Co.*, 187 Ind. 623, 120 N. E. 19, 3 A. L. R. 270; *Hunter v. Colfax Consol. Coal Co.*, 175 Iowa, 245, 154 N. W. 145, L. R. A. 1917 D, 15, Ann. Cas. 1917 E, 803; *Schaake v. Dolley*, 85 Kan. 598, 118 Pac. 80, 37 L. R. A. (N. S.) 877, Ann. Cas. 1913 A 254; *Richardson v. McChesney*, 128 Ky. 363, 108 S. W. 322, 129 Am. St. Rep. 299; *Bangor v. Pierce*, 106 Me. 527, 76 Atl. 945, 138 Am. St. Rep. 363, 29 L. R. A. (N. S.) 770; *Daugherty v. Thomas*, 174 Mich. 371, 140 N. W. 615, 45 L. R. A. (N. S.) 699; *State v. Mankato*, 117 Minn. 458, 136 N. W. 264, 41 L. R. A. (N. S.) 111; *State v. Mailen*, 140 Minn. 112, 167 N. W. 345, 1 A. L. R. 331; *State v. Swagerty*, 203 Mo. 517, 102 S. W. 483; 120 Am. St. Rep. 671, 10 L. R. A. (N. S.) 601, 11 Ann. Cas. 725; *Ex parte Kair*, 28 Nev. 127, 80 Pac. 463, 113 Am. St. Rep. 817, 6 Ann. Cas. 893; *State v. Park*, 42 Nev. 386, 178 Pac. 389, 3 A. L. R. 75; *People v. Beakes Dairy Co.*, 222 N. Y. 416, 119 N. E. 115, 3 A. L. R. 1260; *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187; *Pennsylvania R. Co. v. Ewing*, 241 Pa. St. 581, 88 Atl. 775, 49 L. R. A. (N. S.) 977; *Rio Grande Lumber Co. v.*

but it will generally be found, on an examination of those cases, that what is said is rather by way of argument and illustration, to show the unreasonableness of putting upon constitutions such a construction as would permit legislation of the objectionable character then in question, and to induce a more cautious and patient examination of the statute, with a view to discover in it, if possible, some more just and reasonable legislative intent, than as laying down a rule by which courts would be at liberty to limit, according to their own judgment and sense of justice and propriety, the extent of legislative power in directions in which the Constitution had imposed no restraint. Mr. Justice *Story*, in one case, in examining the extent of power granted by the charter of Rhode Island, which authorized the General Assembly to make laws in the most ample manner, "so as such laws, &c., be not contrary and repugnant unto, but as near as may be agreeable to, the laws of England, considering the nature and constitution of the place and people there", expresses himself thus: "What is the true extent of the power thus granted must be open to explanation as well by usage as by construction of the terms in which it is given. In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice, and without offence. Even if such authority could be deemed to have been confided by the charter to the General Assembly of Rhode Island, as an exercise of transcendental sovereignty before the Revolution, it can scarcely be imagined that that great event could have left the people of that State subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be war-

Darke, 50 Utah, 114, 167 Pac. 241, L. R. A. 1918 A, 1193; Ward Lumber Co. v. Henderson-White Mfg. Co., 107 Va. 626, 59 S. E. 476, 17 L. R. A. (N. S.) 324; *In re Milecke*, 52 Wash. 312, 100 Pac. 743, 132 Am. St. Rep. 968, 21 L. R. A. (N. S.) 259.

A court will not declare an employees' indemnity act invalid on the ground that the scheme it provides is

unduly cumbersome; that its administration will prove unnecessarily costly and burdensome to those whose interests are affected by it, and will lead to private and public abuses and consequent evils more dangerous to the state than the evil it is sought to correct. *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

ranted in assuming that the power to violate and disregard them — a power so repugnant to the common principles of justice and civil liberty — lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention.” “We know of no case in which a legislative act to transfer the property of A. to B. without his consent has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced.”<sup>1</sup> The question discussed by the learned judge in this case is perceived to have been, What is the scope of a grant of legislative power to be exercised in conformity with the laws of England? Whatever he says is pertinent to that question; and the considerations he suggests are by way of argument to show that the power to do certain unjust and oppressive acts was not covered by the grant of legislative power. It is not intimated that if they were within the grant, they would be impliedly prohibited because unjust and oppressive.

In another case, decided in the Supreme Court of New York, one of the judges, in considering the rights of the city of New York to certain corporate property, used this language: “The inhabitants of the city of New York have a vested right in the City Hall, markets, water-works, ferries, and other public property, which cannot be

<sup>1</sup> *Wilkinson v. Leland*, 2 Pet. 627, 657, 7 L. ed. 542, 553. See also what is said by the same judge in *Terrett v. Taylor*, 9 Cranch, 43, 3 L. ed. 650.

“It is clear that statutes passed against plain and obvious principles of common right and common reason are absolutely null and void, so far as they are calculated to operate against those principles.” *Ham v. McClaws*, 1 Bay, 98. But the question in that case was one of construction; whether the court should give to a statute a construction which would make it operate against common right and common reason.

In *Bowman v. Middleton*, 1 Bay, 282, the court held an act which divested a man of his freehold and passed it over to another, to be void “as against common right as well as against Magna Charta.”

In *Regents of University v. Williams*, 9 Gill & J. 365, 31 Am. Dec. 72, it was said that an act was void as opposed to fundamental principles of right and justice inherent in the nature and spirit of the social compact. But the court had already decided that the act was opposed, not only to the constitution of the State, but to that of the United States also. See *Mayor, &c. of Baltimore v. State*, 15 Md. 376.

In *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354, a statute forbidding payments in store orders was held void as preventing persons *sui juris* from making their own contracts. A similar rule was laid down in *State v. Fire Creek, &c. Co.*, 33 W. Va. 188, 10 S. E. 288, where mining companies were forbidden to sell to employees merchandise at a higher rate than they sold it to others.

taken from them any more than their individual dwellings or store-houses. Their rights, in this respect, rest *not merely upon the constitution*, but upon the great principles of eternal justice which lie at the foundation of all free governments.”<sup>1</sup> The great principles of eternal justice which affected the particular case had been incorporated in the Constitution; and it therefore became unnecessary to consider what would otherwise have been the rule; nor do we understand the court as intimating any opinion upon that subject. It was sufficient for the case, to find that the principles of right and justice had been recognized and protected by the Constitution, and that the people had not assumed to confer upon the legislature a power to deprive the city of rights which did not come from the Constitution, but from principles antecedent to and recognized by it.

So it is said by *Hosmer*, Ch. J., in a Connecticut case: “With those judges who assert the omnipotence of the legislature in all cases where the Constitution has not interposed an explicit restraint, I cannot agree. Should there exist — what I know is not only an incredible supposition, but a most remote improbability — a case of direct infraction of vested rights, too palpable to be questioned and too unjust to admit of vindication, I could not avoid considering it as a violation of the social compact, and within the control of the judiciary. If, for example, a law were made without any cause to deprive a person of his property, or to subject him to imprisonment, who would not question its legality, and who would aid in carrying it into effect? On the other hand, I cannot harmonize with those who deny the power of the legislature to make laws, in any case, which, with entire justice, operate on antecedent legal rights. A retrospective law may be just and reasonable, and the right of the legislature to enact one of this description I am not speculatist enough to question.”<sup>2</sup> The cases here supposed of unjust and tyrannical enactments would probably be held not to be within the power of any legislative body in the Union. One of them would be clearly a bill of attainder; the other, unless it was in the nature of remedial legislation, and susceptible of being defended on that theory, would be an exercise of judicial power, and therefore

<sup>1</sup> *Benson v. Mayor, &c. of New York*, 10 Barb. 223, 244.

<sup>2</sup> *Goshen v. Stonington*, 4 Conn. 209, 225.

In *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917 A, 1244, the court said: “We do not wish to be understood as saying that it is impossible for the legislature to exceed its legitimate powers, unless expressly

restrained by the Constitution. It is not omnipotent. It cannot, for instance, reverse a judicial decision, although it may repeal the law supporting such decision; neither can it take a citizen's property or levy taxes, for purposes purely private. Because those things do not fall within the legitimate sphere of government.”



in excess of legislative authority, because not included in the apportionment of power made to that department. No question of implied prohibition would arise in either of these cases; but if the grant of power had covered them, and there had been no express limitation, there would, as it seems to us, be very great probability of unpleasant and dangerous conflict of authority, if the courts were to deny validity to legislative action on subjects within their control, on the assumption that the legislature had disregarded justice or sound policy. The moment a court ventures to substitute its own judgment for that of the legislature, in any case where the Constitution has vested the legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion alone will measure the extent of its interference.<sup>1</sup>

The rule of law upon this subject appears to be, that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people.<sup>2</sup> If this fail, the people in their

<sup>1</sup> "If the legislature should pass a law in plain and unequivocal language, within the general scope of their constitutional powers, I know of no authority in this government to pronounce such an act void, merely because, in the opinion of the judicial tribunals, it was contrary to the principles of natural justice; for this would be vesting in the court a latitudinarian authority which might be abused, and would necessarily lead to collisions between the legislative and judicial departments, dangerous to the well-being of society, or at least not in harmony with the structure of our ideas of natural government." Per *Rogers, J.*, in *Commonwealth v. McCloskey*, 2 Rawle, 374.

"All the courts can do with odious statutes is to chasten their hardness by construction. Such is the imperfection of the best human institutions, that, mould them as we may, a large

discretion must at last be reposed somewhere. The best and in many cases the only security is in the wisdom and integrity of public servants and their identity with the people. Governments cannot be administered without committing powers in trust and confidence." *Beebe v. State*, 6 Ind. 501, 528, per *Stuart, J.* And see *Johnston v. Commonwealth*, 1 Bibb, 603; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194; *State v. Kruttschnitt*, 4 Nev. 178; *Walker v. Cincinnati*, 21 Ohio St. 14; *Hills v. Chicago*, 60 Ill. 86; *Ballentine v. Mayor, &c.*, 15 Lea, 633; *State v. Traders' Bank*, 41 La. Ann. 329, 6 So. 582.

<sup>2</sup> *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; *Richardson v. McChesney*, 128 Ky. 363, 108 S. W. 322, 129 Am. St. Rep. 299; *Ex parte Kair*, 28 Nev. 127, 80 Pac. 463, 113 Am. St. Rep. 817, 6 Ann. Cas. 893;

sovereign capacity can correct the evil; but courts cannot assume their rights.<sup>1</sup> The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power;<sup>2</sup> [nor can it consider the motive which inspired

*Pennsylvania R. Co. v. Ewing*, 241 Pa. St. 581, 88 Atl. 775, 49 L. R. A. (N. S.) 977.

<sup>1</sup> *Bennett v. Boggs*, Baldw. 60, 74; *Walker v. Cincinnati*, 21 Ohio St. 14.

"If the act itself is within the scope of their authority, it must stand, and we are bound to make it stand, if it will upon any intendment. It is its effect, not its purpose, which must determine its validity. Nothing but a clear violation of the constitution — a clear usurpation of power prohibited — will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void." *Pennsylvania R. R. Co. v. Riblet*, 66 Pa. St. 164, 169. See *Weber v. Reinhard*, 73 Pa. St. 370; *Chicago, &c. R. R. Co. v. Smith*, 62 Ill. 268; *People v. Albertson*, 55 N. Y. 50, per *Allen*, J.; *Martin v. Dix*, 52 Miss. 52, 64, per *Chalmers*, J.; *Bennett v. Boggs*, Baldw. 60, 74; *United States v. Brown*, 1 Deady, 566; *Commonwealth v. Moore*, 25 Gratt. 951; *Danville v. Pace*, 25 Gratt. 1, 8; *Reithmiller v. People*, 44 Mich. 280, 6 N. W. 667; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Eastman v. State*, 109 Ind. 278, 10 N. E. 97.

<sup>2</sup> *Perkins*, J., in *Madison & Indianapolis Railroad Co. v. Whiteneck*, 8 Ind. 217; *Bull v. Read*, 13 Gratt. 78, per *Lee*, J.; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 55 L. ed. 107, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912 B, 1312; *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; *Mutual Loan Co. v. Martell*, 222 U. S. 225, 56 L. ed. 175, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913 B, 529; *Brushaber v. Union Pac. R. Co.*, 240 U. S. 1, 60 L. ed. 493, 36 Sup. Ct. Rep. 236, L. R. A. 1917 D, 414, Ann. Cas. 1917 B, 713; *Green v. Frazier*, 253 U. S. 233, 64 L. ed. 878, 40 Sup. Ct. Rep. 499; *Thompson v. Van Lear*, 77 Ark. 506, 92 S. W. 773, 5 L. R. A. (N. S.) 588, 7 Ann. Cas. 154; *People v.*

*Hupp*, 53 Colo. 80, 123 Pac. 651, 41 L. R. A. (N. S.) 792, Ann. Cas. 1914 A, 1177; *Young v. Lemieux*, 79 Conn. 434, 65 Atl. 436, 600, 129 Am. St. Rep. 193, 20 L. R. A. (N. S.) 160, 8 Ann. Cas. 452; *Clendaniel v. Conrad*, 3 Boyce (Del.) 549, 83 Atl. 1036, Ann. Cas. 1915 B, 968; *Delaney v. Plunkett*, 146 Ga. 547, 91 S. E. 561, L. R. A. 1917 D, 926, Ann. Cas. 1917 E, 685; *Atlantic Coast Line R. Co. v. Coachman*, 59 Fla. 130, 52 So. 377, 20 Ann. Cas. 1047; *Davis v. Florida Power Co.*, 64 Fla. 246, 60 So. 759, Ann. Cas. 1914 B, 965; *Wilkerson v. Rome*, 152 Ga. 762, 110 S. E. 895, 20 A. L. R. 1334; *Pike v. State Board of Land Com'rs*, 19 Idaho, 268, 113 Pac. 447, Ann. Cas. 1912 B, 1344; *Perkins v. Cook County*, 271 Ill. 449, 111 N. E. 580, Ann. Cas. 1917 A, 27; *Springfield Gas, etc., Co. v. Springfield*, 292 Ill. 236, 126 N. E. 739, 18 A. L. R. 929; *School Town of Andrews v. Heiney*, 178 Ind. 1, 98 N. E. 628, 43 L. R. A. (N. S.) 1023; *Pittsburg, etc., R. Co. v. State*, 180 Ind. 245, 102 N. E. 25, L. R. A. 1915 D, 458; *Schmitt v. F. W. Cook Brewing Co.*, 187 Ind. 623, 120 N. E. 19, 3 A. L. R. 270; *Bopp v. Clark*, 165 Iowa, 697, 147 N. W. 172, 52 L. R. A. (N. S.) 493, Ann. Cas. 1916 E, 417; *Wheeler v. Weightman*, 96 Kan. 50, 149 Pac. 977, L. R. A. 1916 A, 846; *Kentucky State Journal Co. v. Workmen's Compensation Board*, 161 Ky. 562, 170 S. W. 437, 1166, L. R. A. 1916 A, 389, Ann. Cas. 1916 B, 1273; *State v. Mayo*, 106 Me. 62, 75 Atl. 295, 26 L. R. A. (N. S.) 502, 20 Ann. Cas. 512; *Dirken v. Great Northern Paper Co.*, 110 Me. 374, 86 Atl. 320, Ann. Cas. 1914 D, 396; *State v. Mailen*, 140 Minn. 112, 167 N. W. 345, 1 A. L. R. 331; *State v. J. J. Newman Lumber Co.*, 102 Miss. 802, 59 So. 923, 45 L. R. A. (N. S.) 851; *State v. Senatobia Blank Book, etc., Co.*, 115 Miss. 254, 76 So. 258, Ann. Cas. 1918 B, 953; *State v. Scullin-Gallagher Iron, etc.,*

Co., 268 Mo. 178, 186 S. W. 1007, Ann. Cas. 1918 E, 620; *Hill v. Ray*, 52 Mont. 378, 158 Pac. 826, L. R. A. 1917 A, 495, Ann. Cas. 1917 E, 210; *Schultz v. State*, 89 Neb. 34, 130 N. W. 972, 33 L. R. A. (N. S.) 403, Ann. Cas. 1912 C, 495; *Freadrich v. State*, 89 Neb. 343, 131 N. W. 618, 34 L. R. A. (N. S.) 650; *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47, 1 Ann. Cas. 66; *Worthington v. District Ct.*, 37 Nev. 212, 142 Pac. 230, L. R. A. 1916 A, 696, Ann. Cas. 1916 E, 1097; *People v. Griswold*, 213 N. Y. 92, 106 N. E. 929, L. R. A. 1915 D, 538; *People v. Charles Schweinler Press*, 214 N. Y. 395, 108 N. E. 639, L. R. A. 1918 A, 1124, Ann. Cas. 1916 D, 1059; *Moose v. Alexander County*, 172 N. C. 372, 90 S. E. 441, Ann. Cas. 1917 E, 1183; *State v. Taylor*, 33 N. D. 76, 156 N. W. 561, L. R. A. 1918 B, 156, Ann. Cas. 1918 A, 583; *State v. Miller*, 87 Ohio St. 12, 99 N. E. 1078, 44 L. R. A. (N. S.) 712, Ann. Cas. 1913 E, 761; *Wessel v. Timberlake*, 95 Ohio St. 21, 116 N. E. 43, Ann. Cas. 1918 B, 402; *Winston v. Moore*, 244 Pa. St. 447, 91 Atl. 520, L. R. A. 1915 A, 1190, Ann. Cas. 1915 C, 498; *Rio Grande Lumber Co. v. Darke*, 50 Utah, 114, 167 Pac. 241, L. R. A. 1918 A, 1193; *Stillman v. Lynch*, 56 Utah, 540, 192 Pac. 272, 12 A. L. R. 552; *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893; *State v. Bonham*, 93 Wash. 489, 161 Pac. 377, L. R. A. 1917 D, 996; *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917 A, 1244; *First Wisconsin National Bank v. John*, 179 Wis. 117, 190 N. W. 822, 26 A. L. R. 349.

In *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561, Chief Justice *White*, in delivering the opinion of the court, said: "Whilst, as a result of our written Constitution it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore, in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the founda-

tion of the government where an act which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that, in our constitutional system, the judiciary was not only charged with the duty of upholding the Constitution, but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial, and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation."

In the absence of constitutional restraint "the legislative department of a State government has exclusive and ample power to determine the State's policy. When the legislature, acting within its constitutional powers, has spoken upon a particular subject, its utterance is the public policy of the State upon that subject, and the courts are without power to read into the Constitution a restraint of the legislature with respect thereto. The prohibition must be expressed, or necessarily implied from that which is expressed." *Cavender v. Hewitt*, 145 Tenn. 471, 239 S. W. 767, 22 A. L. R. 755.

A statute cannot be declared void because against public policy. *Julien v. Model B. & L. I. Co.*, 116 Wis. 79, 92 N. W. 561. So in Canada it is held that an act within the scope of legislative power cannot be objected to as contrary to reason and justice. *Re Goodhue*, 19 Ch'y (Ont.), 366; *Toronto, &c. R. Co. v. Crookshank*, 4 Q. B. (Ont.) 318.

Ordinarily the courts will not substitute their opinions for the judgment of the legislature as to the reasonableness of an act fixing the rate of speed at which motor vehicles may be lawfully driven. *Schultz v. State*, 89 Neb. 34, 130 N. W. 972, 33 L. R. A. (N. S.) 403, Ann. Cas. 1912 C, 495.

the passage of a statute in determining the question of its validity.<sup>1]</sup> Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being *prima facie* valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the Constitution, and the case shown to come within them.<sup>2</sup>

<sup>1</sup> *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; *Calder v. People of Michigan*, 218 U. S. 591, 54 L. ed. 1163, 31 Sup. Ct. Rep. 122; *Hamilton v. Kentucky Distilleries, etc., Co.*, 251 U. S. 146, 64 L. ed. 194, 40 Sup. Ct. Rep. 106; *Smith v. Kansas City Title, etc., Co.*, 255 U. S. 180, 65 L. ed. 577, 41 Sup. Ct. Rep. 243; *McDonald v. Doust*, 11 Idaho, 14, 81 Pac. 60, 69 L. R. A. 220; *Schmidt v. Indianapolis*, 168 Ind. 631, 80 N. E. 632, 120 Am. St. Rep. 386, 14 L. R. A. (N. S.) 787; *State v. Taylor*, 33 N. D. 76, 156 N. W. 561, L. R. A. 1918 B, 156, Ann. Cas. 1918 A, 583; *Com. v. Herr*, 229 Pa. St. 132, 78 Atl. 68, Ann. Cas. 1912 A, 422; *State v. Bayer*, 34 Utah, 257, 97 Pac. 129, 19 L. R. A. (N. S.) 297; *Tilly v. Mitchell & Lewis Co.*, 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007.

<sup>2</sup> *Sill v. Village of Corning*, 15 N. Y. 297; *Varick v. Smith*, 5 Paige, 136; *Cochran v. Van Surlay*, 20 Wend. 365; *Morris v. People*, 13 Denio, 381; *Wynehamer v. People*, 13 N. Y. 378; *People v. Supervisors of Orange*, 17 N. Y. 235; *Dow v. Norris*, 4 N. H. 16; *Derby Turnpike Co. v. Parks*, 10 Conn. 522, 543; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210; *Holden v. James*, 11 Mass. 396; *Adams v. Howe*, 14 Mass. 340; 7 Am. Dec. 216; *Norwich v. County Commissioners*, 13 Pick. 60; *Dawson v. Shaver*, 1 Blackf. 206; *Beauchamp v. State*, 6 Blackf. 299; *Doe v. Douglass*, 8 Blackf. 10; *Maize v. State*, 4 Ind. 342; *Stocking v. State*, 7 Ind. 327; *Beebe v. State*, 6 Ind. 501; *Newland v. Marsh*, 19 Ill. 376, 384; *Chicago, &c. R. R. Co. v. Smith*, 62 Ill. 268; *Gutman v. Virginia Iron Co.*, 5 W. Va. 22; *Osburn v. Staley*, 5 W. Va. 85; *Yancy v. Yancy*, 5 Heisk. 353; *Bliss v. Commonwealth*, 2 Litt. 90; *State v. Ashley*, 1 Ark. 513;

*Campbell v. Union Bank*, 7 Miss. 625; *Tate's Ex'r v. Bell*, 4 Yerg. 202, 26 Am. Dec. 221; *Andrews v. State*, 3 Heisk. 165, 8 Am. Rep. 8; *Railroad v. Hicks*, 9 Bax. 446; *Whittington v. Polk*, 1 Harr. & J. 236; *Norris v. Abingdon Academy*, 7 Gill & J. 7; *Harrison v. State*, 22 Md. 468; *State v. Lyles*, 1 McCord, 238; *Myers v. English*, 9 Cal. 341; *Ex parte Newman*, 9 Cal. 502; *Hobart v. Supervisors*, 17 Cal. 23; *Crenshaw v. Slate River Co.*, 6 Rand. 245; *Lewis v. Webb*, 3 Me. 326; *Durham v. Lewiston*, 4 Me. 140; *Lunt's Case*, 6 Me. 412; *Scott v. Smart's Ex'rs*, 1 Mich. 295; *Williams v. Detroit*, 2 Mich. 560; *Tyler v. People*, 8 Mich. 320; *Weimer v. Bunbury*, 30 Mich. 201; *Cotton v. Commissioners of Leon County*, 6 Fla. 610; *State v. Robinson*, 1 Kan. 17; *Santo v. State*, 2 Iowa, 165; *Morrison v. Springer*, 15 Iowa, 304; *Stoddart v. Smith*, 5 Binn. 355; *Moore v. Houston*, 3 S. & R. 169; *Braddee v. Brownfield*, 2 W. & S. 271; *Harvey v. Thomas*, 10 Watts, 63; *Commonwealth v. Maxwell*, 27 Pa. St. 444; *Lewis's Appeal*, 67 Pa. St. 153; *Butler's Appeal*, 73 Pa. St. 448; *Carey v. Giles*, 9 Ga. 253; *Macon & Western Railroad Co. v. Davis*, 13 Ga. 68; *Franklin Bridge Co. v. Wood*, 14 Ga. 80; *Boston v. Cummins*, 16 Ga. 102; *Van Horne v. Dorrance*, 2 Dall. 309, 1 L. ed. 391; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; *Cooper v. Telfair*, 4 Dall. 14, 1 L. ed. 720; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Twining v. New Jersey*, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; *Flowers v. Logan County*, 138 Ky. 59, 127 S. W. 512, 137 Am. St. Rep. 347; *Lawton v. Stewart Dry Goods Co.*, 197 Ky. 394, 247 S. W. 14, 26 A. L. R. 686; *Corbin v. Houlehan*, 100 Me. 246, 61 Atl. 131, 70 L. R. A. 568; *State v. Mankato*, 117 Minn. 458, 136 N. W. 264, 41 L. R. A. (N. S.)

V. If the courts are not at liberty to declare statutes void because of their apparent injustice or impolicy, neither can they do so because they appear to the minds of the judges to violate fundamental principles of republican government, unless it shall be found that those principles are placed beyond legislative encroachment by the Constitution.<sup>1</sup> The principles of republican government are not a set of inflexible rules, vital and active in the Constitution, though unexpressed, but they are subject to variation and modification from motives of policy and public necessity; and it is only in those particulars in which experience has demonstrated any departure from the settled practice to work injustice or confusion, that we shall discover an incorporation of them in the Constitution in such form as to make them definite rules of action under all circumstances. It is undoubtedly a maxim of republican government, as we understand it, that taxation and representation should be inseparable; but where the legislature interferes, as in many cases it may do, to compel taxation by a municipal corporation for local purposes, it is evident that this maxim is applied in the case in a much restricted and very imperfect sense only, since the representation of the locality taxed is but slight in the body imposing the tax, and the burden may be imposed, not only against the protest of the local representative, but against the general opposition of the municipality. The property of women is taxable, notwithstanding they are not allowed a voice in choosing representatives.<sup>2</sup> The maxim is not entirely lost sight of in such cases, but its application in the particu-

111; *Kornegay v. Goldsboro*, 180 N. C. 441, 105 S. E. 187; *State v. Taylor*, 33 N. D. 76, 156 N. W. 561, L. R. A. 1918 B, 156, Ann. Cas. 1918 A, 583; *State v. Packard*, 35 N. D. 298, 160 N. W. 154, L. R. A. 1917 B, 710; *Bishop v. City of Tulsa*, (Okla. Crim. Rep.) 209 Pac. 228, 27 A. L. R. 1008; *Cavender v. Hewitt*, 145 Tenn. 471, 239 S. W. 767, 22 A. L. R. 755; *Tilly v. Mitchell, etc., Co.*, 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007; *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489.

"Every rational presumption is made in favor of the validity of a statute. Its conflict with the Constitution must be established beyond reasonable doubt before the court can refuse to enforce it." *Com. v. Slavski*, 245 Mass. 405, 140 N. E. 465, 29 A. L. R. 281.

Every law found on the statute books is presumptively constitutional, until declared otherwise by the court, and an officer of the executive department of the government has no right or power to declare an act of the legislature to be unconstitutional, or to raise the question of its constitutionality without showing that he will be injured in person, property, or rights by its enforcement. *State ex rel. Atlantic Coast Line Railroad Co. v. State Board of Equalizers*, 84 Fla. 592, 94 So. 681, 30 A. L. R. 362.

<sup>1</sup> *State v. Mankato*, 117 Minn. 458, 136 N. W. 264, 41 L. R. A. (N. S.) 111.

If a statute does not violate any constitutional provision the courts cannot declare it invalid because it is socialistic. *Busser v. Snyder*, 282 Pa. 440, 128 Atl. 80, 37 A. L. R. 1515.

<sup>2</sup> *Wheeler v. Wall*, 6 Allen, 558; *Smith v. Macon*, 20 Ark. 17.

lar case, and the determination how far it can properly and justly be made to yield to considerations of policy and expediency, must rest exclusively with the law-making power, in the absence of any definite constitutional provisions so embodying the maxim as to make it a limitation upon legislative authority.<sup>1</sup> It is also a maxim of republican government that local concerns shall be managed in the local districts, which shall choose their own administrative and police officers, and establish for themselves police regulations; but this maxim is subject to such exceptions as the legislative power of the State shall see fit to make; and when made, it must be presumed that the public interest, convenience, and protection are subserved thereby.<sup>2</sup> The State may interfere to establish new regulations against the will of the local constituency; and if it shall think proper in any case to assume to itself those powers of local police which should be executed by the people immediately concerned, we must suppose it has been done because the local administration has proved imperfect and inefficient, and a regard to the general well-being has demanded the change. In these cases the maxims which have prevailed in the government address themselves to the wisdom of the legislature, and to adhere to them as far as possible is doubtless to keep in the path of wisdom; but they do not constitute restrictions so as to warrant the other departments in treating the exceptions which are made as unconstitutional.<sup>3</sup>

<sup>1</sup> "There are undoubtedly fundamental principles of morality and justice which no legislature is at liberty to disregard, but it is equally undoubted that no court, except in the clearest cases, can properly impute the disregard of those principles to the legislature. . . . This court can know nothing of public policy except from the Constitution and the laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must in general be addressed to the legislature. Questions of policy there are concluded here." *Chase*, Ch. J., in *License Tax Cases*, 5 Wall. 462, 469, 18 L. ed. 497, 500.

"All mere questions of expediency, and all questions respecting the just operation of the law within the limits prescribed by the Constitution, were settled by the legislature when it was

enacted." *Ladd*, J., in *Perry v. Keene*, 56 N. H. 514, 530. And see remarks of *Ryan*, Ch. J., in *Attorney-General v. Chicago, &c. R. R. Co.*, 35 Wis. 425, 580.

<sup>2</sup> *People v. Draper*, 15 N. Y. 532. See *post*, pp. 385 *et seq.*

<sup>3</sup> In *People v. Mahaney*, 13 Mich. 481, 500, where the Metropolitan Police Act of Detroit was claimed to be unconstitutional on various grounds, the court say: "Besides the specific objections made to the act as opposed to the provisions of the Constitution, the counsel for respondent attacks it on 'general principles', and especially because violating fundamental principles of our system, — that governments exist by the consent of the governed, and that taxation and representation go together. The taxation under the act, it is said, is really in the hands of a police board, a body in the choice of which the people of Detroit have no voice. This argument is one which might be

VI. Nor are the courts at liberty to declare an act void, because in their opinion it is opposed to a *spirit* supposed to pervade the Constitution, but not expressed in words. "When the fundamental law has not limited, either in terms or by necessary implication, the general powers conferred upon the legislature, we cannot declare a limitation under the notion of having discovered something in the *spirit* of the Constitution which is not even mentioned in the instrument." <sup>1</sup> "It is difficult," says Mr. Senator Verplanck, "upon

pressed upon the legislative department with great force, if it were true in point of fact. But as the people of Detroit are really represented throughout, the difficulty suggested can hardly be regarded as fundamental. They were represented in the legislature which passed the act, and had the same proportionate voice there with the other municipalities in the State, all of which receive from that body their powers of local government, and such only as its wisdom shall prescribe within the constitutional limit. They were represented in that body when the present police board were appointed by it, and the governor, who is hereafter to fill vacancies, will be chosen by the State at large, including their city. There is nothing in the maxim that taxation and representation go together which requires that the body paying the tax shall alone be consulted in its assessment; and if there were, we should find it violated at every turn in our system. The State legislature not only has a control in this respect over inferior municipalities, which it exercises by general laws, but it sometimes finds it necessary to interpose its power in special cases to prevent unjust or burdensome taxation, as well as to compel the performance of a clear duty. The Constitution itself, by one of the clauses referred to, requires the legislature to exercise its control over the taxation of municipal corporations, by restricting it to what that body may regard as proper bounds. And municipal bodies are frequently compelled most unwillingly to levy taxes for the payment of claims, by the judgments or mandates of courts in which their representation is quite as remote as

that of the people of Detroit in this police board. It cannot therefore be said that the maxims referred to have been entirely disregarded by the legislature in the passage of this act. But as counsel do not claim that, in so far as they have been departed from, the Constitution has been violated, we cannot, with propriety, be asked to declare the act void on any such general objection." And see *Wynehamer v. People*, 13 N. Y. 378, per *Selden*, J.; *Benson v. Mayor, &c. of Albany*, 24 Barb. 248 *et seq.*; *Baltimore v. State*, 15 Md. 376; *People v. Draper*, 15 N. Y. 532; *White v. Stamford*, 37 Conn. 578.

<sup>1</sup> *People v. Fisher*, 24 Wend. 215, 220; *State v. Staten*, 6 Cold. 238; *Walker v. Cincinnati*, 21 Ohio St. 14; *State v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829; *People v. Rucker*, 5 Col. 455; *Whallon v. Ingham Circ. Judge*, 51 Mich. 503, 16 N. W. 876; *Wooten v. State*, 24 Fla. 335, 5 So. 39; *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765; *Kane v. Erie R. Co.*, 67 C. C. A. 653, 133 Fed. 681, 68 L. R. A. 788; *Ex parte Owens*, 148 Ala. 402, 42 So. 676, 121 Am. St. Rep. 67, 8 L. R. A. (N. S.) 888; *Schmitt v. F. W. Cook Brewing Co.*, 187 Ind. 623, 120 N. E. 19, 3 A. L. R. 270; *State v. Mankato*, 117 Minn. 458, 136 N. W. 264, 41 L. R. A. (N. S.) 111; *State v. De Lorenzo*, 81 N. J. L. 613, 79 Atl. 839, Ann. Cas. 1912 D, 329; *Hockett v. State Liquor Licensing Board*, 91 Ohio St. 176, 110 N. E. 485, L. R. A. 1917 B, 7; *Russ v. Com.*, 210 Pa. St. 544, 60 Atl. 169, 105 Am. St. Rep. 825, 1 L. R. A. (N. S.) 409; *Long v. State*, 58 Tex. Crim. Rep. 209, 127 S. W. 208, 21 Ann. Cas. 405; *Ward Lumber Co. v. Henderson-White*

any general principles, to limit the omnipotence of the sovereign legislative power by judicial interposition, except so far as the express words of a written Constitution give that authority. There

Mfg. Co., 107 Va. 626, 59 S. E. 476, 17 L. R. A. (N. S.) 324; *Walker v. Spokane*, 62 Wash. 312, 113 Pac. 775, Ann. Cas. 1912 C, 994.

But in Idaho it has been held that acts inconsistent with the spirit of the Constitution are as much prohibited by its terms as are acts specifically enumerated and forbidden therein. *McDonald v. Doust*, 11 Idaho, 14, 81 Pac. 60, 69 L. R. A. 220.

In *Com. v. Moir*, 199 Pa. 534, 49 Atl. 351, 85 Am. St. 801, 53 L. R. A. 837, the above text is quoted and approved. See also *Sheppard v. Dowling*, 127 Ala. 1, 28 So. 791, 85 Am. St. 68.

For the purpose of determining questions of constitutionality courts will not consider questions of the justice, advisability, or policy of the act. *State ex rel. Smith v. McLellan*, 138 Ind. 395, 37 N. E. 799.

"To me, it is as plain that the General Assembly may exercise all powers which are properly legislative, and which are not taken away by our own or by the Federal Constitution, as it is that the people have all the rights which are expressly reserved. We are urged, however, to go further than this, and to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the object of free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we cannot do this. It would be assuming a right to change the Constitution, to supply what we might conceive to be its defects, to fill up every *casus omissus*, and to interpolate into it whatever, in our opinion, ought to have been put there by its framers. The Constitution has given us a list of the things which the legislature may not do. If we extend that list we alter the instrument; we become ourselves the aggressors, and violate both the letter and spirit of the organic law as grossly as the legislature

possibly could. If we can add to the reserved rights of the people, we can take them away; if we can mend, we can mar. If we can remove the landmarks which we find established, we can obliterate them. If we can change the Constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely. The great powers given to the legislature are liable to be abused. But this is inseparable from the nature of human institutions. The wisdom of man has never conceived of a government with power sufficient to answer its legitimate ends, and at the same time incapable of mischief. No political system can be made so perfect that its rulers will always hold it to be the true course. In the very best, a great deal must be trusted to the discretion of those who administer it. In ours, the people have given large powers to the legislature, and relied for the faithful execution of them on the wisdom and honesty of that department, and on the direct accountability of the members to their constituents. There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary. There is nothing more easy than to imagine a thousand tyrannical things which the legislature may do, if its members forget all their duties, disregard utterly the obligations they owe to their constituents, and recklessly determine to trample upon right and justice." *Russ v. Com.*, 210 Pa. St. 544, 60 Atl. 169, 172, 1 L. R. A. (N. S.) 409, 105 Am. St. Rep. 825, quoting *Black, C. J. in Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 147, 59 Am. Dec. 759.

For a valuable discussion of the power of courts to declare a law unconstitutional because opposed to the "spirit" of the Constitution, see *Lexington v. Thompson*, 113 Ky. 540, 68 S. W. 477, 57 L. R. A. 775.



are indeed many *dicta* and some great authorities holding that acts contrary to the first principles of right are void. The principle is unquestionably sound as the governing rule of a legislature in relation to its own acts, or even those of a preceding legislature. It also affords a safe rule of construction for courts, in the interpretation of laws admitting of any doubtful construction, to presume that the legislature could not have intended an unequal and unjust operation of its statutes. Such a construction ought never to be given to legislative language if it be susceptible of any other more conformable to justice; but if the words be positive and without ambiguity, I can find no authority for a court to vacate or repeal a statute on that ground alone. But it is only in express constitutional provisions, limiting legislative power and controlling the temporary will of a majority, by a permanent and paramount law, settled by the deliberate wisdom of the nation, that I can find a safe and solid ground for the authority of courts of justice to declare void any legislative enactment. Any assumption of authority beyond this would be to place in the hands of the judiciary powers too great and too undefined either for its own security or the protection of private rights. It is therefore a most gratifying circumstance to the friends of regulated liberty, that in every change in their constitutional polity which has yet taken place here, whilst political power has been more widely diffused among the people, stronger and better-defined guards have been given to the rights of property." And after quoting certain express limitations, he proceeds: "Believing that we are to rely upon these and similar provisions as the best safeguards of our rights, as well as the safest authorities for judicial direction, I cannot bring myself to approve of the power of courts to annul any law solemnly passed, either on an assumed ground of its being contrary to natural equity, or from a broad, loose, and vague interpretation of a constitutional provision beyond its natural and obvious sense." <sup>1</sup>

The accepted theory upon this subject appears to be this: In every sovereign State there resides an absolute and uncontrolled power of legislation. In Great Britain this complete power rests in the Parliament; in the American States it resides in the people themselves as an organized body politic. But the people, by creat-

<sup>1</sup> *Cochran v. Van Surlay*, 20 Wend. 365, 381, 383. See also *People v. Gallagher*, 4 Mich. 244; *Benson v. Mayor, &c. of Albany*, 24 Barb. 248; *Grant v. Courter*, 24 Barb. 232; *Wynehamer v. People*, 13 N. Y. 378, per *Comstock, J.*; 13 N. Y. 453, per *Selden, J.*; 13 N. Y. 477, per *Johnson, J.*; *School Town of Andrews v. Heiney*, 178 Ind. 1, 98 N. E. 628, 43 L. R. A. (N. S.) 1023; *In re Milecke*, 52 Wash. 312, 100 Pac. 743, 132 Am. St. Rep. 968, 21 L. R. A. (N. S.) 259.

ing the Constitution of the United States, have delegated this power as to certain subjects, and under certain restrictions, to the Congress of the Union; and that portion they cannot resume, except as it may be done through amendment of the national Constitution. For the exercise of the legislative power, subject to this limitation, they create, by their State constitution, a legislative department upon which they confer it; and granting it in general terms, they must be understood to grant the whole legislative power which they possessed, except so far as at the same time they saw fit to impose restrictions. While, therefore, the Parliament of Britain possesses completely the absolute and uncontrolled power of legislation, the legislative bodies of the American States possess the same power, except, *first*, as it may have been limited by the Constitution of the United States; and, *second*, as it may have been limited by the constitution of the State. A legislative act cannot, therefore, be declared void, unless its conflict with one of these two instruments can be pointed out.<sup>1</sup>

It is to be borne in mind, however, that there is a broad difference between the Constitution of the United States and the constitutions of the States as regards the powers which may be exercised under them. The government of the United States is one of *enumerated* powers; the governments of the States are possessed of all the general powers of legislation. When a law of Congress is assailed as void, we look in the national Constitution to see if the

<sup>1</sup> *People v. New York Central Railroad Co.*, 34 Barb. 123; *Gentry v. Griffith*, 27 Tex. 461; *Danville v. Pace*, 25 Gratt. 1, 18 Am. Rep. 663; *Davis v. State*, 3 Lea, 377; *State v. Birmingham Southern R. Co.*, 182 Ala. 475, 62 So. 77, Ann. Cas. 1915 D, 436; *Idaho Power, etc., Co. v. Blomquist*, 26 Idaho, 222, 141 Pac. 1083, Ann. Cas. 1916 E, 282; *Schmitt v. F. W. Cook Brewing Co.*, 187 Ind. 623, 120 N. E. 19, 3 A. L. R. 270; *Lawrence E. Tierney Coal Co. v. Smith*, 180 Ky. 815, 203 S. W. 731, 4 A. L. R. 1540; *Bayville Village Corp. v. Boothbay Harbor*, 110 Me. 46, 85 Atl. 300, Ann. Cas. 1914 B, 1135; *Laughlin v. Portland*, 111 Me. 486, 90 Atl. 318, L. R. A. (N. S.) 1143, Ann. Cas. 1916 C, 734; *State ex rel. Simpson v. Mankato*, 117 Minn. 458, 136 N. W. 264, 41 L. R. A. (N. S.) 111; *Williams v. Evans*, 139 Minn. 32, 165 N. W. 495, 166 N. W. 504, L. R. A. 1918 F, 542;

*State v. Merchants Exchange*, 269 Mo. 346, 190 S. W. 903, Ann. Cas. 1917 E, 871; *Jenkins v. State Board of Elections*, 180 N. C. 169, 104 S. E. 346, 14 A. L. R. 1247; *State v. Wetz*, 40 N. D. 299, 168 N. W. 835, 5 A. L. R. 731; *Com. v. Herr*, 229 Pa. St. 132, 78 Atl. 68, Ann. Cas. 1912 A, 422; *State v. Summers*, 33 S. D. 40, 144 N. W. 730, 50 L. R. A. (N. S.) 206, Ann. Cas. 1916 B, 860; *Wheelon v. South Dakota Land Settlement Board*, 43 S. D. 551, 181 N. W. 359, 14 A. L. R. 1145; *Long v. State*, 58 Tex. Crim. Rep. 209, 127 S. W. 208, 21 Ann. Cas. 405; *Rio Grande Lumber Co. v. Darke*, 50 Utah, 114, 167 Pac. 241, L. R. A. 1918 A, 1193; *State v. King County*, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913 D, 78; *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917 A, 1244. And see the cases cited, *ante*, p. 348, note 2.

grant of specified powers is broad enough to embrace it; but when a State law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United States or of the State we are able to discover that it is prohibited. We look in the Constitution of the United States for *grants* of legislative power, but in the constitution of the State to ascertain if any *limitations* have been imposed upon the complete power with which the legislative department of the State was vested in its creation. Congress can pass no laws but such as the Constitution authorizes either expressly or by clear implication; while the State legislature has jurisdiction of all subjects on which its legislation is not prohibited.<sup>1</sup> "The law-making power of the State," it is said in one case, "recognizes no restraints, and is bound by none, except such as are imposed by the Constitution. That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity, and is therefore the paramount law. Its object is not to grant legislative power, but to confine and restrain it. Without the constitutional limitations, the power to make laws would be absolute. These limitations are created and imposed by express words, or arise by necessary implication. The leading feature of the Constitution is the separation and distribution of the powers of the government. It takes care to separate the executive, legislative, and judicial powers, and to define their limits. The executive can do no legislative act, nor the legislature any executive act, and neither can exercise judicial authority." <sup>2</sup>

It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the Constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed.<sup>3</sup> Prohibitions

<sup>1</sup> *Sill v. Village of Corning*, 15 N. Y. 297; *People v. Supervisors of Orange*, 27 Barb. 575; *People v. Gallagher*, 4 Mich. 244; *Sears v. Cottrell*, 5 Mich. 250; *People v. New York Central Railroad Co.*, 24 N. Y. 497, 504; *People v. Toynbee*, 2 Park. Cr. R. 490; *State v. Gutierrez*, 15 La. Ann. 190; *Walpole v. Elliott*, 18 Ind. 258; *Smith v. Judge*, 17 Cal. 547; *Commonwealth v. Hartman*, 17 Pa. St. 118; *Kirby v. Shaw*, 19 Pa. St. 258; *Weister v. Hade*, 52 Pa. St. 474; *Danville v. Pace*, 25 Gratt. 1, 9, 18 Am. Rep. 663; *Payne v. Providence Gas Co.*, 31 R. I. 295, 77 Atl. 145, Ann. Cas. 1912 B,

65; *State ex rel. Wagner v. Summers*, 33 S. D. 40, 144 N. W. 730, 50 L. R. A. (n. s.) 206, Ann. Cas. 1916 B, 860.

<sup>2</sup> *Sill v. Corning*, 15 N. Y. 297, 303.

<sup>3</sup> "Legislation contravening what the Constitution necessarily implies is void equally with the legislation contravening its express commands." *Hopper v. Britt*, 203 N. Y. 144, 96 N. E. 371, 37 L. R. A. (n. s.) 825, Ann. Cas. 1913 B, 172.

A remarkable case of evasion to avoid the purpose of the Constitution, and still keep within its terms, was considered in *People v. Albertson*, 55 N. Y. 50

are only important where they are in the nature of exceptions to a general grant of power; and if the authority to do an act has not been granted by the sovereign to its representative, it cannot be necessary to prohibit its being done. If in one department was vested the whole power of the government, it might be essential for the people, in the instrument delegating this complete authority, to make careful and particular exception of all those cases which it was intended to exclude from its cognizance; for without such exception the government might do whatever the people themselves, when met in their sovereign capacity, would have power to do. But when only the legislative power is delegated to one department, and the judicial to another, it is not important that the one should be expressly forbidden to try causes, or the other to make laws. The assumption of judicial power by the legislature in such a case is unconstitutional, because, though not expressly forbidden, it is nevertheless inconsistent with the provisions which have conferred upon another department the power the legislature is seeking to exercise.<sup>1</sup> And for similar reasons a legislative act which should undertake to make a judge the arbiter in his own controversies would be void, because, though in form a provision for the exercise of judicial power, in substance it would be the creation of an arbitrary and irresponsible authority, neither legislative, executive, nor judicial, and wholly unknown to constitutional government.<sup>2</sup> It could not be necessary to forbid the judiciary to render judgment without suffering the party to make defence; because it is implied in judicial authority that there shall be a hearing before condemnation.<sup>3</sup> Taxation cannot be arbitrary, because its very definition includes apportionment, nor can it be for a purpose not public, because that would be a contradiction in terms.<sup>4</sup> The right of local self-government cannot be taken away, because all our constitutions assume its continuance as the undoubted right of the people, and as an inseparable incident to republican government.<sup>5</sup> The bills of rights in the American constitutions forbid that parties shall be deprived

In *Taylor v. Commissioners of Ross County*, 23 Ohio St. 22, the Supreme Court of Ohio found itself under the necessity of declaring that that which was forbidden by the Constitution could no more be done indirectly than directly.

<sup>1</sup> *Ante*, pp. 175 *et seq.*, and cases cited.

<sup>2</sup> *Post*, pp. 869 *et seq.*, and cases cited.

<sup>3</sup> *Post*, pp. 735 *et seq.* On this subject in general, reference is made to those very complete recent works,

Bigelow on Estoppel, and Freeman on Judgments.

<sup>4</sup> *Post*, ch. 14. And see *Curtis v. Whipple*, 24 Wis. 350; *Tyson v. School Directors*, 51 Pa. St. 9; *Freeland v. Hastings*, 10 Allen, 570; *Opinions of Judges*, 58 Me. 590; *People v. Batchellor*, 53 N. Y. 128; *Lowell v. Boston*, 111 Mass. 454; *Re Page*, 60 Kan. 842, 58 Pac. 478, 47 L. R. A. 68.

<sup>5</sup> *People v. Mayor, &c. of Chicago*, 51 Ill. 17; *People v. Hurlbut*, 24

of property except by the law of the land; but if the prohibition had been omitted, a legislative enactment to pass one man's property over to another would nevertheless be void. If the act proceeded upon the assumption that such other person was justly entitled to the estate, and therefore it was transferred, it would be void, because judicial in its nature; and if it proceeded without reasons, it would be equally void, as neither legislative nor judicial, but a mere arbitrary fiat.<sup>1</sup> There is no difficulty in saying that any such

Mich. 44; *State v. Denny*, 118 Ind. 449, 21 N. E. 274; *State ex rel. Gerry v. Edwards*, 42 Mont. 135, 111 Pac. 734, 32 L. R. A. (N. S.) 1078, Ann. Cas. 1912 A, 1063. Further as to the question of the right to local self-government, see *State ex rel. Bulkley v. Williams*, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465; *Rathbone v. Wirth*, 150 N. Y. 459, 45 N. E. 15, 24, 34 L. R. A. 408, 419; *O'Connor v. Fond du Lac*, 109 Wis. 253, 85 N. W. 327, 53 L. R. A. 831; *Com. ex rel. Elkin v. Moir*, 199 Pa. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. 801; *State v. Fox*, 158 Ind. 126, 63 N. E. 19, 55 L. R. A. 893; *State ex rel. White v. Barker*, 116 Iowa, 96, 89 N. W. 204, 57 L. R. A. 244; *Lexington v. Thompson*, 113 Ky. 540, 68 S. W. 477, 57 L. R. A. 775. See cases *post*, pp. 390, 488.

But in *Newport v. Horton*, 22 R. I. 196, 47 Atl. 312, 50 L. R. A. 330, the court said: "The broad claim made and so urgently pressed by the petitioners cannot be sustained to the extent of holding that the Constitution of the State must be interpreted according to an unwritten theory of local self-government, which so entered into its provisions as to make it controlling in construing those provisions." And in a case in the Supreme Court of the United States, *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440, Mr. Justice *Hunt*, in delivering the opinion of the court, said: "A municipal corporation, in the exercise of all its duties, including those most strictly local or internal, is but a department of the State. The legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality. Again: it

may strip it of every power leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all of the powers usually committed to a municipality." The doctrine enunciated in this case has the support of the courts in a number of States. *Hunter v. Pittsburgh*, 207 U. S. 161, 52 L. ed. 151, 28 Sup. Ct. Rep. 40; *Trenton v. New Jersey*, 262 U. S. 182, 67 L. ed. 937, 43 Sup. Ct. Rep. 534, 29 A. L. R. 1471; *Mayor, etc., of Americus v. Perry*, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230; *Booth v. McGuinness*, 78 N. J. L. 346, 75 Atl. 455; *Philadelphia v. Fox*, 64 Pa. St. 169; *Brown v. Galveston*, 97 Tex. 1, 75 S. W. 488; *Callaghan v. Tobin*, (Tex. Civ. App.) 90 S. W. 328; *Ex parte Farnsworth*, 61 Tex. Crim. Rep. 342, 135 S. W. 538, 33 L. R. A. (N. S.) 968; *Meechem v. Shields*, 57 Wash. 617, 107 Pac. 835; *State v. Burr*, 65 Wash. 521, 118 Pac. 639.

<sup>1</sup> *Bowman v. Middleton*, 1 Bay, 252; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. ed. 542; *Terrett v. Taylor*, 9 Cranch, 43, 3 L. ed. 650; *Ervine's Appeal*, 16 Pa. St. 256.

"It is now considered an universal and fundamental proposition in every well regulated and properly administered government, whether embodied in a constitutional form or not, that private property cannot be taken for strictly private purposes at all, nor for public uses without a just compensation; and that the obligation of contracts cannot be abrogated or essentially impaired. These and other vested rights of the citizen are held sacred and inviolable, even against the plenitude of power of the legislative department." *Nelson, J., in People*

act, which under pretence of exercising one power is usurping another, is opposed to the constitution and void. It is assuming a power which the people, if they have not granted it at all, have reserved to themselves. The maxims of Magna Charta and the common law are the interpreters of constitutional grants of power, and those acts which by those maxims the several departments of government are forbidden to do cannot be considered within any grant or apportionment of power which the people in general terms have made to those departments.<sup>1</sup> The Parliament of Great Britain, indeed, as possessing the sovereignty of the country, has the power to disregard fundamental principles, and pass arbitrary and unjust enactments; but it cannot do this rightfully, and it has the power to do so simply because there is no written constitution from which its authority springs or on which it depends, and by which the courts can test the validity of its declared will. The rules which confine the discretion of Parliament within the ancient landmarks are rules for the construction of the powers of the American legislatures; and however proper and prudent it may be expressly to prohibit those things which are not understood to be within the proper attributes of legislative power, such prohibition can never be regarded as essential, when the extent of the power apportioned to the legislative department is found upon examination not to be broad enough to cover the obnoxious authority. The absence of such prohibition cannot, by implication, confer power.

Nor, where fundamental rights are declared by the constitution, is it necessary at the same time to prohibit the legislature, in express terms, from taking them away. The declaration is itself a prohibition, and is inserted in the constitution for the express purpose of operating as a restriction upon legislative power.<sup>2</sup> Many things, indeed, which are contained in the bills of rights to be found in the American constitutions, are not, and from the very nature of the case cannot be, so certain and definite in character as to form rules for judicial decisions; and they are declared rather as guides to the legislative judgment than as marking an absolute limitation of power. The nature of the declaration will generally enable us to determine without difficulty whether it is the one thing or the other. If it is declared that all men are free, and no man can be

*v. Morris*, 13 Wend. 325, 328. See *Bank of Michigan v. Williams*, 5 Wend. 478.

Property of a private eleemosynary corporation is none the less private because it is charged with the maintenance of a public charity. *State v.*

*Neff*, 52 Ohio St. 375, 40 N. E. 720, 28 L. R. A. 409.

<sup>1</sup> *Spann v. Dallas*, 111 Tex. 350, 235 S. W. 513, 19 A. L. R. 1387.

<sup>2</sup> *Beebe v. State*, 6 Ind. 501. This principle is very often acted upon when not expressly declared.

slave to another, a definite and certain rule of action is laid down, which the courts can administer ; but if it be said that "the blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality, and virtue", we should not be likely to commit the mistake of supposing that this declaration would authorize the courts to substitute their own view of justice for that which may have impelled the legislature to pass a particular law, or to inquire into the moderation, temperance, frugality, and virtue of its members, with a view to set aside their action, if it should appear to have been influenced by the opposite qualities.<sup>1</sup> It is plain that what in the one case is a rule, in the other is an admonition addressed to the judgment and the conscience of all persons in authority, as well as of the people themselves.

So the forms prescribed for legislative action are in the nature of limitations upon its authority. The constitutional provisions which establish them are equivalent to a declaration that the legislative power shall be exercised under these forms, and shall not be exercised under any other. A statute which does not observe them will plainly be ineffectual.<sup>2</sup>

### *Statutes Unconstitutional in Part.*

It will sometimes be found that an act of the legislature is opposed in some of its provisions to the constitution, while others, standing by themselves, would be unobjectionable. So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. In any such case the portion which conflicts with the constitution, or in regard to which the necessary conditions have not been observed, must be treated as a nullity. Whether the other parts of the statute must also be adjudged void because of the association must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. A statute, it has been said, is judicially held to be unconstitutional, because it is not within the scope of legislative authority ; it may either propose to accomplish something prohibited by the constitution, or to accomplish some lawful, and even laudable object, by means repugnant to the Constitution of the United States or of the

<sup>1</sup> So a statute cannot authorize a board of health to annul a physician's license "for grossly unprofessional conduct of a character likely to deceive or defraud the public" without

in some way defining what is "grossly unprofessional conduct." *Mathews v. Murphy*, 23 Ky. L. Rep. 750, 63 S. W. 785, 54 L. R. A. 415.

<sup>2</sup> See *ante*, pp. 266 *et seq.*

State.<sup>1</sup> A statute may contain some such provisions, and yet the same act, having received the sanction of all branches of the legislature, and being in the form of law, may contain other useful and salutary provisions, not obnoxious to any just constitutional exception. It would be inconsistent with all just principles of constitutional law to adjudge these enactments void because they are associated in the same act, but not connected with or dependent on others which are unconstitutional.<sup>2</sup> Where, therefore, a part of a

<sup>1</sup> *Commonwealth v. Clapp*, 5 Gray, 97.

"A law that is unconstitutional is so because it is either an assumption of power not legislative in its nature, or because it is inconsistent with some provision of the Federal or State Constitution." *Woodworth, J.*, in *Commonwealth v. Maxwell*, 27 Pa. St. 444, 456.

<sup>2</sup> *Commonwealth v. Clapp*, 5 Gray, 97. See to the same effect, *Fisher v. McGirr*, 1 Gray, 1; *Warren v. Mayor, &c. of Charlestown*, 2 Gray, 84; *Wellington, Petitioner*, 16 Pick. 87; *Commonwealth v. Hitchings*, 5 Gray, 482; *Commonwealth v. Pomeroy*, 5 Gray, 486; *State v. Copeland*, 3 R. I. 33; *State v. Snow*, 3 R. I. 64; *Armstrong v. Jackson*, 1 Blackf. 374; *Clark v. Ellis*, 2 Blackf. 8; *McCulloch v. State*, 11 Ind. 424; *People v. Hill*, 7 Cal. 97; *Lathrop v. Mills*, 19 Cal. 513; *Rood v. McCargar*, 49 Cal. 117; *Supervisors of Knox Co. v. Davis*, 63 Ill. 405; *Myers v. People*, 67 Ill. 503; *Thomson v. Grand Gulf Railroad Co.*, 3 How. (Miss.) 240; *Campbell v. Union Bank*, 7 Miss. 625; *Mobile & Ohio Railroad Co. v. State*, 29 Ala. 573; *South & N. Ala. R. R. Co. v. Morris*, 65 Ala. 193; *Santo v. State*, 2 Iowa, 165; *State v. Cox*, 3 Eng. 436; *Mayor, &c. of Savannah v. State*, 4 Ga. 26; *Exchange Bank v. Hines*, 3 Ohio St. 1; *Robinson v. Bank of Darien*, 18 Ga. 65; *State v. Wheeler*, 25 Conn. 290; *People v. Lawrence*, 36 Barb. 177; *Williams v. Payson*, 14 La. Ann. 7; *Ely v. Thompson*, 3 A. K. Marsh. 70; *Davis v. State*, 7 Md. 151; *State v. Commissioners of Baltimore*, 29 Md. 521; *Hagerstown v. Dechert*, 32 Md. 369; *Berry v. Baltimore, &c. R. R. Co.*, 41 Md. 446, 20 Am. Rep. 69; *State v. Clarke*, 54 Mo. 17;

*Lowndes Co. v. Hunter*, 49 Ala. 507; *Isom v. Mississippi, &c. R. R. Co.*, 36 Miss. 300; *Bank of Hamilton v. Dudley's Lessee* 2 Pet. 492, 7 L. ed. 496; *Turner v. Com'rs*, 27 Kan. 314; *In re Groffs*, 21 Neb. 647, 33 N. W. 426; *State v. Tuttle*, 53 Wis. 45, 9 N. W. 791; *People v. Hall*, 8 Col. 485, 9 Pac. 34; *Brazee v. Michigan*, 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561, Ann. Cas. 1917 C, 522; *Bowman v. Continental Oil Co.*, 256 U. S. 642, 65 L. ed. 1139, 41 Sup. Ct. Rep. 606; *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 67 L. ed. 731, 43 Sup. Ct. Rep. 445; *Joslin Mfg. Co. v. Providence*, 262 U. S. 668, 67 L. ed. 1167, 43 Sup. Ct. Rep. 684; *Cella Commission Co. v. Bohlinger*, 78 C. C. A. 467, 147 Fed. 419, 8 L. R. A. (N. S.) 537; *Chicago, etc., R. Co. v. Westby*, 102 C. C. A. 65, 178 Fed. 619, 47 L. R. A. (N. S.) 97; *Gherna v. State*, 16 Ariz. 344, 146 Pac. 494, Ann. Cas. 1916 D, 94; *Macmillan Co. v. Clarke*, 184 Cal. 491, 194 Pac. 1030, 17 A. L. R. 288; *Hoxie v. New York, etc., R. Co.*, 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324; *Clendaniel v. Conrad*, 3 Boyce (Del.) 549, 83 Atl. 1036, Ann. Cas. 1915 B, 968; *State v. Philips*, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918 A, 138; *Territory v. Hoy Chang*, 21 Hawaii, 39, Ann. Cas. 1915 A, 1115; *Scown v. Czarnecki*, 264 Ill. 305, 106 N. E. 276, L. R. A. 1915 B, 247, Ann. Cas. 1915 A, 772; *State Public Utilities Commission v. Chicago, etc., R. Co.*, 275 Ill. 555, 114 N. E. 325, Ann. Cas. 1917 C, 50; *Springfield Gas, etc., Co. v. Springfield*, 292 Ill. 236, 126 N. E. 739, 18 A. L. R. 929; *Hammer v. State*, 173 Ind. 199, 89 N. E. 850, 140 Am. St. Rep. 248, 24 L. R. A. (N. S.) 795, 21 Ann. Cas. 1034; *Pittsburgh, etc., R. Co. v. Chappell*, 183



statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other.<sup>1</sup> The constitutional and uncon-

Ind. 141, 106 N. E. 403, Ann. Cas. 1918 A, 627; *Des Moines v. Manhattan Oil Co.*, 193 Iowa, 1096, 184 N. W. 828, 23 A. L. R. 1322; *State v. Smiley*, 65 Kan. 240, 69 Pac. 199, 67 L. R. A. 903; *State v. Ryder*, 126 Minn. 95, 147 N. W. 953, 5 A. L. R. 1449; *Nalley v. Home Ins. Co.*, 250 Mo. 452, 157 S. W. 769, Ann. Cas. 1915 A, 283; *Hudspeth v. Swayze*, 85 N. J. L. 592, 89 Atl. 780, Ann. Cas. 1916 A, 102; *State v. Brooken*, 19 N. M. 404, 143 Pac. 479, L. R. A., 1915 B, 213, Ann. Cas. 1916 D, 136; *Hathorn v. Natural Carbonic Gas Co.*, 194 N. Y. 326, 87 N. E. 504, 128 Am. St. Rep. 555, 23 L. R. A. (N. S.) 436 16 Ann. Cas. 989; *State v. Bickford*, 28 N. D. 36, 147 N. W. 407, Ann. Cas. 1916 D, 140; *Bishop v. Tulsa*, (Okla. Crim. Rep.), 209 Pac. 228, 27 A. L. R. 1008; *Wheelon v. South Dakota Land Settlement Board*, 43 S. D. 551, 181 N. W. 359, 14 A. L. R. 1145; *Fite v. State*, 114 Tenn. 646, 88 S. W. 941, 1 L. R. A. (N. S.) 520, 4 Ann. Cas. 1108; *Sabre v. Rutland R. Co.*, 86 Vt. 347, 85 Atl. 693, Ann. Cas. 1915 C, 1269; *Bonnett v. Vallier*, 136 Wis. 193, 116 N. W. 885, 128 Am. St. Rep. 1061, 17 L. R. A. (N. S.) 486.

"To the extent of the collision and repugnancy, the law of the State must yield; and to that extent, and no further, it is rendered by such repugnancy inoperative and void." *Commonwealth v. Kimball*, 24 Pick. 359, 361, per *Shaw*, Ch. J.; *Norris v. Boston*, 4 Met. 282; *Eckhart v. State*, 5 W. Va. 515. Where the portions are separable, action under the statute will be presumed to have been taken without reference to the invalid provisions, and will be upheld so far as it is within the valid portions. *Donnersberger v. Prendergast*, 128 Ill. 229, 21 N. E. 1.

If a statute provides for an uncon-

stitutional method of selecting a jury, that fact alone will not necessarily make other portions of the statute invalid. If a construction can be given an act which will render it constitutional, that construction will be adopted, even though it may eliminate a part of the act. *Bishop v. City of Tulsa*, (Okla. Crim. Rep.), 209 Pac. 228, 27 A. L. R. 1008.

<sup>1</sup>*Commonwealth v. Hitchings*, 5 Gray, 482. See also *Field v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Presser v. Illinois*, 116 U. S. 263, 29 L. ed. 615, 6 Sup. Ct. Rep. 580; *Penniman's Case*, 103 U. S. 716, 26 L. ed. 602; *Keokuk N. L. Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377; *Com. v. Clark*, 195 Pa. 634, 46 Atl. 286, 57 L. R. A. 348; *Wheeler v. N. Y., N. H. & H. R. Co.*, 178 U. S. 321, 44 L. ed. 1085, 20 Sup. Ct. Rep. 949, aff. 70 Conn. 326, 39 Atl. 443; *Hill v. Wallace*, 259 U. S. 44, 66 L. ed. 822, 42 Sup. Ct. Rep. 453; *Cella Commission Co. v. Bohlinger*, 147 Fed. 419; *State v. Philips*, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918 A, 138; *State ex rel. Wilcox v. Ryder*, 126 Minn. 95, 147 N. W. 953, 5 A. L. R. 1449; *People v. Briggs*, 50 N. Y. 553; *Hathorn v. Natural Carbonic Gas Co.*, 194 N. Y. 326, 87 N. E. 504, 23 L. R. A. (N. S.) 436, 128 Am. St. Rep. 555, 16 Ann. Cas. 989, affirming 128 App. Div. 33, 112 N. Y. Supp. 374; *American Exchange National Bank v. Lacy*, 188 N. C. 25, 123 S. E. 475; *O'Neil v. Providence Amusement Co.*, 42 R. I. 479, 108 Atl. 887, 8 A. L. R. 1590.

"A statute bad in part is not necessarily void in its entirety. Provisions within the legislative power may stand if separable from the bad." But a provision inherently unobjectionable cannot be deemed separable unless it appears both that, standing alone,

stitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance.<sup>1</sup> If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule.<sup>2</sup> If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fail unless sufficient remains to effect the object without the aid of the invalid portion.<sup>3</sup> And if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations

legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall. *Dorchy v. Kansas*, 264 U. S. 286, 68 L. ed. 686, 44 Sup. Ct. Rep. 323.

Conceding that a part of a statute exempting from a wheelage tax vehicles used for the purpose of selling or peddling the products of farm or garden was unconstitutional, it was held that it was not so connected with the rest of the act as to render the whole unconstitutional. *Fairley v. City of Duluth*, 150 Minn. 374, 185 N. W. 390, 32 A. L. R. 1258.

"The general rule is that when a proviso in the nature of an exception to a general statute is invalid, the general provisions of the statute are not invalidated thereby, unless it clearly appears that the provisions of the exception are so intimately and inherently related to and connected with the general provisions to which it relates that the legislature would not have enacted the latter without the former." *People v. Monterey Fish Products Co.*, 195 Cal. 548, 234 Pac. 398, 38 A. L. R. 1186.

Although a proviso is ineffectual because unconstitutional, it cannot

be disregarded when the intention of the legislature is in question. *Commonwealth v. Potts*, 79 Pa. St. 164.

<sup>1</sup> *Commonwealth v. Hitchings*, 5 Gray, 482; *Willard v. People*, 5 Ill. 461; *Eells v. People*, 5 Ill. 498; *Robinson v. Bidwell*, 22 Cal. 379; *State v. Easterbrook*, 3 Nev. 173; *Hagerstown v. Dechert*, 32 Md. 369; *People v. Kenney*, 96 N. Y. 294; *Berea College v. Kentucky*, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; *Gherna v. State*, 16 Ariz. 344, 146 Pac. 494, Ann. Cas. 1916 D, 94; *Scown v. Czarnecki*, 264 Ill. 305, 106 N. E. 276, L. R. A. 1915 B, 247, Ann. Cas. 1915 A, 722; *Soper v. Lawrence Bros. Co.*, 98 Me. 268, 56 Atl. 908, 99 Am. St. Rep. 397; *State v. Robb*, 100 Me. 180, 60 Atl. 874, 4 Ann. Cas. 275; *Williams v. State*, 81 N. H. 341, 125 Atl. 661, 39 A. L. R. 490; *Hudspeth v. Swayze*, 85 N. J. L. 592, 89 Atl. 780, Ann. Cas. 1916 A, 102; *Nathan v. Spokane County*, 35 Wash. 26, 76 Pac. 521, 102 Am. St. Rep. 888, 65 L. R. A. 336.

<sup>2</sup> This is a question of interpretation and of legislative intent. *Dorchy v. Kansas*, 264 U. S. 286, 68 L. ed. 686, 44 Sup. Ct. Rep. 323.

<sup>3</sup> *Santo v. State*, 2 Iowa, 165; *State v. Robb*, 100 Me. 180, 60 Atl. 874, 4

for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them.<sup>1</sup>

Ann. Cas. 275. But perhaps the doctrine of sustaining one part of a statute when the other is void was carried to an extreme in *Santo v. State*, *supra*. A prohibitory liquor law had been passed which was not objectionable on constitutional grounds, except that the last section provided that "the question of prohibiting the sale and manufacture of intoxicating liquor" should be submitted to the electors of the State, and if it should appear "that a majority of the votes cast as aforesaid, upon said question of prohibition, shall be for the prohibitory liquor law, then this act shall take effect on the first day of July, 1855." The court held this to be an attempt by the legislature to shift the exercise of legislative power from themselves to the people, and therefore void; but they also held that the remainder of the act was complete without this section, and must therefore be sustained on the rule above given. The reasoning of the court by which they are brought to this conclusion is ingenious; but one cannot avoid feeling, especially after reading the dissenting opinion of Chief Justice *Wright*, that by the decision the court gave effect to an act which the legislature did not design should take effect unless the result of the unconstitutional submission to the people was in its favor. See also *Weir v. Cram*, 37 Iowa, 649. For a similar ruling, see *Maize v. State*, 4 Ind. 342; overruled in *Meshmeier v. State*, 11 Ind. 482. And see *State v. Dombaugh*, 20 Ohio St. 167, where it was held competent to construe a part of an act held to be valid by another part adjudged unconstitutional, though the court considered it "quite probable" that if the legislature had supposed they were without power to adopt the void part of the act, they would have made an essentially different provision by the other. See also *People v. Bull*, 46 N. Y. 57,

where part of an act was sustained which probably would not have been adopted by the legislature separately.

It must be obvious, in any case where part of an act is set aside as unconstitutional, that it is unsafe to indulge in the same extreme presumptions in support of the remainder that are allowable in support of a complete act when some cause of invalidity is suggested to the whole of it. In the latter case, we know the legislature designed the whole act to have effect, and we should sustain it if possible; in the former, we do not know that the legislature would have been willing that a part of the act should be sustained if the remainder were held void, and there is generally a presumption more or less strong to the contrary. While, therefore, in the one case the act should be sustained unless the invalidity is clear, in the other the whole should fall unless it is manifest the portion not opposed to the constitution can stand by itself, and that in the legislative intent it was not to be controlled or modified in its construction and effect by the part which was void. *Noel v. People*, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. 238; *Redell v. Moores*, 63 Neb. 219, 88 N. W. 243, 55 L. R. A. 740.

<sup>1</sup> *Warren v. Mayor, &c. of Charleston*, 2 Gray, 84; *State v. Commissioners of Perry County*, 5 Ohio St. 497; *State v. Pugh*, 43 Ohio St. 98; *Slauson v. Racine*, 13 Wis. 398; *Allen County Commissioners v. Silvers*, 22 Ind. 491; *State v. Denny*, 118 Ind. 449, 21 N. E. 274; *Eckhart v. State*, 5 W. Va. 515; *Allen v. Louisiana*, 103 U. S. 80, 26 L. ed. 318; *Tillman v. Cocke*, 9 Bax. 429; *Jones v. Jones*, 104 N. Y. 234, 10 N. E. 269; *Meyer v. Berlandi*, 39 Minn. 438, 40 N. W. 513; *International Text-Book Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, 30 Sup. Ct. Rep. 481, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; *Replogle v.*

It has accordingly been held, where a statute submitted to the voters of a county the question of the removal of their county seat, and one section imposed the forfeiture of certain vested rights in case the vote was against the removal, that this portion of the act being void, the whole must fall, inasmuch as the whole was submitted to the electors collectively, and the threatened forfeiture would naturally affect the result of the vote.<sup>1</sup>

Little Rock, 166 Ark. 617, 267 S. W. 353, 36 A. L. R. 1333; *Eliasberg Bros. Mercantile Co. v. Grimes*, 204 Ala. 492, 86 So. 56; *Hoxie v. New York, etc., R. Co.*, 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324; *Beach v. Bradstreet*, 85 Conn. 344, 82 Atl. 1030, Ann. Cas. 1913 B, 946; *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. S.) 639; *State v. Tampa Waterworks Co.*, 56 Fla. 858, 47 So. 358, 19 L. R. A. (N. S.) 183; *State v. Philips*, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918 A, 138; *Scown v. Czarnecki*, 264 Ill. 305, 106 N. E. 276, L. R. A. 1915 B, 247, Ann. Cas. 1915 A, 772; *Springfield Gas, etc., Co. v. Springfield*, 292 Ill. 236, 126 N. E. 739, 18 A. L. R. 929; *Gretna v. Bailey*, 141 La. 625, 75 So. 491, Ann. Cas. 1918 E, 566; *Soper v. Lawrence Bros. Co.*, 98 Me. 268, 56 Atl. 908, 99 Am. St. Rep. 397; *State v. Robb*, 100 Me. 180, 60 Atl. 874, 4 Ann. Cas. 275; *State v. Rice*, 115 Md. 317, 80 Atl. 1026, 36 L. R. A. (N. S.) 344, Ann. Cas. 1913 A, 1247; *Mutual Loan Co. v. Martell*, 200 Mass. 482, 86 N. E. 916, 128 Am. St. Rep. 446, 43 L. R. A. (N. S.) 746; *State ex rel. Ragan v. Junkin*, 85 Neb. 1, 122 N. W. 473, 23 L. R. A. (N. S.) 839; *Hudspeth v. Swayze*, 85 N. J. L. 592, 89 Atl. 780, Ann. Cas. 1916 A, 102; *Malin v. La Moure County*, 27 N. D. 140, 145 N. W. 582, 50 L. R. A. (N. S.) 997; *Pugh v. Pugh*, 25 S. D. 7, 124 N. W. 959, 32 L. R. A. (N. S.) 954; *State v. State Canvassers*, 159 Wis. 216, 150 N. W. 542, Ann. Cas. 1916 D, 159.

This doctrine is particularly applicable to a referendum statute, because of the improbability that a majority of the electors who voted for its adoption or rejection would have voted for the adoption of the provisions that do not violate the Constitution, inde-

pendently of the provisions subsequently decreed to be unconstitutional and invalid. *Gretna v. Bailey*, 141 La. 625, 75 So. 491, Ann. Cas. 1918 E, 566.

When a part of a statute is unconstitutional, that fact does not compel the courts to declare the remainder void, unless the unconstitutional part is of such import that the other parts of the statute, if sustained without it, would cause results not contemplated or desired by the legislature. The question to be determined is whether the obnoxious part is an inducement of the whole act or whether it is merely an incident thereto. The test to be applied in determining whether the unconstitutional provision in a statute invalidates the whole enactment is the answer to the following questions: (1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part and to give effect to the former only? *State v. Bickford*, 28 N. D. 36, 147 N. W. 407, Ann. Cas. 1916 D, 140.

Where a statute made the same provision for taxing telegraph messages sent to points within and to points without the State, and was void as to the latter, it was held wholly void. *Western Union Tel. Co. v. State*, 62 Tex. 630.

<sup>1</sup> *State v. Commissioners of Perry County*, 5 Ohio St. 497. And see *Jones v. Robbins*, 8 Gray, 329; *Mon-*

And, where a statute annexed to the city of Racine certain lands previously in the township of Racine, but contained an express provision that the lands so annexed should be taxed at a different and less rate than other lands in the city; the latter provision being held unconstitutional, it was also held that the whole statute must fail, inasmuch as such provision was clearly intended as a compensation for the annexation.<sup>1</sup>

And where a statute, in order to obtain a jury of six persons, provided for the summoning of twelve jurors, from whom six were to be chosen and sworn, and under the Constitution the jury must consist of twelve, it was held that the provision for reducing the number to six could not be rejected and the statute sustained, inasmuch as this would be giving to it a construction and effect different from that the legislature designed; and would deprive the parties of the means of obtaining impartial jurors which the statute had intended to give.<sup>2</sup> [And where price-fixing features of a State statute, clearly regulatory of interstate commerce, were essential and vital parts of the general plan of the statute to control the purchase of grain and to determine the profit at which it might be sold, and it was apparent that without these features the legislature would not have passed the act, it was held that such an essential feature of the law could not be eliminated and the constitutional parts of it saved.<sup>3</sup>]

On the other hand, — to illustrate how intimately the valid and invalid portions of a statute may be associated, — a section of the criminal code of Illinois provided that “if any person shall harbor or secrete any negro, mulatto, or person of color, the same being a slave or servant, owing service or labor to any other persons, whether they reside in this State or in any other State, or Territory, or district, within the limits and under the jurisdiction of the United States, or shall in any wise hinder or prevent the lawful owner or owners of such slaves or servants from retaking them in a lawful manner, every person so offending shall be deemed guilty of a misdemeanor”, etc., and it was held that, although the latter portion of the section was void within the decision in *Prigg v. Pennsylvania*,<sup>4</sup> yet that the first portion, being a police regulation for the preservation of order in the State, and important to its well-being, and capable of being enforced without reference to the rest, was not affected

*roe v. Collins*, 17 Ohio St. 666, 684; See *Commonwealth v. Potts*, 79 Pa. Taylor *v. Commissioners of Ross* County, 23 Ohio St. 22, 84. St. 164.

<sup>1</sup> *Stanson v. Racine*, 13 Wis. 398, followed in *State v. Dousman*, 28 Wis. 541.

<sup>2</sup> *Campau v. Detroit*, 14 Mich. 266.

<sup>3</sup> *Lemke v. Farmers Grain Co.*, 258 U. S. 50, 66 L. ed. 458, 42 Sup. Ct. Rep. 244.

<sup>4</sup> 16 Pet. 539, 10 L. ed. 1060.

by the invalidity of the rest.<sup>1</sup> [Where there is a scheme of legislation for a particular purpose, created by the enactment of a law specially referring to the subject, and to other laws required for a complete plan, if the special enactment is the inducing provision and it is unconstitutional, the whole of the legislation is void.<sup>2</sup>]

A legislative act may be entirely valid as to some classes of cases, and clearly void as to others.<sup>3</sup> A general law for the punishment of offenses, which should endeavor to reach, by its retroactive operation, acts before committed, as well as to prescribe a rule of conduct for the citizen in the future, would be void so far as it was retrospective; but such invalidity would not affect the operation of the law in regard to the cases which were within the legislative control. A law might be void as violating the obligation of existing contracts, but valid as to all contracts which should be entered into subsequent to its passage, and which therefore would have no legal force except such as the law itself would allow.<sup>4</sup> [A State statute which interferes with interstate commerce, while invalid in so far as it does so, may be valid in its application to intrastate commerce.<sup>5</sup> In response to a question whether a single tax, assessed by a State upon the receipts of a telegraph company derived partly from interstate commerce and partly from commerce within the State, but returned and assessed in gross and without separation or apportionment, was wholly valid or invalid only in proportion and to the extent that the receipts were derived from interstate com-

<sup>1</sup> *Willard v. People*, 5 Ill. 461; *Eells v. People*, 5 Ill. 498. See *Hagerstown v. Dechert*, 32 Md. 369.

<sup>2</sup> *Huber v. Martin*, 127 Wis. 412, 105 N. W. 1031, 1135, 115 Am. St. Rep. 1023, 3 L. R. A. (N. S.) 653, 7 Ann. Cas. 400.

<sup>3</sup> *Moore v. New Orleans*, 32 La. Ann. 726; *Leep v. St. Louis, etc., R. Co.*, 58 Ark. 407, 25 S. W. 75, 41 Am. St. Rep. 109, 23 L. R. A. 264; *John Woods & Sons v. Curl*, 75 Ark. 328, 87 S. W. 621, 5 Ann. Cas. 423; *Territory v. Hoy Chang*, 21 Hawaii, 39, Ann. Cas. 1915 A, 1155; *State v. Robb*, 100 Me. 180, 60 Atl. 874, 4 Ann. Cas. 275; *Sault Ste. Marie Hospital v. Sharpe*, 209 Mich. 684, 177 N. W. 297. Compare *Cella Commission Co. v. Bohlinger*, 78 C. C. A. 467, 147 Fed. 419, 8 L. R. A. (N. S.) 537.

A law forbidding the sale of liquors may be void as to imported liquors and valid as to all others. *Tiernan v.*

*Rinker*, 102 U. S. 123, 26 L. ed. 103; *State v. Amery*, 12 R. I. 64.

<sup>4</sup> *Mundy v. Monroe*, 1 Mich. 68; *Cargill v. Power*, 1 Mich. 369; *Brady v. Mattern*, 125 Iowa, 158, 100 N. W. 358, 106 Am. St. Rep. 291.

In *People v. Rochester*, 50 N. Y. 525, certain commissioners were appointed to take for a city hall either lands belonging to the city or lands of individuals. The act made no provision for compensation. The commissioners elected to take lands belonging to the city. Held, that the act was not wholly void for the omission to provide compensation in case the lands of individuals had been selected.

<sup>5</sup> *Ratherman v. Western Union Telegraph Co.*, 127 U. S. 411, 32 L. ed. 229, 8 Sup. Ct. Rep. 1127; *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304, 58 L. ed. 974, 34 Sup. Ct. Rep. 493.

merce, the Supreme Court of the United States unanimously answered that so far as levied upon receipts derived from interstate commerce the tax was void, but so far as levied upon receipts from commerce wholly within the State it was valid.<sup>1</sup> In any such case the unconstitutional law must operate as far as it can,<sup>2</sup> and it will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the Constitution forbids.<sup>3</sup> If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others.<sup>4</sup>

<sup>1</sup> *Ratherman v. Western Union Telegraph Co.*, 127 U. S. 411, 32 L. ed. 229, 8 Sup. Ct. Rep. 1127. This case has been cited repeatedly with approval and its principle accepted. *Western Union Telegraph Co. v. Alabama*, 132 U. S. 472, 33 L. ed. 409, 10 Sup. Ct. Rep. 161; *Lehigh Valley R. R. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 12 Sup. Ct. Rep. 806; *Postal Telegraph Cable Co. v. Charleston*, 153 U. S. 692, 38 L. ed. 871, 14 Sup. Ct. Rep. 1094; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190; *Bowman v. Continental Oil Co.*, 256 U. S. 642, 65 L. ed. 1139, 41 Sup. Ct. Rep. 606.

<sup>2</sup> *Baker v. Braman*, 6 Hill, 47; *Regents of University v. Williams*, 9 Gill & J. 365, 31 Am. Dec. 72; *Re Middletown*, 82 N. Y. 196. The case of *Sadler v. Langham*, 34 Ala. 311, appears to be opposed to this principle, but it also appears to us to be based upon cases which are not applicable.

<sup>3</sup> *State v. Philips*, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918 A, 138.

The constitutionality of a provision of a statute cannot be tested by a party whose rights or duties are not affected by it, unless the provision is of such a nature that it renders invalid a provision of the statute that does affect the parties' rights or duties. *State ex rel. Clarkson v. Philips*, 70 Fla. 340, 70 So. 367, Ann. Cas. 1918 A, 138.

<sup>4</sup> In *United States v. Reese*, 92 U. S.

214, 23 L. ed. 563, there was a penal statute couched in general language broad enough to cover wrongful acts without as well as within the constitutional inhibition, and it was held that the court could not reject the unconstitutional part and retain the remainder, because it was not possible to separate the one from the other.

In *Williams v. Taladega*, 226 U. S. 404, 57 L. ed. 275, 33 Sup. Ct. Rep. 116, there was a state license tax that operated without exemption or distinction upon the privilege of carrying on a business a part of which was that of an essential governmental agency constituted under a law of the United States. It was held that the tax necessarily included within its operation this part of the business, and since this was unconstitutional, the whole tax was rendered void.

In *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 8 Sup. Ct. Rep. 1380, 2 Inters. Com. Rep. 134, the court held a general license tax imposed by the State of Alabama upon the business of a telegraph company in part interstate and in part internal, to be unconstitutional, and held that since the tax affected the whole business without discrimination it could not be sustained with respect to that portion of the business that was internal and therefore taxable by the State. See also *Norfolk, etc., R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 10 Sup. Ct. Rep. 958, 3 Inters. Com. Rep. 178; *Crutcher v. Kentucky*, 141 U. S.

[A provision in a statute declaring that the act as a whole shall not be declared invalid because one or more sections may be so declared, provides a rule of construction which may aid in determining the legislative intent, but it is not an inexorable command.<sup>1</sup> Where, however, an act declares each paragraph to be independent and directs that the holding of any paragraph or any part of it invalid shall not affect the validity of the rest, the fact that one or more paragraphs are invalid will not invalidate the whole act.<sup>2</sup>]

### *Waiving a Constitutional Objection.*

There are cases where a law in its application to a particular case must be sustained, because the party who makes objection has, by prior action, precluded himself from being heard against it.<sup>3</sup> Where a constitutional provision is designed for the protection solely of the

47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; Galveston, etc., R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638; Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 Sup. Ct. Rep. 190.

Where a Federal statute, though it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and the two are so interblended in the statute that they are incapable of separation, the entire statute is unenforceable. *Howard v. Illinois Central R. Co.*, 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; *Chicago, etc., R. Co. v. Hackett*, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581.

<sup>1</sup> *Dorcy v. Kansas*, 264 U. S. 286, 68 L. ed. 686, 44 Sup. Ct. Rep. 323. See also *Hill v. Wallace*, 259 U. S. 44, 66 L. ed. 822, 42 Sup. Ct. Rep. 453; *State v. Carter*, 174 Ala. 266, 56 So. 974; *State ex rel. Crumpton v. Montgomery*, 177 Ala. 212, 59 So. 294; *Ex parte Schuler*, 167 Cal. 282, 139 Pac. 685, Ann. Cas. 1915 C, 706; *Springfield Gas, etc., Co. v. Springfield*, 292 Ill. 236, 126 N. E. 739, 18 A. L. R. 929.

<sup>2</sup> *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 67 L. ed. 731, 43 Sup. Ct. Rep. 445. See also *Snetzer v. Gregg*, 129 Ark. 542, 196 S. W. 925, L. R. A. 1917 F, 999; *Borgnis v.*

*Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 466.

<sup>3</sup> *Shepard v. Barron*, 194 U. S. 553, 49 L. ed. 1115, 24 Sup. Ct. Rep. 737; *Humbird v. Avery*, 195 U. S. 480, 49 L. ed. 286, 25 Sup. Ct. Rep. 123; *International, etc., R. Co. v. Anderson County*, 246 U. S. 424, 62 L. ed. 807, 38 Sup. Ct. Rep. 370; *Hurley v. Commission of Fisheries*, 257 U. S. 223, 66 L. ed. 206, 42 Sup. Ct. Rep. 83; *Pierce Oil Corp. v. Phoenix Refining Co.*, 259 U. S. 125, 66 L. ed. 855, 42 Sup. Ct. Rep. 440; *Hirsh v. Block*, 267 Fed. 614, 50 App. Cas. (D. C.) 56, 11 A. L. R. 1238; *Greene County v. Lydy*, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917 C, 274; *Gay v. District Ct.*, 41 Nev. 330, 171 Pac. 156, 3 A. L. R. 224; *Ross v. Lipscomb*, 83 S. C. 136, 65 S. E. 451, 137 Am. St. Rep. 794; *Mellen Lumber Co. v. Industrial Commission* 154 Wis. 114, 142 N. W. 187, L. R. A. 1916 A, 374, Ann. Cas. 1915 B, 997.

One who invokes the provisions of a statute cannot attack its constitutionality. *Moore v. Napier*, 64 S. C. 564, 42 S. E. 997.

One waives right to object to law under which a grand jury is made up, by pleading in bar to the indictment. *United States v. Gale*, 109 U. S. 65, 27 L. ed. 857, 3 Sup. Ct. Rep. 1.

An officer who has acted and received money under an act cannot



property rights of the citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will.<sup>1</sup> On this ground it has been held that an act appropriating the private property of one person for the private purposes of another, on compensation made, was valid if he whose property was taken assented thereto; and that he did assent and waive the constitutional privilege, if he received the compensation awarded, or brought an action to recover it.<sup>2</sup> So if an act providing for the appropriation of property for a public use shall authorize more to be taken than the use requires, although such act would be void without the owner's assent, yet with it all objection on the ground of unconstitutionality is removed.<sup>3</sup> [So a person who obtains a license under a law, and seeks for a time to enjoy the benefits thereof, cannot afterwards, and when the license is sought to be revoked, ques-

contest its constitutionality. *People v. Bunker*, 70 Cal. 212, 11 Pac. 703.

Where a municipal corporation has entered into a contract with an individual under and by virtue of a statute which is unconstitutional, and the subject-matter of the contract is not *ultra vires*, illegal, or *malum prohibitum*, and the facts are such, as against the corporation, as would estop an individual from setting up as a defense the unconstitutionality of the statute, the municipal corporation will also be so estopped, *Mt. Vernon v. State*, 71 Ohio St. 428, 73 N. E. 515, 104 Am. St. Rep. 783, 2 Ann. Cas. 399.

<sup>1</sup> *Shepard v. Barron*, 194 U. S. 553, 48 L. ed. 1115, 24 Sup. Ct. Rep. 737; *Humbird v. Avery*, 195 U. S. 480, 49 L. ed. 286, 25 Sup. Ct. Rep. 123; *Hellen v. Medford*, 188 Mass. 42, 73 N. E. 1070, 108 Am. St. Rep. 459, 69 L. R. A. 314.

"It is well settled that an individual may waive even constitutional provisions for his benefit when no question of public policy or public morals is involved. Mayor, etc., of New York *v. Manhattan Ry. Co.*, 143 N. Y. 1, 37 N. E. 494." *Musco v. United Surety Co.*, 196 N. Y. 459, 90 N. E. 171, 134 Am. St. Rep. 851.

"A person may, by his acts or omission to act, waive a right which he might otherwise have under the Constitution of the United States." *Pierce v. Somerset Ry.*, 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64.

"Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up." *Shepard v. Barron*, 194 U. S. 553, 48 L. ed. 1115, 24 Sup. Ct. Rep. 737.

Under some circumstances a person whose land is assessed for a public improvement under a statute which violates his constitutional rights may be held to have waived all right to a remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. *Shepard v. Barron*, 194 U. S. 553, 48 L. ed. 1115, 24 Sup. Ct. Rep. 737.

<sup>2</sup> *Baker v. Braman*, 6 Hill, 47. So, if one has started the machinery to set going a local improvement act. *Dewhurst v. Allegheny*, 95 Pa. St. 437.

<sup>3</sup> *Embury v. Conner*, 3 N. Y. 511. And see *Heyward v. Mayor, &c. of New York*, 8 Barb. 486; *Mobile & Ohio Railroad Co. v. State*, 29 Ala. 573; *Detmold v. Drake*, 46 N. Y. 318. For a waiver in tax cases resting on a similar principle, see *Motz v. Detroit*, 18 Mich. 495; *Ricketts v. Spraker*, 77 Ind. 371.

tion the constitutionality of the act.<sup>1</sup>] And where parties were authorized by statute to erect a dam across a river, provided they should first execute a bond to the people conditioned to pay such damages as each and every person might sustain in consequence of the erection of the dam, the damages to be assessed by a justice of the peace, and the dam was erected and damages assessed as provided by the statute, it was held, in an action on the bond to recover those damages, that the party erecting the dam and who had received the benefit of the statute, was precluded by his action from contesting its validity, and could not insist upon his right to a common-law trial by jury.<sup>2</sup> In these and the like cases the statute must be read with an implied proviso that the party to be affected shall assent thereto; and such consent removes all obstacles, and lets the statute in to operate the same as if it had in terms contained the condition.<sup>3</sup> Under the terms of the statutes which exempt property from forced sale on execution, to a specified amount or value, it is sometimes necessary that the debtor, or some one in his behalf, shall appear and make selection or otherwise participate in the setting off of that to which he is entitled; and where this is the case, the exemption cannot be forced upon him if he declines or neglects to claim it.<sup>4</sup> In Pennsylvania and Alabama it has been decided that a party may, by executory agreement entered into at the time of contracting a debt, and as a part of the contract, waive his rights under the exemption laws and preclude himself from claiming them as against judgments obtained for such debt;<sup>5</sup> [and in Georgia it has been held that a waiver of homestead and exemption, contained in a note signed

<sup>1</sup> *Cofman v. Osterhous*, 40 N. D. 390, 168 N. W. 826, 18 A. L. R. 219. See also *State v. Seebold*, 192 Mo. 720, 91 S. W. 491; *Hart v. Folsom*, 70 N. H. 213, 47 Atl. 603; *Minneapolis, etc., R. Co. v. Nester*, 3 N. D. 480, 57 N. W. 510.

<sup>2</sup> *People v. Murray*, 5 Hill, 468. See *Lee v. Tillotson*, 24 Wend. 337.

<sup>3</sup> *Embury v. Conner*, 3 N. Y. 511. And see *Matter of Albany St.*, 11 Wend. 149; *Chamberlain v. Lyell*, 3 Mich. 448; *Beecher v. Baldy*, 7 Mich. 488; *Mobile & Ohio Railroad Co. v. State*, 29 Ala. 573; *Detmold v. Drake*, 46 N. Y. 318; *Haskell v. New Bedford*, 108 Mass. 208; *Wanser v. Atkinson*, 43 N. J. L. 571.

<sup>4</sup> See *Barton v. Brown*, 68 Cal. 11, 8 Pac. 517; *Butler v. Shiver*, 79 Ga. 172, 4 S. E. 115.

In some States the officer must

make the selection when the debtor fails to do so, and in some the debtor, if a married man, is precluded from waiving the privilege except with the consent of his wife, given in writing. See *Denny v. White*, 2 Cold. 283; *Ross v. Lister*, 14 Tex. 469; *Vanderhurst v. Bacon*, 38 Mich. 669, 31 Am. Rep. 328; *Gilman v. Williams*, 7 Wis. 329. She need not assent as to exemption of stock in trade. *Charpentier v. Bresnahan*, 62 Mich. 360, 28 N. W. 916.

<sup>5</sup> *Case v. Dunmore*, 23 Pa. St. 93; *Bowman v. Smiley*, 31 Pa. St. 225; *Shelly's Appeal*, 36 Pa. St. 373; *O'Neil v. Craig*, 56 Pa. St. 161; *Thomas's Appeal*, 69 Pa. St. 120; *Bibb v. Janney*, 45 Ala. 329; *Brown v. Leitch*, 60 Ala. 313, 31 Am. Rep. 42; *Neely v. Henry*, 63 Ala. 261. And see *Hoisington v. Huff*, 24 Kan. 379.

by a partner, in the partnership name, is effectual as against the separate property of the partner signing the note; <sup>1</sup>] but in other States it is held, on what seems to be the better reason, that, as the exemption is granted on grounds of general policy, an executory agreement to waive it must be deemed contrary to the policy of the law, and for that reason void.<sup>2</sup> [An employee may, by contract freely and voluntarily made, waive the benefit of a constitutional provision inhibiting the legislature from limiting the amount to be recovered for personal injuries.<sup>3</sup>] In criminal cases the doctrine that a constitutional privilege may be waived must be true to a very limited extent only. A party may consent to waive rights of property, but the trial and punishment for public offenses are not within the provinces of individual consent or agreement.<sup>4</sup>

### *Judicial Doubts on Constitutional Questions.*

It has been said by an eminent jurist, that when courts are called upon to pronounce the invalidity of an act of legislation, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment,

<sup>1</sup> *Perry v. Britt-Carson Shoe Co.*, 129 Ga. 560, 59 S. E. 216, 121 Am. St. Rep. 232. But in *Tribble v. Anderson*, 63 Ga. 31, the court said: "Homestead is favored by the law and usury is noxious to the law. For reasons of public policy, no waiver of homestead can be effectual where the consideration has any taint of usury." See also *Cleghorn v. Greeson*, 77 Ga. 343.

<sup>2</sup> *Maxwell v. Reed*, 7 Wis. 582; *Kneetle v. Newcomb*, 22 N. Y. 249; *Recht v. Kelly*, 82 Ill. 147, 25 Am. Rep. 301; *Moxley v. Ragan*, 10 Bush, 156, 19 Am. Rep. 61; *Denny v. White*, 2 Cold. 283; *Branch v. Tomlinson*, 77 N. C. 388; *Carter's Adm'r v. Carter*, 20 Fla. 558.

A woman cannot by ante-nuptial agreement release the special allowance made to her as widow by statute; it being against public policy. *Phelps v. Phelps*, 72 Ill. 545.

<sup>3</sup> *Kentucky State Journal Co. v. Workmen's Compensation Bd.*, 161 Ky. 562, 170 S. W. 1166, L. R. A. 1916 A, 389.

<sup>4</sup> See *post*, p. 674. And as to the waiver of the right to jury trial in civil cases, *post*, pp. 864-869.

When a case involves the punishment of a defendant for a crime, the constitutionality of the statute authorizing the prosecution may be questioned at any stage of the proceedings. *Com. v. Hana*, 195 Mass. 262, 81 N. E. 149, 122 Am. St. Rep. 251, 11 L. R. A. (N. S.) 799, 11 Ann. Cas. 514; *Ex parte Lewis*, 45 Tex. Crim. Rep. 1, 73 S. W. 811, 108 Am. St. Rep. 929.

A constitutional objection to a criminal statute may be raised on a petition for a rehearing, even though it has not been raised either upon the trial or upon the original appeal. *State v. Bickford*, 28 N. D. 36, 147 N. W. 407, Ann. Cas. 1916 D, 140.

beyond reasonable doubt.<sup>1</sup> A reasonable doubt must be solved in favor of the legislative action, and the act be sustained.<sup>2</sup> [But

<sup>1</sup> Wellington, Petitioner, 16 Pick. 87, per *Shaw*, Ch. J.; *Alexander v. People*, 7 Col. 155, 2 Pac. 894; *Crowley v. State*, 11 Oreg. 512, 6 Pac. 70; *State v. Bassett*, 100 Conn. 430, 123 Atl. 842, 37 A. L. R. 131; *Consumers' League v. Colorado, etc., R. Co.*, 53 Colo. 54, 125 Pac. 577, Ann. Cas. 1914 A, 1158; *Atlantic Coast Line R. Co. v. Coachman*, 59 Fla. 130, 52 So. 377, 20 Ann. Cas. 1047; *McPherson v. State*, 174 Ind. 60, 90 N. E. 610, 31 L. R. A. (N. S.) 188; *Shaw v. Marshalltown*, 131 Iowa, 128, 104 N. W. 1121, 10 L. R. A. (N. S.) 825, 9 Ann. Cas. 1039; *Sanders v. Com.*, 117 Ky. 1, 77 S. W. 358, 111 Am. St. Rep. 219, 1 L. R. A. (N. S.) 932; *Soper v. Lawrence Bros. Co.*, 98 Me. 268, 56 Atl. 908, 99 Am. St. Rep. 397; *Cochran v. Preston*, 107 Md. 220, 70 Atl. 113, 129 Am. St. Rep. 432, 23 L. R. A. (N. S.) 1163, 15 Ann. Cas. 1048; *Pawloski v. Hess*, 250 Mass. 22, 144 N. E. 760, 35 A. L. R. 945; *State v. Clement National Bank*, 84 Vt. 167, 78 Atl. 944, Ann. Cas. 1912 D, 22; *State v. Superior Court*, 60 Wash. 370, 111 Pac. 233, 140 Am. St. Rep. 925; *Record Pub. Co. v. Monson*, 123 Wash. 596, 213 Pac. 13.

A law will be upheld unless its unconstitutionality is so clear "as to leave no doubt on the subject." *Kelly v. Meeks*, 87 Mo. 396; *Robinson v. Schenck*, 102 Ind. 307, 1 N. E. 698. See also *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969, 32 L. R. A. (N. S.) 639; *Jenkins v. State Board of Elections*, 180 N. C. 169, 104 S. E. 346, 14 A. L. R. 1247; *Ex parte Berry*, 84 S. C. 243, 67 S. E. 225, 20 Ann. Cas. 1344; *Wheelon v. South Dakota Land Settlement Board*, 43 S. D. 551, 181 N. W. 359, 14 A. L. R. 1145.

"Doubts as to the constitutionality of a statute, though arising from a prior decision, should always be resolved in favor of constitutionality." *Heisler v. Thomas Colliery Co.*, 274 Pa. St. 448, 118 Atl. 394, 24 A. L. R. 1215, affirmed, 260 U. S. 245, 67 L. ed. 237, 43 Sup. Ct. Rep. 83.

If an act may be valid or not according to the circumstances, a court would be bound to presume that such circumstances existed as would render it valid. *Talbot v. Hudson*, 16 Gray, 417.

It will be presumed that the legislature acted with full knowledge of all the facts and conditions essential to valid legislation when it adopted a regulation in the exercise of the police power. *Jay Burns Baking Co. v. McKelvie*, 108 Neb. 674, 189 N. W. 383, 26 A. L. R. 24.

If plaintiffs assail legislation as unreasonable the burden is on them to prove every fact essential to a determination of that issue in their favor. *Jay Burns Baking Co. v. McKelvie*, 108 Neb. 674, 189 N. W. 383, 26 A. L. R. 24.

<sup>2</sup> *Copper v. Telfair*, 4 Dall. 14, 1 L. ed. 721; *Dow v. Norris*, 4 N. H. 16; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194; *Carey v. Giles*, 9 Ga. 253; *Macon & Western Railroad Co. v. Davis*, 13 Ga. 68; *Franklin Bridge Co. v. Wood*, 14 Ga. 80; *Kendall v. Kingston*, 5 Mass. 524; *Foster v. Essex Bank*, 16 Mass. 245; *Norwich v. County Commissioners of Hampshire*, 13 Pick. 60; *Hartford Bridge Co. v. Union Ferry Co.*, 29 Conn. 210; *Rich v. Flanders*, 39 N. H. 304; *Eason v. State*, 11 Ark. 481; *Hedley v. Commissioners of Franklin Co.*, 4 Blackf. 116; *Stocking v. State*, 7 Ind. 326; *La Fayette v. Jenners*, 10 Ind. 74; *Ex parte McCollum*, 1 Cow. 550; *Coutant v. People*, 11 Wend. 511; *Clark v. People*, 26 Wend. 559; *Morris v. People*, 3 Denio, 376; *N. Y. & C. R. R. Co. v. Van Horn*, 57 N. Y. 473; *Baltimore v. State*, 15 Md. 376; *Cotton v. Commissioners of Leon Co.*, 6 Fla. 610; *Cheney v. Jones*, 14 Fla. 587; *Lane v. Dorman*, 4 Ill. 238, 36 Am. Dec. 543; *Newland v. Marsh*, 19 Ill. 376; *Farmers' and Mechanics' Bank v. Smith*, 3 S. & R. 63; *Weister v. Hade*, 52 Pa. St. 474; *Sears v. Cottrell*, 5 Mich. 251; *Tyler v. People*, 8 Mich. 320; *Allen County Commissioners v. Silvers*, 22 Ind. 491; *State v. Robinson*, 1 Kan. 17; *Eyre v. Jacob*,

14 Gratt. 422; *Gormley v. Taylor*, 44 Ga. 76; *State v. Cape Girardeau, &c. R. R. Co.*, 48 Mo. 468; *Oleson v. Railroad Co.*, 36 Wis. 383; *Newsom v. Cocke*, 44 Miss. 352; *Slack v. Jacob*, 8 W. Va. 612; *Commonwealth v. Moore*, 25 Gratt. 951; *State v. Standard Oil Co.*, 61 Neb. 28, 84 N. W. 413, 87 Am. St. 449; *Isenhour v. State*, 157 Ind. 517, 62 N. E. 40, 87 Am. St. 228; *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, 61 Pac. 258, 87 Am. St. 918; *Adkins v. Children's Hospital*, 261 U. S. 525, 67 L. ed. 785, 43 Sup. Ct. Rep. 394, 24 A. L. R. 1238; *Kane v. Erie R. Co.*, 67 C. C. A. 653, 133 Fed. 681, 68 L. R. A. 788; *Whaley v. State*, 168 Ala. 152, 52 So. 941, 30 L. R. A. (n. s.) 499; *State v. Birmingham Southern R. Co.*, 182 Ala. 475, 62 So. 77, Ann. Cas. 1915 D, 436; *Young v. Lemieux*, 79 Conn. 434, 65 Atl. 436, 600, 129 Am. St. Rep. 193, 20 L. R. A. (n. s.) 160, 8 Ann. Cas. 452; *Jacksonville v. Bowden*, 67 Fla. 181, 64 So. 769, L. R. A. 1916 D, 913, Ann. Cas. 1915 D, 99; *Anderson v. Ocala*, 67 Fla. 204, 64 So. 775, 52 L. R. A. (n. s.) 287; *Wilkerson v. Rome*, 152 Ga. 762, 110 S. E. 895, 20 A. L. R. 1334; *Achenbach v. Kincaid*, 25 Idaho, 768, 140 Pac. 529; *Ex parte Kessler*, 26 Idaho, 764, 146 Pac. 113, L. R. A. 1915 D, 322; *People v. Rose*, 203 Ill. 46, 67 N. E. 746; *People v. People's Gas Light & Coke Co.*, 205 Ill. 482, 68 N. E. 950, 98 Am. St. Rep. 244; *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; *State v. Barrett*, 172 Ind. 169, 87 N. E. 7; *McPherson v. State*, 174 Ind. 60, 90 N. E. 610, 31 L. R. A. (n. s.) 188; *Brady v. Mat-tern*, 125 Iowa, 158, 100 N. W. 358, 106 Am. St. Rep. 291; *McGuire v. Chicago, etc., R. Co.*, 131 Iowa, 340, 108 N. W. 902, 33 L. R. A. (n. s.) 706; *State v. Butler*, 105 Me. 91, 73 Atl. 560, 24 L. R. A. (n. s.) 744, 18 Ann. Cas. 484; *Dirken v. Great Northern Paper Co.*, 110 Me. 374, 86 Atl. 320, Ann. Cas. 1914 D, 396; *Salisbury Land & Imp. Co. v. Com.*, 215 Mass. 371, 102 N. E. 619, 46 L. R. A. (n. s.) 1196; *Com. v. Slavski*, 245 Mass. 405, 140 N. E. 465, 29 A. L. R. 281;

*State v. Ryder*, 126 Minn. 95, 147 N. W. 953, 5 A. L. R. 1449; *Mathison v. Minneapolis St. Ry. Co.*, 126 Minn. 286, 148 N. W. 71, 5 N. C. C. A. 871; *State v. J. Newman Lumber Co.*, 102 Miss. 802, 59 So. 923, 45 L. R. A. (n. s.) 851; *Tuberculosis Hospital Dist. v. Peter*, 253 Mo. 520, 161 S. W. 1155, Ann. Cas. 1915 C, 310; *State v. Buente*, 256 Mo. 227, 165 S. W. 340, Ann. Cas. 1915 D, 879; *Greene County v. Lydy*, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917 C, 274; *State v. Scullin-Gallagher Iron, etc., Co.*, 268 Mo. 178, 186 S. W. 1007, Ann. Cas. 1918 E, 620; *Northwestern Mut. Life Ins. Co. v. Lewis & Clarke County*, 28 Mont. 484, 72 Pac. 982, 98 Am. St. Rep. 572; *State v. Alder-son*, 49 Mont. 387, 142 Pac. 210, Ann. Cas. 1916 B, 39; *State v. Stewart*, 54 Mont. 504, 171 Pac. 755, Ann. Cas. 1918 D, 1101; *Gas Products Co. v. Rankin*, 63 Mont. 372, 207 Pac. 993, 24 A. L. R. 294; *Ex parte Kair*, 28 Nev. 127, 425, 80 Pac. 463, 6 Ann. Cas. 893; *Jenkins v. State Board of Elections*, 180 N. C. 169, 104 S. E. 346, 14 A. L. R. 1247; *Steller v. O'Hara*, 69 Ore. 519, 139 Pac. 743, L. R. A. 1917 C, 944, Ann. Cas. 1916 A, 217; *Smith v. Cameron*, 106 Ore. 1, 210 Pac. 716, 27 A. L. R. 510; *State v. Kofines*, 33 R. I. 211, 80 Atl. 432, Ann. Cas. 1913 C, 1120; *State v. Summers*, 33 S. D. 40, 144 N. W. 730, 50 L. R. A. (n. s.) 206, Ann. Cas. 1916 B, 860; *McCoy v. Handlin*, 35 S. D. 487, 153 N. W. 361, L. R. A. 1915 E, 858, Ann. Cas. 1917 A, 1046; *State v. Candland*, 36 Utah, 406, 104 Pac. 285, 140 Am. St. Rep. 834, 24 L. R. A. (n. s.) 1260; *Willis v. Kalmbach*, 109 Va. 475, 64 S. E. 342, 21 L. R. A. (n. s.) 1009; *State v. Pitney*, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916 A, 209; *Duncan v. Baltimore, etc., R. Co.*, 68 W. Va. 293, 69 S. E. 1004, Ann. Cas. 1912 B, 272; *Bon-nett v. Vallier*, 136 Wis. 193, 116 N. W. 885, 128 Am. St. Rep. 1061, 17 L. R. A. (n. s.) 486; *Lawrence University v. Outagamie County*, 150 Wis. 244, 136 N. W. 619, 2 A. L. R. 465; *Peter-son v. Widula*, 157 Wis. 641, 147 N. W. 966, 52 L. R. A. (n. s.) 778, Ann. Cas. 1916 B, 1040

the presumption of validity in favor of the legislative action is not conclusive.<sup>1]</sup>

"The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes; but it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."<sup>2</sup> Mr. Justice *Washington* gives a reason for this rule, which has been repeatedly recognized in other cases which we have cited. After expressing the opinion that the particular question there presented, and which regarded the constitutionality of a State law, was involved in difficulty and doubt, he says: "But if I could rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt."<sup>3</sup>

One who assails the classification in a police law or regulation has the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *New Orleans v. Calamari*, 150 La. 737, 91 So. 172.

<sup>1</sup> *New Orleans v. Toca*, 141 La. 551, 75 So. 238, L. R. A. 1917 E, 761, Ann. Cas. 1918 B, 1032. The court, in this case, said: "The legislative action will be sustained if the doing so is possible under any reasonably supposable state of facts."

<sup>2</sup> *Fletcher v. Peck*, 6 Cranch, 87, 128, 3 L. ed. 162, 175, per *Marshall*, Ch. J.

<sup>3</sup> *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606. See *Adams v. Howe*, 14 Mass. 340, 7 Am. Dec. 216; *Kellogg v. State Treasurer*, 44 Vt. 356, 359; *Slack v. Jacob*, 8 W. Va. 612; *Jacksonville v. Bowden*, 67 Fla. 181, 64 So. 769, L. R. A. 1916 D, 913, Ann. Cas. 1915 D, 99; *McPherson v. State*,

174 Ind. 60, 90 N. E. 610, 31 L. R. A. (N. S.) 188; *Lawrence E. Tierney Coal Co. v. Smith*, 180 Ky. 815, 203 S. W. 731, 4 A. L. R. 1540; *Laughlin v. Portland*, 111 Me. 486, 90 Atl. 318, 57 L. R. A. (N. S.) 1143, Ann. Cas. 1916 C, 734; *Harris v. Allegany County*, 130 Md. 488, 100 Atl. 733, L. R. A. 1917 E, 824; *Bowman v. Virginia State Entomologist*, 128 Va. 351, 105 S. E. 141, 12 A. L. R. 1121; *State v. Superior Court*, 60 Wash. 370, 111 Pac. 233, 140 Am. St. Rep. 925.

In *Missouri, etc., R. Co. v. May*, 194 U. S. 267, 48 L. ed. 971, 24 Sup. Ct. Rep. 638, Justice *Holmes* says: "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

The constitutionality of a law, then, is to be presumed, because the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the Constitution upon their action, have adjudged that it is so. They are a co-ordinate department of the government with the judiciary, invested with very high and responsible duties, as to some of which their acts are not subject to judicial scrutiny, and they legislate under the solemnity of an official oath, which it is not to be supposed they will disregard. It must, therefore, be supposed that their own doubts of the constitutionality of their action have been deliberately solved in its favor, so that the courts may with some confidence repose upon their conclusion, as one based upon their best judgment. For although it is plain, upon the authorities, that the courts should sustain legislative action when not clearly satisfied of its invalidity, it is equally plain in reason that the legislature should abstain from adopting such action if not fully assured of their authority to do so. Respect for the instrument under which they exercise their power should impel the legislature in every case to solve their doubts in its favor, and it is only because we are to presume they do so, that courts are warranted in giving weight in any case to their decision. If it were understood that legislators refrained from exercising their judgment, or that, in cases of doubt, they allowed themselves to lean in favor of the action they desired to accomplish, the foundation for the cases we have cited would be altogether taken away.<sup>1</sup>

As to what the doubt shall be upon which the court is to act, we conceive that it can make no difference whether it springs from an endeavor to arrive at the true interpretation of the Constitution, or from a consideration of the law after the meaning of the Constitution has been judicially determined. It has sometimes been supposed that it was the duty of the court, first, to interpret the Constitution, placing upon it a construction that must remain unvarying, and then test the law in question by it; and that any other rule would lead to differing judicial decisions, if the legislature should put one interpretation upon the Constitution at one time and a different one at another. But the decided cases do not sanction this rule,<sup>2</sup> and the difficulty suggested is rather imaginary than real, since it is but reasonable to expect that, where a construction has once been

<sup>1</sup> See upon this subject what is said in *Osburn v. Staley*, 5 W. Va. 85; *Tate v. Bell*, 4 Yerg. 202, 26 Am. Dec. 221; *State v. Crawford*, 36 N. D. 385, 162 N. W. 718, Ann. Cas. 1917 E, 955.

<sup>2</sup> *Sun Mutual Insurance Co. v. New York*, 5 Sandf. 10; *Clark v. People*, 26 Wend. 599; *Baltimore v. State*, 15 Md. 376; *Veterans' Welfare Board v. Riley*, 189 Cal. 159, 208 Pac. 678, 22 A. L. R. 1531.

placed upon a constitutional provision, it will be followed afterwards, even though its original adoption may have sprung from deference to legislative action rather than from settled convictions in the judicial mind.<sup>1</sup>

The duty of the court to uphold a statute when the conflict between it and the Constitution is not clear, and the implication which must always exist that no violation has been intended by the legislature, may require it in some cases, where the meaning of the Constitution is not in doubt, to lean in favor of such a construction of the statute as might not at first view seem most obvious and natural.<sup>2</sup> For as a conflict between the statute and the Constitution is not to be implied, it would seem to follow, where the meaning of the Constitution is clear, *that the court, if possible, must give the statute such a construction as will enable it to have effect.* This is only saying, in another form of words, that the court must construe the statute in accordance with the legislative intent; since it is always to be presumed the legislature designed the statute to take effect, and not to be a nullity.<sup>3</sup>

The rule upon this subject is thus stated by the Supreme Court of Illinois: "Whenever an act of the legislature can be so construed

<sup>1</sup> *People v. Blodgett*, 13 Mich. 127; *State v. Rice*, 115 Md. 317, 80 Atl. 1026, 36 L. R. A. (N. S.) 344, Ann. Cas. 1913 A, 1247.

<sup>2</sup> If the language used in a statute is reasonably susceptible of two constructions, one rendering it constitutional and the other not, the former must be adopted although the other is the more natural. *State ex rel. Wilcox v. Ryder*, 126 Minn. 95, 147 N. W. 953, 5 A. L. R. 1449.

<sup>3</sup> *Cheseborough v. San Francisco*, 153 Cal. 559, 96 Pac. 288; *State v. Savings Union Bank & Trust Co.*, 186 Cal. 294, 199 Pac. 26; *People v. Lochner*, 177 N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773; *People v. Ringe*, 197 N. Y. 143, 90 N. E. 451, 27 L. R. A. (N. S.) 528.

"Every enactment of the legislature must be deemed in harmony with constitutional provisions until the contrary clearly appears." *State v. Gee Jon*, 46 Nev. 418, 211 Pac. 676, 30 A. L. R. 1443.

When a legislative enactment is attacked upon the ground that it is discriminatory or unreasonable, all presumptions and intendments are in

favor of its reasonableness and fairness. *People v. Monterey Fish Products Co.*, 195 Cal. 548, 234 Pac. 398, 38 A. L. R. 1186.

Nothing but the most explicit language will authorize the courts in interpreting an act of Congress as intended to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime, as such an interpretation would be repugnant to the spirit of the Fourth Amendment to the Federal Constitution. *Federal Trade Commission v. American Tobacco Co.*, 264 U. S. 298, 68 L. ed. 696, 44 Sup. Ct. Rep. 336.

A statute requiring notice of injury within thirty days in case of injury on a city street due to the negligence of the city will not be construed to apply to one injured so severely as to be unable to give the notice, as to make the requirement apply to such a person would render the statute unconstitutional as denying him due process of law. *Randolph v. City of Springfield*, 302 Mo. 33, 257 S. W. 449, 31 A. L. R. 612; *McDonald v. Spring Valley*, 285 Ill. 52, 120 N. E.



and applied as to avoid conflict with the Constitution and give it the force of law, such construction will be adopted by the courts. Therefore, acts of the legislature, in terms retrospective, and which, literally interpreted, would invalidate and destroy vested rights, are upheld by giving them prospective operation only; for, applied to, and operating upon, future acts and transactions only, they are rules of property under and subject to which the citizen acquires property rights, and are obnoxious to no constitutional limitation; but as retroactive laws, they reach to and destroy *existing* rights, through force of the legislative will, without a hearing or judgment of law. So will acts of the legislature, having elements of limitation, and capable of being so applied and administered, although the words are broad enough to, and do, literally read, strike at the right itself, be construed to limit and control the remedy; for as such they are valid, but as weapons destructive of vested rights they are void; and such force only will be given the acts as the legislature could impart to them.”<sup>1</sup>

The Supreme Court of New Hampshire, a similar question being involved, recognizing their obligation “so to construe every act of the legislature as to make it consistent, if it be possible, with the provisions of the Constitution”, proceed to the examination of a statute by the same rule, “without stopping to inquire what construction might be warranted by the natural import of the language used.”<sup>2</sup>

And it is said by *Harris, J.*, delivering the opinion of the majority of the Court of Appeals of New York: “A legislative act is not to be declared void upon a mere conflict of interpretation between the legislative and the judicial power. Before proceeding to annul, by judicial sentence, what has been enacted by the law-making power,

476, 2 A. L. R. 1359; *Williams v. Port Chester*, 72 App. Div. 505, 76 N. Y. Supp. 631, reaffirmed on appeal in 97 App. Div. 84, 89 N. Y. Supp. 671, and affirmed without opinion in 183 N. Y. 550, 76 N. E. 1116; *Murphy v. Ft. Edward*, 213 N. Y. 397, 107 N. E. 716, Ann. Cas. 1916 C, 1040, 9 N. C. C. A. 279; *Forsyth v. Oswego*, 191 N. Y. 441, 84 N. E. 392, 123 Am. St. Rep. 605; *Terrell v. Washington*, 158 N. C. 281, 73 S. E. 888; *Hartsell v. Asheville*, 166 N. C. 633, 82 S. E. 946.

The court will not go beyond the face of the law to seek for grounds, for holding it unconstitutional. *Steven-*

*son v. Colgan*, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. 230, and note on extrinsic evidence to show unconstitutionality in 25 Am. St. 233.

<sup>1</sup> *Newland v. Marsh*, 19 Ill. 376, 384. See also *Bigelow v. West Wisconsin R. R. Co.*, 27 Wis. 478; *Attorney-General v. Eau Claire*, 37 Wis. 400; *Coleman v. Yesler*, 1 Wash. Ter. 591; *Singer Mfg. Co. v. McCollock*, 24 Fed. 667.

<sup>2</sup> *Dow v. Norris*, 4 N. H. 16, 18. See *Dubuque v. Illinois Cent. R. R. Co.*, 39 Iowa, 56; *State v. Lapointe*, 81 N. H. 227, 123 Atl. 692, 31 A. L. R. 1212.

it should clearly appear that the act cannot be supported by any reasonable intendment or allowable presumption."<sup>1</sup> And this after all is only the application of the familiar rule, that in the exposition of a statute it is the duty of the court to seek to ascertain and carry out the intention of the legislature in its enactment, and to give full effect to such intention; and they are bound so to construe the statute, if practicable, as to give it force and validity, rather than to avoid it, or render it nugatory.<sup>2</sup> [But in Indiana it has been held that where the provisions of a statute are not ambiguous or uncertain in their meaning there is no room for construction and can be no question as to the legislative intent;<sup>3</sup> and the Criminal Court of Appeals of Oklahoma has held that though it is the duty of the courts to uphold any statute enacted in the ordinary exercise of the legislative power, unless the constitutional objections to it are clear and indisputable, yet when it is proposed by a statute to deny, modify, or diminish a right or immunity secured to the people by a clear and explicit constitutional provision, then the presumption is against the validity of the statute, and the courts should enforce the constitutional provision.<sup>4</sup>]

The rule is not different when the question is whether any portion of a statute is void, than when the whole is assailed. The excess of power, if there is any, is the same in either case, and is not to be applied in any instance.

And on this ground it has been held that where the repealing clause in an unconstitutional statute repeals all inconsistent acts, the repealing clause is to stand and have effect, notwithstanding the invalidity of the rest.<sup>5</sup> But other cases hold that such repealing clause is to be understood as designed to repeal all conflicting provisions, in order that those of the new statute can have effect; and

<sup>1</sup> *People v. Supervisors of Orange*, 17 N. Y. 235, 241. See also *Boisdere v. Citizens' Bank*, 9 La. 506, 29 Am. Dec. 453; *State v. Martin*, 193 Ind. 120, 139 N. E. 282, 26 A. L. R. 1386.

It is the duty of the court to adopt a construction of a statute which, without doing violence to the fair meaning of words, brings it into harmony with the Constitution. *Grenada Co. Supervisors v. Brogden*, 112 U. S. 261, 28 L. ed. 704, 5 Sup. Ct. Rep. 125.

<sup>2</sup> *Clarke v. Rochester*, 24 Barb. 446. See *Marshall v. Grimes*, 41 Miss. 27; *Morrell v. Fickle*, 3 Lea, 79.

"A statute must be construed, if fairly possible, so as to avoid not only

the conclusion that it is unconstitutional, but also grave doubts upon that score." *Linder v. United States*, 268 U. S. 5, 69 L. ed. 819, 45 Sup. Ct. Rep. 229, 39 A. L. R. 229.

<sup>3</sup> *State v. Martin*, 193 Ind. 120, 139 N. E. 282, 26 A. L. R. 1386. See also *State v. Taylor*, 33 N. D. 76, 156 N. W. 561, L. R. A. 1918 B, 156, Ann. Cas. 1918 A, 583.

<sup>4</sup> *Salter v. State*, 2 Okla. Crim. Rep. 464, 102 Pac. 719, 139 Am. St. Rep. 935, 25 L. R. A. (N. S.) 60.

<sup>5</sup> *Meshmeier v. State*, 11 Ind. 482; *Ely v. Thompson*, 3 A. K. Marsh. 70; *Equit. G. & Trust Co. v. Donahoe*, 3 Penn. (Del.) 191, 49 Atl. 372.

that if the statute is invalid, nothing can conflict with it, and therefore nothing is repealed.<sup>1</sup> Great caution is necessary in some cases, or the rule which was designed to ascertain and effectuate the legislative intent will be pressed to the extreme of giving effect to part of a statute exclusively, when the legislative intent was that the part should not stand except as a component part of the whole.<sup>2</sup>

### *Inquiry into Legislative Motives.*

From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature in the particular case, in respect to the subject-matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it, has kept within the constitutional limits and observed the constitutional conditions. In any case in which this question is answered in the affirmative, the courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been properly exercised.<sup>3</sup> If evidence was required,

<sup>1</sup> *Shepardson v. Milwaukee & Beloit Railroad Co.*, 6 Wis. 605; *State v. Judge of County Court*, 11 Wis. 50; *Tims v. State*, 26 Ala. 165; *Sullivan v. Adams*, 3 Gray, 476; *Devoy v. Mayor, &c. of New York*, 35 Barb. 264; *Campau v. Detroit*, 14 Mich. 276; *Childs v. Shower*, 18 Iowa, 261; *Harbeck v. New York*, 10 Bosw. 366; *People v. Fleming*, 7 Col. 230, 3 Pac. 70; *Portland v. Schmidt*, 13 Oreg. 17, 6 Pac. 221; *State v. Rice*, 115 Md. 317, 80 Atl. 1026, 36 L. R. A. (N. S.) 344, Ann. Cas. 1913 A, 1247; *Allen v. Raleigh*, 181 N. C. 453, 107 S. E. 463.

<sup>2</sup> The declaration of *Brewer, J.*, in *Chicago, &c. Ry. Co. v. Wellman*, 143 U. S. 343, 345, 36 L. ed. 176, 12 Sup. Ct. Rep. 400, aff. 83 Mich. 592, 47 N. W. 592, illustrates the hesitation of the courts to determine constitutional questions except where the duty is clear. It was raised in this case on an agreed statement of facts. Said Justice *Brewer*: "Whenever in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily

rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act is constitutional or not. But such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort and as a necessity in the determination of real, earnest, and vital controversies between individuals. It never was the thought that by means of a friendly suit a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."

See also, *supra* pp. 338, 339.

<sup>3</sup> *People v. Lawrence*, 36 Barb. 177; *People v. New York Central Railroad Co.*, 34 Barb. 123; *Baltimore v. State*, 15 Md. 376; *Goddin v. Crump*, 8 Leigh, 154; *Grainger v. Douglas Park Jockey Club*, 78 C. C. A. 199, 148 Fed. 513, 8 Ann. Cas. 997; *Beach v. Bradstreet*, 85 Conn. 344, 82 Atl. 1030, Ann. Cas. 1913 B, 946; *Schmidt v. Indianapolis*, 168 Ind. 631, 80 N. E. 632, 120 Am. St. Rep. 386, 14 L. R. A. (N. S.) 787; *People v. Lochner*, 177, N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773; *People v. Griswold*, 213 N. Y. 92, 106 N. E. 929, L. R. A. 1915 D, 538; *St. Louis Southwestern*

it must be supposed that it was before the legislature when the act was passed;<sup>1</sup> and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding.<sup>2</sup> And although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegation were established the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon.<sup>3</sup> The reasons are the same here as those which preclude an

R. Co. v. Griffin, 106 Tex. 477, 171 S. W. 703, L. R. A. 1917 B, 1108; Sabre v. Rutland R. Co., 86 Vt. 347, 85 Atl. 693, Ann. Cas. 1915 C, 1269.

"The propriety, expediency, and necessity of a legislative act are purely for the determination of the legislative authority, and are not for determination by the courts." *In re Kansas City Ordinance No. 39,946*, 298 Mo. 569, 252 S. W. 404, 28 A. L. R. 295.

The statement of legislative reasons in the preamble of an act will not affect its validity. *Lothrop v. Steadman*, 42 Conn. 583.

<sup>1</sup> *De Camp v. Eveland*, 19 Barb. 81; *Lusher v. Scites*, 4 W. Va. 11.

<sup>2</sup> *Johnson v. Joliet & Chicago Railroad Co.*, 23 Ill. 202. The Constitution of Illinois provided that "corporations not possessing banking powers or privileges may be formed under general laws, but shall not be created by special acts except for municipal purposes, and in cases where, in the judgment of the General Assembly, the objects of the corporation cannot be attained under general laws." A special charter being passed without any legislative declaration that its object could not be attained under a general law, the Supreme Court sustained it, but placed their decision mainly on the ground that the clause had been wholly disregarded, "and it would now produce far-spread ruin to declare such acts unconstitutional and void." It is very clearly intimated in the opinion, that the legislative practice, and this decision sustaining it, did violence to the intent of the Constitution.

A provision in the Constitution of

Indiana that "no act shall take effect until the same shall have been published and circulated in the several counties of this State, by authority, except in case of emergency", adds the words, "which emergency shall be declared in the preamble, or in the body of the law"; thus clearly making the legislative declaration necessary. *Carpenter v. Montgomery*, 7 Blackf. 415; *Mark v. State*, 15 Ind. 98; *Hendrickson v. Hendrickson*, 7 Ind. 13.

<sup>3</sup> *Sunbury & Erie Railroad Co. v. Cooper*, 33 Pa. St. 278; *Ex parte Newman*, 9 Cal. 502; *Baltimore v. State*, 15 Md. 376; *Johnson v. Higgins*, 3 Met. (Ky.) 566; *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; *Calder v. Michigan*, 218 U. S. 591, 54 L. ed. 1163, 31 Sup. Ct. Rep. 122; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912 B, 1312; *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163, 63 L. ed. 910, 39 Sup. Ct. Rep. 507; *Hamilton v. Kentucky Distilleries, etc., Co.*, 251 U. S. 146, 64 L. ed. 194, 40 Sup. Ct. Rep. 106; *Smith v. Kansas City Title, etc., Co.*, 255 U. S. 180, 65 L. ed. 577, 41 Sup. Ct. Rep. 243; *McDonald v. Doust*, 11 Idaho, 14, 81 Pac. 60, 69 L. R. A. 220; *Schmidt v. Indianapolis*, 168 Ind. 631, 80 N. E. 632, 120 Am. St. Rep. 386, 14 L. R. A. (N. S.) 787; *State v. Taylor*, 33 N. D. 76, 156 N. W. 561, Ann. Cas. 1918 A, 583, L. R. A. 1918 B, 156; *Com. v. Herr*, 229 Pa. St. 132, 78 Atl. 68, Ann. Cas. 1912 A, 422; *State v. Bayer*, 34 Utah, 257, 97 Pac. 129, 19 L. R. A. (N. S.) 297; *Tilly v. Mitchell & Lewis Co.*, 121 Wis. 1,

98 N. W. 969, 105 Am. St. Rep. 1007.

In *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, 65 L. ed. 577, 41 Sup. Ct. Rep. 243, Mr. Justice Day, who delivered the opinion of the court, said: "Nothing is better settled by the decisions of this court than that when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the government to question its motives. *Veazie Bank v. Fenno*, 8 Wall. 533, 541, 19 L. ed. 482; *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769; *Flint v. Stone Tracy Co.*, 220 U. S. 107, 147, 153, 156, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, and cases cited." "The courts cannot impute to the legislature any other than public motives for their acts." *People v. Draper*, 15 N. Y. 532, 545, per *Denio*, Ch. J.

"We are not made judges of the motives of the legislature, and the court will not usurp the inquisitorial office of inquiring into the *bona fides* of that body in discharging its duties." *Shankland, J.*, in the same case, p. 555. "The powers of the three departments are not merely equal; they are exclusive in respect to the duties assigned to each. They are absolutely independent of each other. It is now proposed that one of the three powers shall institute an inquiry into the conduct of another department, and form an issue to try by what motives the legislature were governed in the enactment of a law. If this may be done, we may also inquire by what motives the executive is induced to approve a bill or withhold his approval, and in case of withholding it corruptly, by our mandate compel its approval. To institute the proposed inquiry would be a direct attack upon the independence of the legislature, and a usurpation of power subversive of the Constitution." *Wright v. Defrees*, 8 Ind. 298, 302, per *Gookins, J.*

"We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution." Per *Chase, Ch. J.*, in *Ex parte McCordle*, 7 Wall.

506, 514, 19 L. ed. 264. The same doctrine is restated by Mr. Justice *Hunt*, in *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. ed. 148.

Courts cannot inquire into legislative motives "except as they may be disclosed on the face of the acts or be inferable from their operation considered with reference to the condition of the country and existing legislation." *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730. See also *Com. ex rel. Elkin v. Moir*, 199 Pa. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. 801; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 10 Sup. Ct. Rep. 862; *Grainger v. Douglas Park Jockey Club*, 78 C. C. A. 199, 148 Fed. 513, 8 Ann. Cas. 997.

"It is . . . argued, if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department. The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions. . . . It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain

inquiry into the motives of the governor in the exercise of a discretion vested in him exclusively. He is responsible for his acts in such a case, not to the courts, but to the people.<sup>1</sup>

*Consequences if a Statute is Void.*

When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made.<sup>2</sup> And what is true of an act void *in toto* is true also as to any

a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power." Chief Justice *White* in *McCray v. United States*, 195 U. S. 27, 24 Sup. Ct. Rep. 769, 49 L. ed. 78, 1 Ann. Cas. 561. The rule applies to the legislation of municipalities. *Brown v. Cape Girardeau*, 90 Mo. 377, 2 S. W. 302; *Grainger v. Douglas Park Jockey Club*, 78 C. C. A. 199, 148 Fed. 513, 8 Ann. Cas. 997; *Dobbins v. Los Angeles*, 139 Cal. 179, 72 Pac. 970, 96 Am. St. Rep. 95; *Burlingame v. Thompson*, 74 Kan. 393, 86 Pac. 449, 11 Ann. Cas. 64. And see *McCulloch v. State*, 11 Ind. 424; *Bradshaw v. Omaha*, 1 Neb. 16; *Lyon v. Morris*, 15 Ga. 480; *People v. Flagg*, 46 N. Y. 401; *Slack v. Jacob*, 8 W. Va. 612, 635; *State v. Cardozo*, 5 S. C. 297; *Humboldt County v. Churchill County Com'rs*, 6 Nev. 30; *Flint, &c. Plank Road Co. v. Woodhull*, 25 Mich. 99; *State v. Fagan*, 22 La. Ann. 545; *State v. Hays*, 49 Mo. 604; *Luehrman v. Taxing District*, 2 Lea, 425; *Kountze v. Omaha*, 5 Dill. 443.

In *Jones v. Jones*, 12 Pa. St. 350, the general principle was recognized, and it was decided not to be competent

to declare a legislative divorce void for fraud. It was nevertheless held competent to annul it, on the ground that it had been granted (as shown by parol evidence) for a cause which gave the legislature no jurisdiction. The legislature was regarded as being for the purpose a court of limited jurisdiction.

In *Attorney-General v. Supervisors of Lake Co.*, 33 Mich. 289, it is decided that when supervisors and people, having full authority over the subject, have acted upon the question of removal of a county seat, no question of motive can be gone into to invalidate their action.

But in a New York case it was held that the fact that a resolution accepting an imperfect sewer was secured by fraud and corrupt influences was a valid defense to an action brought upon the resolution. *Weston v. Syracuse*, 158 N. Y. 274, 53 N. E. 12, 43 L. R. A. 678, 70 Am. St. 472.

<sup>1</sup> *Attorney-General v. Brown*, 1 Wis. 513; *Wright v. Defrees*, 8 Ind. 298.

<sup>2</sup> *Strong v. Daniel*, 5 Ind. 348; *Sumner v. Beeler*, 50 Ind. 341; *Astrom v. Hammond*, 3 McLean, 107; *Woolsey v. Commercial Bank*, 6 McLean, 142; *Detroit v. Martin*, 34 Mich. 170; *Kelly v. Bemis*, 4 Gray, 83; *Hover v. Barkhoof*, 44 N. Y. 113; *Clark v. Miller*, 54 N. Y. 528; *Meagher v. Storey Co.*, 5 Nev. 244; *Ex parte Rosenblatt*, 19 Nev. 439, 14 Pac. 298; *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; *Chicago, etc., R. Co. v. Hackett*, 228 U. S. 559, 57 L. ed. 966, 33 Sup. Ct. Rep. 581; *Hirsh v. Block*, 267

Fed. 614, 11 A. L. R. 1238; *Quong Ham Wah Co. v. Industrial Acc. Commission*, 184 Cal. 26, 192 Pac. 1021, 12 A. L. R. 1190; *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 479, 38 L. R. A. (N. S.) 77; *Board of Highway Com'rs v. Bloomington*, 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913 A, 471; *Henderson v. Lieber*, 175 Ky. 15, 192 S. W. 830, 9 A. L. R. 620; *State v. Williams*, 146 N. C. 618, 61 S. E. 61, 14 Ann. Cas. 562, 17 L. R. A. (N. S.) 299; *Thomas v. State*, 76 Ohio St. 341, 81 N. E. 437, 118 Am. St. Rep. 884, 10 L. R. A. (N. S.) 1112; *Threadgill v. Cross*, 26 Okla. 403, 109 Pac. 558, 138 Am. St. Rep. 964; *Ex parte Hollman*, 79 S. C. 9, 60 S. E. 19, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105; *State v. Candland*, 36 Utah, 406, 104 Pac. 285, 140 Am. St. Rep. 834, 24 L. R. A. (N. S.) 1260; *Servonitz v. State*, 133 Wis. 231, 113 N. W. 277, 126 Am. St. Rep. 955; *Bonnett v. Vallier*, 136 Wis. 193, 116 N. W. 885, 128 Am. St. Rep. 1061, 17 L. R. A. (N. S.) 486.

"An unconstitutional act is not law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121.

Where a statute peremptorily requires certain stipulations or agreements to be inserted in a contract, and the same are, by force of such statute, and because of its provisions, inserted by the contracting parties in their contract, the obligatory and binding force of such stipulations and agreements so inserted depends upon the validity of the statute requiring their insertion; and where such statute is itself unconstitutional such stipulations and agreements, although incorporated in the contract, are in law without any binding force upon the parties to the contract. *Cleveland v. Clements Bros. Const. Co.*, 67 Ohio St. 197, 65 N. E. 885, 93 Am. St. Rep. 679, 59 L. R. A. 775.

A void statute can confer no authority upon a municipal corporation to enact an ordinance. *Barnard & Miller v. Chicago*, 316 Ill. 519, 147 N. E. 1533.

But in New Jersey and Maine it has been held that an invalid act of the legislature, until it has received judicial condemnation, is binding upon a citizen. *Lang v. Bayonne*, 74 N. J. L. 455, 68 Atl. 90, 122 Am. St. Rep. 391, 12 Ann. Cas. 961, 15 L. R. A. (N. S.) 93; *State v. Pooler*, 105 Me. 224, 74 Atl. 119, 134 Am. St. Rep. 543, 24 L. R. A. (N. S.) 408. And in a number of States it has been held that where a statute creating an office is unconstitutional, an officer acting under it is, prior to its being adjudged invalid, an officer *de facto*, and his acts as such are valid as to the public. *Brown v. O'Connell*, 36 Conn. 432, 4 Am. Rep. 89; *Wendt v. Berry*, 154 Ky. 586, 157 S. W. 1115, 45 L. R. A. (N. S.) 1101, Ann. Cas. 1915 C, 493; *Riley v. Garfield Township*, 58 Kan. 299, 49 Pac. 85; *State v. Pooler*, 105 Me. 224, 74 Atl. 119, 134 Am. St. Rep. 543, 24 L. R. A. (N. S.) 408; *Thompson v. Couch*, 144 Mich. 671, 108 N. W. 363; *Burt v. Winona, etc., R. Co.*, 31 Minn. 472, 18 N. W. 285; *Lang v. Bayonne*, 74 N. J. L. 455, 68 Atl. 90, 122 Am. St. Rep. 391, 15 L. R. A. (N. S.) 93. *Sessums v. Botts*, 34 Tex. 335. See also *Miller v. Dunn*, 72 Cal. 462, 14 Pac. 27, 1 Am. St. Rep. 67.

In Iowa, a magistrate who had issued a warrant, and the officer who had served it, for the destruction of liquors, under a city ordinance which the city had no power to adopt, were held to be protected, notwithstanding this want of power in the city. *Henke v. McCord*, 55 Iowa, 378, 7 N. W. 623. The warrant seems to have been considered "fair on its face;" but can process ever be fair on its face when it commands that which is illegal?

A North Carolina case, *State v. Godwin*, 123 N. C. 697, 31 S. E. 221, 44 Am. St. 42, holds that a person acting in reliance upon a statute before it has been judicially determined to be unconstitutional cannot be held to answer criminally for such conduct if the conduct would not have been criminal if the statute was valid.

If a decision adjudging a statute unconstitutional is afterwards overruled, the statute is to be considered

part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force.

as having been in force for the whole period. *Pierce v. Pierce*, 46 Ind. 86. But see *State v. O'Neil*, 147 Iowa, 513, 126 N. W. 454, 33 L. R. A. (N. S.) 788, Ann. Cas. 1912 B, 691.

A statute void for unconstitutionality is dead and cannot be vitalized by a subsequent amendment of the Constitution removing the constitutional objection, but must be re-enacted. *Seneca Mining Co. v. Secretary of State*, 82 Mich. 573, 47 N. W. 25, 9 L. R. A. 770; *Banaz v. Smith*, 133 Cal. 102, 65 Pac. 309; *Whetstone v. Slonaker*, 110 Neb. 343, 193 N. W.

749; *Fleming v. Hance*, 153 Cal. 162, 94 Pac. 620; *State v. Tufley*, 20 Nev. 427, 22 Pac. 1054. See also *Stockyards National Bank v. Banman County Treasurer*, 5 F. (2d) 905. But see *Re Rahrer*, 43 Fed. 556, 10 L. R. A. 444; and this case in the Supreme Court, *Wilkerson v. Rahrer*, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Re Spickler*, 43 Fed. 653, 10 L. R. A. 446; *Re Van Vliet*, 43 Fed. 761, 10 L. R. A. 451; *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 479, 38 L. R. A. (N. S.) 77; *People v. Roberts*, 148 N. Y. 360, 42 N. E. 1082.



## CHAPTER VIII

### THE SEVERAL GRADES OF MUNICIPAL GOVERNMENT

IN the examination of American constitutional law, we shall not fail to notice the care taken and the means adopted to bring the agencies by which power is to be exercised as near as possible to the subjects upon which the power is to operate.

In contradistinction to those governments where power is concentrated in one man, or one or more bodies of men, whose supervision and active control extends to all the objects of government within the territorial limits of the State, the American system is one of complete *decentralization*, the primary and vital idea of which is, that local affairs shall be managed by local authorities, and general affairs only by the central authority. It was under the control of this idea that a national Constitution was formed, under which the States, while yielding to the national government complete and exclusive jurisdiction over external affairs, conferred upon it such powers only, in regard to matters of internal regulation, as seemed to be essential to national union, strength, and harmony, and without which the purpose in organizing the national authority might have been defeated. It is this, also, that impels the several States, as if by common arrangement, to subdivide their territory into counties, towns, road and school districts,<sup>1</sup> and to confer powers

<sup>1</sup> The general rules respecting schools are sufficiently alike in the several States to justify bringing together in this place the leading authorities concerning them. To what degree the legislature shall provide for the education of the people at the cost of the State or of its municipalities, is a question which, except as regulated by the Constitution, addresses itself to the legislative judgment exclusively. *Commonwealth v. Hartman*, 17 Pa. St. 118. See also *Associated Schools, etc., v. Renville County School District No. 83*, 122 Minn. 254, 142 N. W. 325, 47 L. R. A. (N. S.) 200; *Ransom v. Rutherford*

*County*, 123 Tenn. 1, 130 S. W. 1057, Ann. Cas. 1912 B, 1356; *Spedden v. Board of Education*, 74 W. Va. 181, 81 S. E. 724, 52 L. R. A. (N. S.) 163.

It has been sometimes contended that it was incompetent to go beyond making provision for general education in the common branches of learning; but this notion is exploded. High schools may be established: *Stuart v. School District*, 30 Mich. 69; *Richards v. Raymond*, 92 Ill. 612, 34 Am. Rep. 151; and so may normal schools and colleges: *Powell v. Board of Education*, 97 Ill. 375; *Briggs v. Johnson Co.*, 4 Dill. 148; music may be taught: *Bellmeyer v. School Dis-*

trict, 44 Iowa, 564; *State v. Webber*, 108 Ind. 31, 8 N. E. 708.

"Common schools", means schools open to all, rather than those of a definite grade: *Roach v. Board, &c.*, 77 Mo. 484; and the State may confer upon the governing boards such authority as it shall deem wise, but subject to alteration at all times, and to be taken away at the discretion of the State. *Rawson v. Spencer*, 113 Mass. 40.

Many of the State constitutions provide common-school funds, and some provide a fund for higher education with certain restrictions; whatever these are they must be observed. *People v. Board of Education*, 13 Barb. 400; *People v. Allen*, 42 N. Y. 404; *Halbert v. Sparks*, 9 Bush, 259; *Collins v. Henderson*, 11 Bush, 74; *State v. Graham*, 25 La. Ann. 440; *State v. Board of Liquidation*, 29 La. Ann. 77; *Sun Mut. Ins. Co. v. Board of Liquidation*, 31 La. Ann. 175; *Littlewort v. Davis*, 50 Miss. 403; *Weir v. Day*, 35 Ohio St. 143; *Otken v. Lamkin*, 56 Miss. 758; *School Dist. No. 20 v. Bryan*, 51 Wash. 498, 99 Pac. 28, 20 L. R. A. (N. S.) 1033.

Although it is customary to leave the control of schools in the hands of the school authorities, it is held competent for the State to contract with a publisher to supply all the schools of the State with text-books of a uniform character and price. *Curryer v. Merrill*, 25 Minn. 1, 33 Am. Rep. 450; *Bancroft v. Thayer*, 5 Sawy. 502; *People v. Board of Education*, 55 Cal. 331; *Leeper v. State*, 103 Tenn. 500, 53 S. W. 962, 48 L. R. A. 166; *State v. Haworth*, 122 Ind. 462, 23 N. E. 946, 7 L. R. A. 240.

The governing school boards derive all their authority from the statute, and can exercise no powers except those expressly granted, and those which result by necessary implication from the grant. *Peers v. Board of Education*, 72 Ill. 508; *Clark v. School Directors*, 78 Ill. 474; *Adams v. State*, 82 Ill. 132; *Stevenson v. School Directors*, 87 Ill. 255; *Manning v. Van Buren*, 28 Iowa, 332; *Monticello Bank v. Coffin's Grove*, 51 Iowa, 350, 1 N. W. 592; *State v. Board of*

*Education*, 35 Ohio St. 368; *State v. Mayor, &c.*, 7 Neb. 267; *Gehling v. School District*, 10 Neb. 239, 4 N. W. 1023; *Wright v. Board of Education*, 295 Mo. 466, 246 S. W. 43, 27 A. L. R. 1061.

The board, in exercising its authority, must act as such, in regular meetings convened for the purpose; it is not sufficient that the members severally give their assent to what is done. *State v. Leonard*, 3 Tenn. Ch. 117; *State v. Tiedemann*, 69 Mo. 515; *Smith v. Township Board*, 58 Mo. 297; *Dennison School District v. Padden*, 89 Pa. St. 395; *Hazen v. Lerche*, 47 Mich. 626, 11 N. W. 413. But see *Crane v. School District*, 61 Mich. 299, 28 N. W. 105; *Russell v. State*, 13 Neb. 68, 12 N. W. 829.

Illegal or unauthorized action by the board cannot be ratified by it, and the fact that the district has the benefit of what is done will not amount to a ratification by the district. *School District v. Fogelman*, 76 Ill. 189; *Johnson v. School District*, 67 Mo. 319; *Board of Education v. Thompson*, 33 Ohio St. 321; *Gibson v. School District*, 36 Mich. 404; *Wells v. People*, 71 Ill. 532.

The general control of a school building is in the board, which may maintain all proper suits for possession. *Barber v. Trustees of Schools*, 51 Ill. 396; *Alderman v. School Directors*, 91 Ill. 179.

The board must not enter into contracts with its own members, as these would be void. *Pickett v. School District*, 25 Wis. 551; *Hewitt v. Normal School District*, 94 Ill. 528; *Flint, &c. R. R. Co. v. Dewey*, 14 Mich. 477; *Scott v. Williamstown School Dist. No. 9*, 67 Vt. 150, 31 Atl. 145, 27 L. R. A. 588.

The board is entrusted with the authority to employ teachers, and to remove them under the rules prescribed by statute. *Crawfordsville v. Hays*, 42 Ind. 200; *School District v. Colvin*, 10 Kan. 283; *Directors, &c. v. Burton*, 26 Ohio St. 421; *Jones v. Nebraska*, 1 Neb. 176; *Bays v. State*, 6 Neb. 167; *Parker v. School District*, 5 Lea, 505. If a teacher is rightfully dismissed, he cannot recover

for services performed thereafter, though he takes possession of the school-house and continues to teach. *Pierce v. Beck*, 61 Ga. 413. But if he is wrongfully dismissed, or if he leaves school because of the unjustifiable action of the board, he may recover for his whole time. *Ewing v. School Directors*, 2 Ill. App. 458; *Scott v. School District*, 46 Vt. 452. See *McCutchen v. Windsor*, 55 Mo. 149.

Contracts for a stated time are subject to the observance of public holidays, and the teacher is entitled to these without deduction from his salary. *School District v. Gage*, 39 Mich. 484.

The school board may make the contract for teaching extend beyond their own term of office: *Wilson v. School District*, 36 Conn. 280; *Wait v. Ray*, 67 N. Y. 36; provided they act in good faith and do not unreasonably forestall the action of their successors. *Loomis v. Coleman*, 51 Mo. 21; *Stevenson v. School District*, 87 Ill. 255; *Hewitt v. School District*, 94 Ill. 528; *School Directors v. Hart*, 4 Ill. App. 224. See *Tappan v. School District*, 44 Mich. 500, 7 N. W. 73; *Athearn v. Independent District*, 33 Iowa, 105.

The board has general authority to establish for the school such rules and regulations as it shall deem wise. *Donahoe v. Richards*, 38 Me. 376; *Spiller v. Woburn*, 12 Allen, 127; *Board of Education v. Minor*, 23 Ohio St. 211; *Garvin County School Board Dist. No. 18 v. Thompson*, 24 Okla. 1, 103 Pac. 578, 138 Am. St. Rep. 861, 24 L. R. A. (N. S.) 221, 19 Ann. Cas. 1188. The rules may be enforced by suspensions and expulsions if necessary. *Hodgkins v. Rockport*, 105 Mass. 475; *Murphy v. Directors*, 30 Iowa, 429; *Burdick v. Babcock*, 31 Iowa, 562; *Board of Education v. Thompson*, 33 Ohio St. 321; *Rulison v. Post*, 79 Ill. 567; *Sewell v. Board of Education*, 29 Ohio St. 89. But this power is subject to the general principle that the by-laws of all corporations must be reasonable; if a rule is unreasonable, and a pupil is punished for refusal to submit to it, an action will lie. *Roe*

*v. Deming*, 21 Ohio St. 666. See *Ward v. Flood*, 48 Cal. 36; *State v. Vanderbilt*, 116 Ind. 11, 18 N. E. 266; *Fertich v. Michener*, 111 Ind. 472, 11 N. E. 605; *State v. Board of Education*, 63 Wis. 234, 23 N. W. 102; *Holman v. School Trustees*, 77 Mich. 605, 43 N. W. 996.

The board and the teacher have no control of pupils after they have returned to their homes: *Dritt v. Snodgrass*, 66 Mo. 286; *State v. Osborne*, 24 Mo. App. 309; *Hobbs v. Germany*, 94 Miss. 469, 49 So. 515, 22 L. R. A. (N. S.) 983. But see *Wright v. Board of Education*, 295 Mo. 466, 246 S. W. 43, 27 A. L. R. 1061; *State v. District Board of School Dist. No. 1*, 135 Wis. 619, 116 N. W. 232, 128 Am. St. Rep. 1050, 16 L. R. A. (N. S.) 730. But see *Voorhees' "Law of Public Schools"*, § 77. Otherwise while they are on their way home before parental control is resumed. *Deskins v. Gose*, 85 Mo. 485; *Hutton v. State*, 23 Tex. App. 386, 5 S. W. 122. Mr. Voorhees says: "We find it held that the school authorities have the power to suspend a pupil for an offense committed outside of school hours and not in the presence of the teacher, which has a direct and immediate tendency to influence the conduct of other pupils while in the schoolroom, to set at naught the proper discipline of the school, to impair the authority of the teachers and to bring them into ridicule and contempt." The "Law of Public Schools", § 77, citing cases in Iowa, Missouri, Texas, Washington, and Wisconsin.

The school authorities have the power to classify and grade the pupils in their respective districts and cause them to be taught in such departments as they may deem expedient. They may also prescribe the courses of study and text-books for the use of the schools, and may require prompt attendance, respectful deportment, and diligence in study. *Garvin County School Board Dist. No. 18 v. Thompson*, 24 Okla. 1, 103 Pac. 578, 138 Am. St. Rep. 861, 24 L. R. A. (N. S.) 221, 19 Ann. Cas. 1188. The school authorities are required to exercise their authority over the pupils

of local legislation upon the people of each subdivision, and also to incorporate cities, boroughs, and villages wherever the circumstances and needs of a dense population seem to require other regulations than those which are needful for the rural districts.

The system is one which almost seems a part of the very nature of the race to which we belong. A similar subdivision of the realm for the purposes of municipal government has existed in England from the earliest ages;<sup>1</sup> and in America, the first settlers, as if instinctively, adopted it in their frame of government, and no other has ever supplanted it, or even found advocates. In most of the colonies the central power created and provided for the organization of the towns;<sup>2</sup> in one at least the towns preceded and created the central authority;<sup>3</sup> but in all, the final result was substantially

with a due regard to the natural and legal rights of the parents. *State v. Ferguson*, 95 Neb. 63, 144 N. W. 1039, 50 L. R. A. (N. S.) 266.

It is held in Wisconsin, Nebraska, and Illinois that parents have a right to excuse their children from taking any particular study in a course, and that teachers cannot refuse to give instruction in other studies of the course to the pupils thus excused. *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471; *Rulison v. Post*, 79 Ill. 567; *Lake View School Trustees v. People*, 87 Ill. 303; *State v. Ferguson*, 95 Neb. 63, 144 N. W. 1039, 50 L. R. A. (N. S.) 266.

In Oklahoma a parent may make a reasonable selection from the prescribed course of study, and this selection must be respected by the school authorities. *Garvin County School Board Dist. No. 18 v. Thompson*, 24 Okla. 1, 103 Pac. 578, 138 Am. St. Rep. 861, 24 L. R. A. (N. S.) 221, 19 Ann. Cas. 1188.

As to the power to discriminate between colored and other children in schools, see *post*, 807, note. As to devoting school funds and school buildings to religious purposes, see *post*, 966, note.

That towns, &c., may hold in trust moneys given for education, see *Piper v. Moulton*, 72 Me. 155; *Hatheway v. Sackett*, 32 Mich. 97.

<sup>1</sup> Crabbe's *History of English Law*, c. 2; 1 Bl. Com. 114; Hallam's *Middle Ages*, c. 8, pt. 1; 2 Kent, 278;

Vaughan's *Revolutions in English History*, b. 2, c. 8; Frothingham's *Rise of the Republic*, 14, 15. The early local institutions of England are presented with great fulness and erudition in the *Constitutional History* by Professor Stubbs.

<sup>2</sup> For an interesting history of the legislation in Connecticut on this subject, see *Webster v. Harwinton*, 32 Conn. 131. In New Hampshire, see *Bow v. Allenstown*, 34 N. H. 351. The learned note to *Commonwealth v. Roxbury*, 9 Gray, 503, will give similar information concerning the organization and authority of towns in the Massachusetts provinces. And see *People v. Hurlbut*, 24 Mich. 98, 9 Am. Rep. 103; *Shumway v. Bennett*, 29 Mich. 451.

Mr. Elliott well says: "The prime strength of New England and of the whole republic was and is in the municipal governments and in the homes." And he adds, that among the earliest things decided in Massachusetts was, "that trivial things should be ended in towns" (1635). Elliott's *New England*, Vol. I. p. 182.

<sup>3</sup> Rhode Island; see Arnold's *History*, c. 7. It is remarked by this author that, when the charter of Rhode Island was suspended to bring the colony under the dominion of Andros, "the American system of town governments which necessity had compelled Rhode Island to initiate fifty years before, became the means of preserving the individual liberty of

the same, that towns, villages, boroughs, cities, and counties exercised the powers of local government, and the Colony or State the powers of a more general nature.<sup>1</sup>

The several State constitutions have been framed with this system in view, and the delegations of power which they make, and the express and implied restraints which they impose thereupon, can only be correctly understood and construed by keeping in view its present existence and anticipated continuance. There are few of the general rules of constitutional law that are not more or less affected by the fact that the powers of government, instead of being concentrated in one body of men, are carefully distributed, with a view to being exercised with intelligence, economy, and facility, and as far as possible by the persons most directly and immediately interested.

It has already been seen that the legislature cannot delegate its power to make laws; but fundamental as this maxim is, it is so qualified by the customs of our race, and by other maxims which regard local government, that the right of the legislature, in the entire absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and

the citizen when that of the State or Colony was crushed." Arnold, Vol. I. p. 487.

<sup>1</sup> "The townships," says De Tocqueville, "are only subordinate to the State in those interests which I shall term *social*, as they are common to all the citizens. They are independent in all that concerns themselves, and among the inhabitants of New England I believe that not a man is to be found who would acknowledge that the State has any right to interfere in their local interests. The towns of New England buy and sell, prosecute or are indicted, augment or diminish their rates, without the slightest opposition on the part of the administrative authority of the State. They are bound, however, to comply with the demands of the community. If a State is in need of money, a town can neither give nor withhold the supplies. If a State projects a road, the township cannot refuse to let it cross its territory; if a police regulation is made by the State, it must be enforced by the town. A uniform system of instruc-

tion is organized all over the country, and every town is bound to establish the schools which the law ordains. . . . Strict as this obligation is, the government of the State imposes it in principle only, and in its performance the township assumes all its independent rights. Thus taxes are voted by the State, but they are assessed and collected by the township; the existence of a school is obligatory, but the township builds, pays, and superintends it. In France, the State collector receives the local imposts; in America, the town collector receives the taxes of the State. Thus the French government lends its agents to the commune; in America, the township is the agent of the government. This fact alone shows the extent of the differences which exist between the two nations." Democracy in America, c. 5. See Frothingham's Rise of the Republic, 14-28. On the Right to Local Self-Government, see articles by Amasa M. Eaton in 13 Harv. L. Rev. 441, 570, 638, and 14 Harv. L. Rev. 20, 116.

police regulation usual with such corporations, would always pass unchallenged.<sup>1</sup> The legislature in these cases is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers is not understood to belong properly to the State; and when it interferes, as sometimes it must, to restrain and control the local action, there should be reasons of State policy or dangers of local abuse to warrant the interposition.<sup>2</sup>

<sup>1</sup> The police powers of the State may be delegated to municipal corporations created by the State, to be exercised for the welfare, safety, and health of the public. *Cook County v. Chicago*, 311 Ill. 234, 142 N. E. 512, 31 A. L. R. 442.

<sup>2</sup> "It seems to be generally conceded that powers of local legislation may be granted to cities, towns, and other municipal corporations. And it would require strong reasons to satisfy us that it could have been the design of the framers of our Constitution to take from the legislature a power which has been exercised in Europe by governments of all classes from the earliest history, and the exercise of which has probably done more to promote civilization than all other causes combined; which has been constantly exercised in every part of our country from its earliest settlement, and which has raised up among us many of our most valuable institutions." *State v. Noyes*, 30 N. H. 279, 292, per *Bell*, J. See also *Tanner v. Trustees of Albion*, 5 Hill, 121; *Dalby v. Wolf*, 14 Iowa, 228; *State v. Simonds*, 3 Mo. 414; *McKee v. McKee*, 8 B. Monr. 433; *Smith v. Levinus*, 8 N. Y. 472; *People v. Draper*, 15 N. Y. 532; *Burgess v. Pue*, 2 Gill, 11; *New Orleans v. Turpin*, 13 La. Ann. 56; *Gilkeson v. The Frederick Justices*, 13 Gratt. 577; *Mayor, &c. of New York v. Ryan*, 2 E. D. Smith, 368; *St. Louis v. Russell*, 9 Mo. 507; *Bliss v. Kraus*, 16 Ohio St. 55; *Trigally v. Memphis*, 6 Cold. 382; *Durach's Appeal*, 62 Pa. St. 491; *State v. Wilcox*, 45 Mo. 458; *Jones v. Richmond*, 18 Gratt. 517; *State v. O'Neill*, 24 Wis. 149; *Bradley v. M'Attee*, 7 Bush, 667, 3 Am. Rep. 309; *Burckholter v. M'Connellsville*, 20 Ohio St. 308; *People v. Hurlbut*, 24

*Mich.* 44, 9 Am. Rep. 103; *Mills v. Charleton*, 29 Wis. 400; *Commonwealth v. Coyningham*, 65 Pa. St. 76; *People v. Kelsey*, 34 Cal. 470; *Tugman v. Chicago*, 78 Ill. 405; *Manly v. Raleigh*, 4 Jones Eq. 370; *Stone v. Charlestown*, 114 Mass. 214; *Hayden v. Goodnow*, 39 Conn. 164; *Goldthwaite v. Montgomery*, 50 Ala. 486; *Stanfill v. Court of Co. Rev.*, 80 Ala. 287; *Robinson v. Schenck*, 102 Ind. 307, 1 N. E. 698; *Cross v. Hopkins*, 6 W. Va. 323; *Jacksonville v. Bowden*, 67 Fla. 181, 64 So. 769, L. R. A. 1916 D, 913, Ann. Cas. 1915 D, 99; *Chicago Union Traction Co. v. Chicago*, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631; *Cook County v. Chicago*, 311 Ill. 234, 142 N. E. 512, 31 A. L. R. 442; *State v. Keener*, 78 Kan. 649, 97 Pac. 860, 19 L. R. A. (N. S.) 615; *Downs v. Swann*, 111 Md. 53, 73 Atl. 653, 134 Am. St. Rep. 586, 23 L. R. A. (N. S.) 739; *Sanning v. Cincinnati*, 81 Ohio St. 142, 90 N. E. 125, 25 L. R. A. (N. S.) 686; *State Board of Health v. St. Johnsbury*, 82 Vt. 276, 73 Atl. 581, 23 L. R. A. (N. S.) 766, 18 Ann. Cas. 496.

Statute for government of cities of certain class may provide for appointment by governor temporarily of an executive officer for said city. *Com. v. Moir*, 199 Pa. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. 801.

The propriety of establishing a municipality is not a judicial question. *People v. Riverside*, 70 Cal. 461, 11 Pac. 759.

The legislature may delegate to municipal corporations authority to regulate weights and measures. *Stegemann v. Weeke*, 279 Mo. 140, 214 S. W. 137, 5 A. L. R. 1060. And may confer upon cities and towns power to license and regulate transportation by motor vehicles of passengers for hire.

The people of the municipalities, however, do not define for themselves their own rights, privileges, and powers, nor is there any common law which draws a definite line of distinction between the powers which may be exercised by the State, and those which must be left to the local governments.<sup>1</sup> The municipalities must look to the State for such charters of government as the legislature shall see fit to provide; and they cannot prescribe for themselves the details, though they have a right to expect that those charters will be granted with a recognition of the general principles with which we are familiar. The charter, or the general law under which they exercise their powers, is their constitution, in which they must be able to show authority for the acts they assume to perform. They have no inherent jurisdiction to make laws or adopt regulations of government; they are governments of enumerated powers, acting by a delegated authority; so that while the State legislature may exercise such powers of government coming within a proper designation of legislative power as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant.<sup>2</sup>

*Com. v. Theberge*, 231 Mass. 386, 121 N. E. 30. It is not an unlawful delegation of power to give a city the right to extend its bounds. *Kelly v. Meeks*, 87 Mo. 396. See cases, *post*, p. 489. Nor to confer upon it the power to levy license taxes upon occupations, and under such power it may tax brokers, even though they deal in nothing but stocks, and trade only upon the stock exchange. *Banta v. Chicago*, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611.

The height of buildings in cities may be reasonably regulated by ordinances adopted in pursuance of legislative authority. *Euclid-Doan Bldg. Co. v. Cunningham*, 97 Ohio St. 130, 119 N. E. 361, L. R. A. 1918 D, 700; *Bebb v. Jordan*, 111 Wash. 73, 189 Pac. 553, 9 A. L. R. 1035; *State ex rel. Sale v. Stahlman*, 81 W. Va. 335, 94 S. E. 497, L. R. A. 1918 C, 77.

County commissioners may be authorized to provide additional justices of the peace for any precinct above 20,000 inhabitants if "the needs of the precinct . . . require." *Pueblo Co. Com'rs v. Smith*, 22 Col. 534, 45 Pac. 357, 33 L. R. A. 465.

<sup>1</sup> As to the common law affecting these corporate existences, and the effect of usage, see 2 Kent, 278, 279.

<sup>2</sup> *Stetson v. Kempton*, 13 Mass. 272; *Willard v. Killingworth*, 8 Conn. 247; *Abendroth v. Greenwich*, 29 Conn. 356; *Baldwin v. North Branford*, 32 Conn. 47; *Webster v. Harwinton*, 32 Conn. 131; *Douglass v. Placerville*, 18 Cal. 643; *Lackland v. Northern Missouri Railroad Co.*, 31 Mo. 180; *Mays v. Cincinnati*, 1 Ohio St. 268; *Frost v. Belmont*, 6 Allen, 152; *Hess v. Pegg*, 7 Nev. 23; *Ould v. Richmond*, 23 Gratt. 464; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 655; *Louisiana Constr. & Imp. Co. v. Illinois C. R. Co.*, 49 La. Ann. 527, 21 So. 891, 37 L. R. A. 661; *Attorney General v. Lowrey*, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27; *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U. S. 394, 63 L. ed. 1054, 39 Sup. Ct. Rep. 526, P. U. R. 1916 E, 178; *Trenton v. New Jersey*, 262 U. S. 182, 67 L. ed. 937, 43 Sup. Ct. Rep. 534, 29 A. L. R. 1471; *Fort Scott v. W. G. Eads Brokerage Co.*, 54 C. C. A. 437, 117 Fed. 51; *Gambill v. Erdrich Bros. & Marx*, 143 Ala. 506, 39 So. 297;

*Cleveland School Furniture Co. v. Greenville*, 146 Ala. 559, 41 So. 862; *Porter v. Vinzant*, 49 Fla. 213, 38 So. 607, 111 Am. St. Rep. 93; *People v. Grover*, 258 Ill. 124, 101 N. E. 216, Ann. Cas. 1914 B, 212; *McAllen v. Hamblin*, 129 Iowa, 329, 105 N. W. 593, 5 L. R. A. (N. S.) 434; *Barnard & Miller v. Chicago*, 316 Ill. 519, 147 N. E. 384, 38 A. L. R. 1533; *State ex rel. Bayer v. Funk*, 105 Oreg. 134, 209 Pac. 113, 25 A. L. R. 625; *Donable's Adm'r v. Harrisonburg*, 104 Va. 533, 52 S. E. 174, 2 L. R. A. (N. S.) 910, 113 Am. St. Rep. 1056; *State v. Wertz*, 91 W. Va. 622, 114 S. E. 242, 29 A. L. R. 391.

"The city is a political subdivision of the State, created as a convenient agency for the exercise of such of the governmental powers of the State as may be intrusted to it." *Trenton v. New Jersey*, 262 U. S. 182, 67 L. ed. 937, 43 Sup. Ct. Rep. 534, 29 A. L. R. 1471; *Bowler v. Nagel*, 228 Mich. 434, 200 N. W. 258, 37 A. L. R. 1154.

"Municipal corporations are bodies politic and corporate, created by the legislature as governmental agencies of the State, and they can only exercise such power as they derive from their source of creation. The powers which they exercise at all times are subject to legislative control. The State has the power to determine what matters are of general public concern." *Sapulpa v. Land*, 101 Okla. 22, 223 Pac. 640, 35 A. L. R. 872.

The prevention of damages by fire is an object within the scope of municipal authority, either by express grant or by the power delegated to the city to make police regulations. *Cook County v. Chicago*, 311 Ill. 234, 142 N. E. 512, 31 A. L. R. 442.

It is within the police power of a municipality to regulate the orderly, sanitary disposal of garbage. *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; *Gardner v. Michigan*, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106; *Re Zhizhuzza*, 147 Cal. 328, 81 Pac. 955; *Blakeman v. Wichita*, 103 Kan. 763, 175 Pac. 975; *Wheeler v. City of Boston*, 233 Mass. 275, 123 N. E. 684,

15 A. L. R. 275; *Valley Spring Hog Ranch Co. v. Plagmann*, 282 Mo. 1, 220 S. W. 1, 15 A. L. R. 266; *Bishop v. City of Tulsa*, (Okla. Crim. Rep.) 209 Pac. 228, 27 A. L. R. 1008. And under such power it may make provisions regulating the removal of ashes or other refuse matter, but such provisions must be reasonable. *Goodland v. Popejoy*, 98 Kan. 183, 157 Pac. 410; *Baltimore v. Hampton Court Co.*, 138 Md. 271, 113 Atl. 850; *Iler v. Ross*, 64 Neb. 710, 90 N. W. 869, 57 L. R. A. 895, 97 Am. St. Rep. 676.

Charters of municipal corporations have been construed to confer upon them power to prohibit meetings in public streets or parks without a permit. *Anderson v. Tedford*, 80 Fla. 376, 85 So. 673, 10 A. L. R. 1481; *Fitts v. Atlanta*, 121 Ga. 567, 49 S. E. 793, 67 L. R. A. 803, 104 Am. St. Rep. 167; *Love v. Judge of Records Ct.*, 128 Mich. 545, 87 N. W. 785, 55 L. R. A. 618; *People v. Pierce*, 85 App. Div. (N. Y.) 125, 83 N. Y. Supp. 79; *Buffalo v. Till*, 192 App. Div. (N. Y.) 99, 182 N. Y. Supp. 418; *People ex rel. Doyle v. Atwell*, 232 N. Y. 96, 133 N. E. 364, 25 A. L. R. 107; *Duquesne v. Fincke*, 269 Pa. St. 112, 112 Atl. 130. And it has been held that such authority may be exercised by a municipality under the police power. *Buffalo v. Till*, 192 App. Div. (N. Y.) 99, 182 N. Y. Supp. 418; *Com. v. Mervis*, 55 Pa. Super. Ct. 178; *Com. v. Curtis*, 55 Pa. Super. Ct. 184. But in Florida it has been held that a city ordinance which prohibits the holding of any public meeting, or meeting of any character, upon any street of the city or within any city park, without first obtaining permission in writing from the mayor or a majority of the city councilmen, in the absence of any charter provision definitely and specifically empowering the city to prohibit public meetings in the streets or parks of the city, is void for unreasonableness. *Anderson v. Tedford*, 80 Fla. 376, 85 So. 673, 10 A. L. R. 1481.

Where legislature grants right to occupy streets of a city upon getting consent of city council, that body cannot attach conditions to its consent



The creation of municipal corporations, and the conferring upon them of certain powers and subjecting them to corresponding duties, does not deprive the legislature of the State of that general control over their citizens which was before possessed. It still has authority to amend their charters, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, overrule their legislative action whenever it is deemed unwise, impolitic, or unjust, and even abolish them altogether in the legislative discretion, and substitute those which are different.<sup>1</sup> The rights and franchises

unless the conditions are restricted entirely to matters within the city limits. *Galveston & W. R. Co. v. Galveston*, 90 Tex. 398, 39 S. W. 920, 36 L. R. A. 33 and note.

Interest cannot be required upon delayed payments of sewer assessments in the absence of statutory authority therefor. *Sargent & Co. v. Tuttle*, 67 Conn. 162, 34 Atl. 1028, 32 L. R. A. 822.

Nor can the city regulate the charges of gas companies for gas furnished private consumers in the absence of a reservation of such power in their charter. *Re Pryor*, 55 Kan. 724, 41 Pac. 958, 29 L. R. A. 398, 49 Am. St. 280.

<sup>1</sup> *St. Louis v. Allen*, 13 Mo. 400; *Coles v. Madison Co.*, Breese, 115; *Richland County v. Lawrence County*, 12 Ill. 1; *Trustees of Schools v. Tattman*, 13 Ill. 27; *Robertson v. Rockford*, 21 Ill. 451; *People v. Power*, 25 Ill. 187; *St. Louis v. Russell*, 9 Mo. 507; *State v. Cowan*, 29 Mo. 330; *McKim v. Odom*, 3 Bland, 407; *Granby v. Thurston*, 23 Conn. 416; *Harrison Justices v. Holland*, 3 Gratt. 247; *Brighton v. Wilkinson*, 2 Allen, 27; *Sloan v. State*, 8 Blackf. 361; *Mills v. Williams*, 11 Ired. 558; *Langworthy v. Dubuque*, 16 Iowa, 271; *Weeks v. Milwaukee*, 10 Wis. 242; *State v. Branin*, 23 N. J. L. 484; *Patterson v. Society, &c.*, 24 N. J. L. 385; *Atchison v. Bartholow*, 4 Kan. 124; *City of St. Louis v. Cafferata*, 24 Mo. 94; *People v. Draper*, 15 N. Y. 532; *Hawkins v. Commonwealth*, 76 Pa. St. 15; *People v. Tweed*, 63 N. Y. 202; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Laramie Co. v. Albany Co.*, 92 U. S. 307, 23

L. ed. 552; *Aspinwall v. Commissioners, &c.*, 22 How. 364, 16 L. ed. 296; *Howard v. McDiamid*, 26 Ark. 100; *Philadelphia v. Fox*, 94 Pa. St. 169; *Bradshaw v. Omaha*, 1 Neb. 16; *Kuhn v. Board of Education*, 4 W. Va. 499; *Sinton v. Ashbury*, 41 Cal. 525; *Hess v. Pegg*, 7 Nev. 23; *Hagerstown v. Schuer*, 37 Md. 180; *San Francisco v. Canavan*, 42 Cal. 541; *State v. Jennings*, 27 Ark. 419; *Division of Howard Co.*, 15 Kan. 194; *Martin v. Dix*, 52 Miss. 53; *Goff v. Frederick*, 44 Md. 67; *Blessing v. Galveston*, 42 Tex. 641; *Wiley v. Bluffton*, 111 Ind. 152, 12 N. E. 165; *True v. Davis*, 133 Ill. 522, 22 N. E. 410; *Attorney-General v. Lowrey*, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27; *Hunter v. Pittsburgh*, 207 U. S. 161, 52 L. ed. 151, 28 Sup. Ct. Rep. 40, *Joslin Mfg. Co. v. Providence*, 262 U. S. 668, 67 L. ed. 1167, 43 Sup. Ct. Rep. 684; *Londoner v. City and County of Denver*, 52 Colo. 15, 119 Pac. 156; *People v. Grover*, 228 Ill. 124, 101 N. E. 216, Ann. Cas. 1914 B, 212; *People v. McBride*, 234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994; *McSurely v. McGrew*, 140 Iowa, 163, 118 N. W. 415, 132 Am. St. Rep. 248; *Carrithers v. Shelbyville*, 126 Ky. 769, 104 S. W. 744, 17 L. R. A. (n. s.) 421; *Sweeten v. State*, 122 Md. 634, 90 Atl. 180; *People ex rel. Simon v. Bradley*, 207 N. Y. 592, 101 N. E. 766; *Wharton v. Greensboro*, 146 N. C. 356, 59 S. E. 1043; *Town of Murphy v. C. A. Webb & Co.*, 156 N. C. 402, 72 S. E. 460; *Pettsburg's Petition*, 217 Pa. St. 227, 66 Atl. 348, 120 Am. St. Rep. 845; *Malone v. Williams*, 118 Tenn. 390, 103 S. W. 798, 121 Am. St. Rep. 1002.

Legislature may create a municipality of the inhabitants residing near the mouth of a navigable river and compel them to maintain a ship channel therein, although a portion of the benefit thereof is enjoyed by the inhabitants of a much larger area. *Cook v. Portland*, 20 Oreg. 580, 27 Pac. 263, 13 L. R. A. 533. May combine several cities and towns into a sewage district and compel them to construct a system of sewerage. *Re Kingman*, 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417.

The legislature may in its discretion recall to itself and exercise so much of such powers as it has conferred upon municipal corporations as is not secured to them by the Constitution. *People v. Pinkney*, 32 N. Y. 377. The subject was considered at length in *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197, in which was considered the effect of the legislation which abolished the city government of Memphis; and in *Amy v. Selma*, 77 Ala. 103.

The creditors of a county cannot prevent the legislature reducing its limits, notwithstanding their security may be diminished thereby. *Wade v. Richmond*, 18 Gratt. 583; *Luerhman v. Taxing District*, 2 Lea, 425. Compare *Milner v. Pensacola*, 2 Woods, 632; *Galesburg v. Hawkinson*, 75 Ill. 152; *Rader v. Road District*, 36 N. J. L. 273; *Wallace v. Sharon Trustees*, 84 N. C. 164. A charter may not be repealed to the injury of creditors already entitled to payment. *Morris v. State*, 62 Tex. 728. This power is not defeated or affected by the circumstance that the municipal corporation was by its charter made the trustee of a charity; and in such case, if the corporation is abolished, the Court of Chancery may be empowered and directed by the repealing act to appoint a new trustee to take charge of the property and execute the trust. *Montpelier v. East Montpelier*, 29 Vt. 12. And see *Harrison v. Bridgeton*, 16 Mass. 16; *Montpelier Academy v. George*, 14 La. Ann. 406; *Reynolds v. Baldwin*, 1 La. Ann. 162; *Police Jury v. Shreveport*, 5 La. Ann. 665; *Philadelphia v. Fox*, 64 Pa. St.

169; *Weymouth & Braintree Fire Commissioners v. County Commissioners*, 108 Mass. 142. As to extent of power to hold property in trust, see *Hatheway v. Sackett*, 32 Mich. 97.

But neither the identity of a corporation, nor its right to take property by devise, is destroyed by a change in its name, or enlargement of its area, or an increase in the number of its corporators. *Girard v. Philadelphia*, 7 Wall. 1, 19 L. ed. 53.

Changing a borough into a city does not of itself abolish or affect the existing borough ordinances. *Trustees of Erie Academy v. City of Erie*, 31 Pa. St. 515. Nor will it affect the indebtedness of the corporation, which will continue to be its indebtedness under its new organization. *Olney v. Harvey*, 50 Ill. 453. So when a city has had a *de facto* organization, and is afterward reorganized so as to become *de jure*, its old obligations continue. *Shapleigh v. San Angelo*, 167 U. S. 646, 42 L. ed. 310, 17 Sup. Ct. Rep. 957; *Ranken v. McCallum*, 25 Tex. Civ. App. 83, 60 S. W. 975. Upon municipal bonds and changes in statutory construction, see note to 18 L. ed. U. S. 350; also notes to 26 L. ed. U. S. 263, and 35 L. ed. U. S. 344.

Property brought within a city by the exercise of legislative discretion is liable for existing municipal indebtedness. *Maddrey v. Cox*, 73 Tex. 538, 11 S. W. 541.

A general statute, containing a clause repealing all statutes contrary to its provisions, does not repeal a clause in a municipal charter on the same subject. *State v. Branin*, 23 N. J. L. 484.

Where the Constitution prescribes that the charter of a certain city can be amended by its own citizens, the power of the legislature to amend is excluded. *St. Louis v. Dorr*, 145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 42 L. R. A. 686, 68 Am. St. 575.

Legislature has power to divide counties and to modify their boundaries, but such modifications do not modify the boundaries of legislative districts. *People v. Board of Supervisors*, 147 N. Y. 1, 41 N. E. 563, 30 L. R. A. 74.

of such a corporation, being granted for the purposes of government, can never become such vested rights as against the State that they cannot be taken away; nor does the charter constitute a contract in the sense of the constitutional provision which prohibits the obligation of contracts being violated.<sup>1</sup> [In the absence of a statutory provision conferring upon a municipal corporation, in express terms, power to enter into an irrevocable contract with a public service corporation in relation to rates to be charged by the latter, the legislature, or a public service commission under legislative authority, may control such rates, and authorize their increase, notwithstanding a contract between the municipality and the public service corporation fixing the maximum rates which the latter may charge. Such a change of rates is not unconstitutional as depriving the city and its inhabitants of property and rights without due process of law or as impairing the obligation of a contract.<sup>2</sup>] Restraints on the

A constitutional provision authorizing cities of a certain class to frame charters for their own government not in conflict with the Constitution and laws of the State, reserves to the State a general legislative control in the State over such cities, and the general laws of the State pertaining to any rightful subject of legislation of general public concern which conflict with any charter provisions of such municipalities prevail over such charter provisions. *Sapulpa v. Land*, 101 Okla. 22, 223 Pac. 640, 35 A. L. R. 872.

<sup>1</sup> This principle was recognized by the several judges in *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629, and in *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197. And see *People v. Morris*, 13 Wend. 325; *St. Louis v. Russell*, 9 Mo. 507; *Montpelier v. East Montpelier*, 29 Vt. 12; *Trustees of Schools v. Tatman*, 13 Ill. 27; *Brighton v. Wilkinson*, 2 Allen, 27; *Reynolds v. Baldwin*, 1 La. Ann. 162; *Police Jury v. Shreveport*, 5 La. Ann. 665; *Mt. Carmel v. Wabash County*, 50 Ill. 69; *Lake View v. Rose Hill Cemetery*, 70 Ill. 191; *Zitske v. Goldberg*, 38 Wis. 216; *Weeks v. Gilmanton*, 60 N. H. 500; *Dillon, Mun. Corp.* §§ 24, 30, 37; *Covington v. Kentucky*, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383; *Essex Public Road Bd. v. Skinkle*, 140

U. S. 334, 35 L. ed. 446, 11 Sup. Ct. Rep. 790; *Attorney-General v. Lowrey*, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27; *Hunter v. Pittsburgh*, 207 U. S. 161, 52 L. ed. 151, 28 Sup. Ct. Rep. 40; *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U. S. 394, 63 L. ed. 1054, 39 Sup. Ct. Rep. 526; *Trenton v. New Jersey*, 262 U. S. 182, 67 L. ed. 937, 43 Sup. Ct. Rep. 534, 29 A. L. R. 1471.

<sup>2</sup> *Meridian Light & R. Co. v. Meridian*, 265 Fed. 765; *Chicago R. Co. v. Illinois Commerce Commission*, 277 Fed. 970; *Miller v. Southern Bell Teleph. & Teleg. Co.*, 279 Fed. 806; *Camden v. Arkansas Light & P. Co.*, 145 Ark. 205, 224 S. W. 444; *Hayne v. Chicago & O. P. Elev. R. Co.*, 294 Ill. 413, 128 N. E. 587; *Washington v. Public Service Commission*, 190 Ind. 105, 129 N. E. 401; *Cimarron v. Midland Water, Light & Ice Co.*, 110 Kan. 812, 205 Pac. 603; *Winfield v. Court of Industrial Relations*, 111 Kan. 580, 207 Pac. 813; *Shreveport v. Southwestern Gas & E. Co.*, 151 La. 864, 92 So. 365; *City Water Co. v. Sedalia*, 288 Mo. 411, 231 S. W. 942; *State ex rel. Harrisonville v. Public Service Commission*, 291 Mo. 432, 236 S. W. 852; *Hackensack Water Co. v. Public Utility Com'rs*, 96 N. J. L. 184, 115 Atl. 528; *Public Service Commission v. Pavilion Natural Gas Co.*, 232 N. Y. 146, 133 N. E.

427; *O'Connor v. Public Service Commission*, 114 Misc. (N. Y.) 337, 186 N. Y. Supp. 390; *New York v. Richmond Light & R. Co.*, 183 N. Y. Supp. 922; *Re Fleming*, 117 Misc. (N. Y.) 373, 191 N. Y. Supp. 586; *Durant v. Consumers' Light & P. Co.*, 71 Okla. 282, 177 Pac. 361; *Sapulpa v. Oklahoma Natural Gas Co.*, 79 Okla. 196, 192 Pac. 224; *Scranton v. Public Service Commission*, 268 Pa. St. 192, 110 Atl. 775, affirming 73 Pa. Super. Ct. 192; *Wilkinsburg v. Public Service Commission*, 72 Pa. Super. Ct. 423; *Foltz v. Public Service Commission*, 73 Pa. Super. Ct. 24; *Landsdowne v. Public Service Commission*, 74 Pa. Super. Ct. 203; *Edgewood v. Public Service Commission*, 75 Pa. Super. Ct. 280; *Mitchell v. Railroad Com'rs*, 44 S. D. 430, 184 N. W. 246; *Victoria v. Victoria Ice, Light & P. Co.*, 134 Va. 134, 114 S. E. 92, 28 A. L. R. 562; *Richmond v. Chesapeake & P. Teleph. Co.*, 127 Va. 612, 105 S. E. 127; *North Coast Power Co. v. Public Service Commission*, 114 Wash. 102, 194 Pac. 587; *State ex rel. Spokane v. Kuykendall*, 119 Wash. 107, 205 Pac. 3.

In exercising the power of making contracts with public utilities and in enacting ordinances in reference thereto, a city acts as an agent of the State in its governmental character, and it is within the power of the State to withdraw that authority and confer it upon another governmental agency, such as the Court of Industrial Relations or the Public Utilities Commission, and such latter governmental agency has the power, with the express or implied assent of the utility concerned, to alter the contract and other incidental regulations theretofore established by the city. *City of Winfield v. Court of Industrial Relations*, 111 Kan. 580, 207 Pac. 813.

An order of the Corporation Commission changing the rate to be charged for gas provided by a franchise granted by the city of Sapulpa, Oklahoma, prior to the admission of Oklahoma to statehood, is not void for impairment of contract rights, as the United States granted said franchise through the city as its agent, and as upon statehood the State of Okla-

homa became substituted to the rights of the United States, the State has a right to change the provisions thereof, through its representative, the Corporation Commission. *City of Sapulpa v. Oklahoma Natural Gas Co.*, 79 Okla. 196, 192 Pac. 224.

Where a city under a statutory power to contract for electric current enters into a fifteen year contract with a private corporation to furnish it at an agreed price with electricity for its own use and for its distribution to its residents on such terms as it shall see fit, the public utilities commission under a statute passed before the making of the contract, giving it power to regulate the charges of public utilities, may authorize an increase in the rates fixed in such contract; that is, it may release the company from the obligation to continue furnishing service at the contract rates. *City of Cimarron v. Midland Water, Light & Ice Co.*, 110 Kan. 812, 205 Pac. 603. Justice *Mason*, who delivered the opinion of the court in this case, said: "The plaintiff urges that its contract with the company was duly authorized and under the Federal Constitution its obligation cannot be impaired by State law. A rate fixed for a term of years by a franchise contract expressly authorized by statute between a municipality and a public service corporation cannot be reduced by subsequent legislation, but there is room for doubt as to just what constitutes an express authorization. Note, L. R. A. 1915 C, 261. The prevailing view is that the legislature directly or through a utilities commission may increase franchise rates notwithstanding the existence of a contract valid as between the parties. Notes, 3 A. L. R. 730, 9 A. L. R. 1165. Many decisions to that effect are based on this reason, which does not apply to a reduction of rates — the city exists at the will of the State; its rights are subject to unlimited control by the legislature; the State may act for it and in co-operation with the utility may in effect modify the contract. Note, 3 L. R. A. 742. See also *Worcester v. Street Railway Co.*, 196

legislative power of control must be found in the Constitution of the State, or they must rest alone in the legislative discretion.<sup>1</sup> If the

U. S. 549, 49 L. ed. 591, 25 Sup. Ct. Rep. 327, and *Little River Township v. Reno County*, 65 Kan. 9, 68 Pac. 1105. A distinction has sometimes been noted, in the matter of the effect of legislation thereon, between a contract made by a city for services to itself and one regarding rates to be charged to its residents. Note, 3 A. L. R. 735. See, also, *City of Charleston v. Public Service Com.*, 86 W. Va. 536, 103 S. E. 673. It is settled, however, that as far as concerns any provision of the Federal Constitution a statutory commission may fix rates to be charged by a public service corporation to an individual, which will supersede those of an unexpired contract (*Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372, 63 L. ed. 309, 39 Sup. Ct. 117, annotated in 9 A. L. R. 1423), and this irrespective of whether the statute was passed before or after the contract was made (*Producers' Transp. Co. v. Railroad Com.*, 251 U. S. 228, 232, 64 L. ed. 239, 40 Sup. Ct. 131; and other cases cited in *Nowata County Gas Co. v. Henry Oil Co. (C. C. A.)* 269 Fed. 742, 745). We think a city even when (and perhaps especially when) acting in its proprietary capacity stands upon no higher ground in this regard than an individual or private corporation, and is subject to the same rule. See *City of Washington v. Public Service Commission*, 190 Ind. 105, 129 N. E. 401; *Leiper v. Baltimore & P. R. Co.*, 262 Pa. St. 328, 105 Atl. 551; *State v. Public Service Comm.*, 275 Mo. 201, 204 S. W. 497; 3 *Dillon on Mun. Corp.* § 1303, p. 2134, text to note 3. In respect to its governmental powers a city is absolutely subject to legislative control. If that control is limited where the city acts in its proprietary capacity, it must then be content to accept the same treatment given to a private corporation, rather than claim any degree of immunity growing out of its public character, which it has in a sense laid aside for the time being.

It cannot well assert at once and with respect to the same transaction the privileges peculiar to each side of its dual capacity."

<sup>1</sup> See *ante*, pp. 93-94; *post*, pp. 488-500. "Where a corporation is the mere creature of legislative will, established for the general good and endowed by the State alone, the legislature may, at pleasure, modify the law by which it was created. For in that case there would be but one party affected, — the government itself, — and therefore not a contract within the meaning of the Constitution. The trustees of such a corporation would be the mere mandatories of the State, having no personal interest involved, and could not complain of any law that might abridge or destroy their agency." *Montpelier Academy v. George*, 14 La. Ann. 406.

In *Trustees of Schools v. Tatman*, 13 Ill. 27, 30, the court say: "Public corporations are but parts of the machinery employed in carrying on the affairs of the State; and they are subject to be changed, modified, or destroyed, as the exigencies of the public may demand. The State may exercise a general superintendence and control over them and their rights and effects, so that their property is not diverted from the uses and objects for which it was given or purchased." And see *State v. Miller*, 65 Mo. 50.

"A municipal corporation, being a creature of the legislature, cannot question the authority of its creator to amend or abrogate its charter, except in so far as the legislature attempts to exceed its own constitutional authority. But the General Assembly is as well bound not to violate the mandates expressed in the Constitution as a corporation created by the legislature is controlled by its statutes. Hence a municipal corporation, having authority to prosecute and defend suits in the courts, may invoke the protection afforded by the Constitution to prevent a violation of its rights." *Gretna v. Bailey*, 141 La. 625, 75 So. 491, Ann.

Cas. 1918 E, 566, overruling *Mayor and Council of the City of Carrollton v. Board of Metropolitan Police*, 21 La. Ann. 447.

As to the effect of legislation abolishing a corporation upon its property and debts, see *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 699; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Rawson v. Spencer*, 113 Mass. 40.

Where a municipal corporation is dissolved and a new one for the same general purposes is created containing the same population and property in substance, to which the corporate property passes without consideration, the debts of the old fall upon the new municipality, and with them the power to tax for their payment *Mobile v. Watson*, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. Rep. 398; *Amy v. Selma*, 77 Ala. 103.

Upon the division of towns and counties, &c. the legislature may apportion the debts as it sees fit. *People v. Supervisors*, 94 N. Y. 263; *Clay Co. v. Chickasaw Co.*, 64 Miss. 534, 1 So. 753; *Dare Co. v. Currituck Co.*, 95 N. C. 189; *Morrow Co. v. Hendryx*, 14 Ore. 397, 12 Pac. 806. It is a lawful exercise of legislative authority upon such division, to confer a part of the corporate property of the old corporation upon the new, and to direct the old body to pay it over to the new. *Harrison v. Bridgeton*, 16 Mass. 16; *Salem Turnpike v. Essex Co.*, 100 Mass. 282; *Whitney v. Stow*, 111 Mass. 368; *Stone v. Charlestown*, 114 Mass. 214; *Sedgwick Co. v. Bunker*, 14 Kan. 498; *Portwood v. Montgomery*, 52 Miss. 523; *Bristol v. New Chester*, 3 N. H. 524; *Milwaukee Town v. Milwaukee City*, 12 Wis. 93; *Marshall Co. Court v. Calloway Co. Court*, 3 Bush, 93; *Columbus v. Columbus*, 82 Wis. 374, 52 N. W. 425, 16 L. R. A. 695, and note. But it seems that an apportionment of property can only be made at the time of the division. *Windham v. Portland*, 4 Mass. 384; *Hampshire v. Franklin*, 16 Mass. 76. See *Richland v. Lawrence*, 12 Ill. 1; *Bowdoinham v. Richmond*, 6 Me. 112. In *Bowdoinham v. Richmond*, 6 Me. 112, it was

held that the apportionment of debts between an old town and one created from it was in the nature of a contract; and it was not in the power of the legislature afterwards to release the new township from payment of its share as thus determined. But the case of *Layton v. New Orleans*, 12 La. Ann. 515, is *contra*. See also *Borough of Dunmore's Appeal*, 52 Pa. St. 374, and *School District v. Board of Education*, 73 Mo. 627; *Johnson v. San Diego*, 109 Cal. 468, 42 Pac. 249, 30 L. R. A. 178; *Perry County v. Conway County*, 52 Ark. 430, 12 S. W. 877, 6 L. R. A. 665, and note; which in principle seem to accord with the Louisiana case. In the absence of such legislation each part is entitled to the property falling within it, and to any equitable share of the moneys of the township. *Towle v. Brown*, 110 Ind. 65, 10 N. E. 626. The old corporation retains all the property within its borders and remains subject to the then existing debts, in the absence of any legislative apportionment. *McCully v. Tracy*, 66 N. J. L. 489, 49 Atl. 436.

Where two municipal corporations are consolidated and the new corporation receives assets of value, or where one municipality absorbs another, and receives property and cash which is liable for the payment of the debts of the absorbed and dissolved corporation, the absorbing municipality becomes liable, at least to the amount of the assets it receives, for such pre-existing debts. *Walker v. Rome*, 6 Ga. App. 59, 64 S. E. 310.

Where the legislature creates a new municipal corporation, embracing part of the territory of an existing municipal corporation, it may impose on the former the obligation of existing contracts of the latter; but in the absence of legislation to that effect, the old corporation remains liable for pre-existing obligations. *Board of Education of Borough of Flemington v. State Board of Education*, 81 N. J. L. 211, 81 Atl. 163, affirmed 85 N. J. L. 384, 91 Atl. 1068.

Where the legislature amends the charter of a municipality so as to extend its corporate limits and include

legislative action in these cases operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right through the ballot-box all these wrongs.<sup>1</sup> This is the general

therein contiguous territory previously unincorporated, all the inhabitants and their property within the limits so fixed are subject to taxation to raise municipal revenue for all legitimate purposes, without respect to the time when some of the liabilities arose. *White v. Atlanta*, 134 Ga. 532, 68 S. E. 103. Under such circumstances, unless otherwise provided by law, debts of the corporation contracted before the limits were extended are chargeable upon the city as enlarged by the territory added, as well as upon that included in the boundaries before they were extended. *White v. Atlanta*, 134 Ga. 532, 68 S. E. 103.

In *Burns v. Clarion County*, 62 Pa. St. 422, it was held the legislature had the power to open a settlement made by county auditors with the county treasurer, and to compel them to settle with him on principles of equity. See further, *Cambridge v. Lexington*, 17 Pick. 222; *Attorney-General v. Cambridge*, 16 Gray, 247; *Clark v. Cambridge, &c. Bridge Proprietors*, 104 Mass. 236.

The legislature has power to lay out a road through several towns, and apportion the expense between them. *Waterville v. Kennebeck County*, 59 Me. 80; *Commonwealth v. Newburyport*, 103 Mass. 129. And it may change the law and redistribute the burden afterwards, if from a change of circumstances or other reasons it is deemed just and proper to do so. *Scituate v. Weymouth*, 108 Mass. 128, and cases cited. And where a highway or bridge, although lying outside the territorial limits of a municipality, is especially beneficial to the people thereof, the legislature may compel that municipality to sustain part of the burden of providing and maintaining such highway, and may determine what portion of such expense shall be contributed by such municipality. *State v. Williams*, 68 Conn.

131, 35 Atl. 24, 421, 48 L. R. A. 465, aff. in *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617. Upon the power of the legislature to impose burdens upon municipalities, see the cases collected in note to 48 L. R. A. 465.

A statute abolishing school districts is not void on grounds like the following: that it takes the property of the districts without compensation; that the taxes imposed will not be proportional and reasonable, or that contracts will be affected. *Rawson v. Spencer*, 113 Mass. 40. See *Weymouth &c. Fire District v. County Commissioners*, 108 Mass. 142.

The legislature may lay a penalty upon any county in which a lynching occurs, and may provide that such penalty shall be recovered by the person injured. *Champaign Co. v. Church*, 62 Ohio St. 318, 57 N. E. 50, 48 L. R. A. 738.

<sup>1</sup> "The correction of these abuses is as readily attained at the ballot-box as it would be by subjecting it to judicial revision. A citizen or a number of citizens may be subtracted from a county free from debt, having no taxation for county purposes, and added to an adjacent one, whose debts are heavy, and whose taxing powers are exercised to the utmost extent allowed by law, and this, too, without consulting their wishes. It is done every day. Perhaps a majority of the people thus annexed to an adjacent or thrown into a new county by the division of an old one may have petitioned the legislature for this change; but this is no relief to the outvoted minority, or the individual who deems himself oppressed and vexed by the change. Must we, then, to prevent such occasional hardships, deny the power entirely?

"It must be borne in mind that these corporations, whether established over cities, counties, or townships (where such incorporated subdivisions

rule; and the exceptions to it are not numerous, and will be indicated hereafter.

### *Powers of Public Corporations.*

The powers of these corporations are either express or implied. The former are those which the legislative act under which they exist confers in express terms; the latter are such as are necessary in order to carry into effect those expressly granted, and which must, therefore, be presumed to have been within the intention of the legislative grant.<sup>1</sup> Certain powers are also incidental to corporations, and will be possessed unless expressly or by implication prohibited.<sup>2</sup> Of these an English writer has said: "A municipal corporation has at common law few powers beyond those of electing, governing, and removing its members, and regulating its franchises

exist), are never intrusted and can never be intrusted with any legislative power inconsistent or conflicting with the general laws of the land, or derogatory to those rights, either of person or property, which the Constitution and the general laws guarantee. They are strictly subordinate to the general laws, and merely created to carry out the purposes of those laws with more certainty and efficiency. They may be and sometimes are intrusted with powers which properly appertain to private corporations, and in such matters their power as mere municipal corporations ceases." *City of St. Louis v. Allen*, 13 Mo. 400.

The propriety, expediency, and necessity of a municipal ordinance authorized by statute is purely for the determination of the legislative authority; and not for determination by the courts. *In re Kansas City Ordinance No. 39*, 946, 298 Mo. 569, 252 S. W. 404, 28 A. L. R. 295.

<sup>1</sup> 2 Kent, 278, note; *Halstead v. Mayor, &c. of New York*, 3 N. Y. 430; *Hodges v. Buffalo*, 2 Denio, 110; *New London v. Brainard*, 22 Conn. 552; *State v. Ferguson*, 33 N. H. 424; *McMillan v. Lee County*, 3 Iowa, 311; *La Fayette v. Cox*, 5 Ind. 38; *Clark v. Des Moines*, 19 Iowa, 199; *State v. Morristown*, 33 N. J. L. 57; *Beaty v. Knowler*, 4 Pet. 152, 7 L. ed. 813; *Mills v. Gleason*, 11 Wis. 470; *Chicago v. Washingtonian Home*, 289 Ill. 206,

124 N. E. 416, 6 A. L. R. 1584; *City National Bank v. Kiowa*, 104 Okla. 161, 230 Pac. 894, 39 A. L. R. 206; *Chapman v. Hood River*, 100 Ore. 43, 196 Pac. 467; *State ex rel. Bayer v. Funk*, 105 Ore. 134, 209 Pac. 113, 25 A. L. R. 625.

When to accomplish a general municipal purpose powers are expressly conferred upon a city, and it does not appear that only the powers expressly given are to be exercised, other powers that are incident to or consistent with those expressly given may be implied, when necessary to fully effectuate the express powers and the general purposes designed, if such implication may fairly arise from the language used and object desired. *Malone v. Quincy*, 66 Fla. 52, 62 So. 922, Ann. Cas. 1916 D, 208.

<sup>2</sup> "A municipal corporation possesses and can exercise the following powers, and no others: 'First, those granted in express words; second, those necessary or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, — not simply convenient but indispensable.' *Chicago v. Blair*, 149 Ill. 310, 24 L. R. A. 412, 36 N. E. 829; *Wilkie v. Chicago*, 188 Ill. 444, 80 Am. St. Rep. 182, 58 N. E. 1004." *Chicago v. Weber*, 246 Ill. 304, 92 N. E. 859, 34 L. R. A. (N. S.) 306, 20 Ann. Cas. 359.



and property. The power of its governing officers can only extend to the administration of the by-laws and other ordinances by which the body is regulated."<sup>1</sup> But without being expressly empowered so to do, they may sue and be sued; may have a common seal; may purchase and hold lands and other property for corporate purposes,<sup>2</sup> and convey the same; may make by-laws whenever necessary to accomplish the design of the incorporation, and enforce the same by penalties; and may enter into contracts to effectuate the corporate purposes.<sup>3</sup> Except as to these incidental powers, which need not be, though they usually are, mentioned in the charter, the charter itself, or the general law under which they exist, is the measure of the authority to be exercised. And the general disposition of the courts in this country has been to confine municipalities within the limits that a strict construction of the grants of powers in their charters will assign to them; thus applying substantially the same rule that is applied to charters of private incorporation.<sup>4</sup> The rea-

<sup>1</sup> Willcock on Municipal Corporations, tit. 769.

<sup>2</sup> Such property as is held by the corporation in its public capacity is not liable to be taken on execution. See *Klein v. New Orleans*, 99 U. S. 149, 25 L. ed. 430, and other cases in note to 35 L. ed. U. S. 556.

<sup>3</sup> *Angell & Ames on Corp.* §§ 111, 239; 2 *Kyd on Corp.* 102; *State v. Ferguson*, 33 N. H. 424. See *Dillon, Mun. Corp.*, for an examination, in the light of the authorities, of the several powers here mentioned.

As to the power of a municipality which has entered into a contract for labor to be performed by the other party thereto, to bind itself to grant additional compensation to such party to induce him not to abandon the contract, see *Clough v. Verrette*, 79 N. H. 356, 109 Atl. 78; *Meech v. Buffalo*, 29 N. Y. 198; *Dockett v. Old Forge*, 240 Pa. St. 98, 87 Atl. 421; *McGillivray v. Bremerton*, 90 Wash. 394, 156 Pac. 23.

The Constitution of New York provides that "the legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent or contractor." For a construction of this provision in relation to a contract made by a city, see *McGovern v.*

*New York*, 234 N. Y. 377, 138 N. E. 26, 25 A. L. R. 1442.

<sup>4</sup> Any fair, reasonable doubt concerning the existence of the power of a municipal corporation is resolved by the courts against the corporation and the power is denied. *Malone v. Quincy*, 66 Fla. 52, 62 So. 922, Ann. Cas. 1916 D, 208; *Chicago v. Blair*, 149 Ill. 310, 36 N. E. 829, 24 L. R. A. 412; *Wilkie v. Chicago*, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182; *Chicago v. Weber*, 246 Ill. 304, 92 N. E. 859, 34 L. R. A. (N. S.) 306, 20 Ann. Cas. 359; *Chicago v. M. & M. Hotel Co.*, 248 Ill. 264, 93 N. E. 753; *Chicago v. Ross*, 257 Ill. 76, 100 N. E. 159, 43 L. R. A. (N. S.) 205; *People ex rel. Friend v. Chicago*, 261 Ill. 16, 103 N. E. 609, 49 L. R. A. (N. S.) 438; *Barnard & Miller v. Chicago*, 316 Ill. 519, 147 N. E. 384, 38 A. L. R. 1533.

"Doubtful claims of power, or doubt or ambiguity in the terms used by the legislature, are resolved against the corporation." *Stern v. Fargo*, 18 N. D. 289, 122 N. W. 403, 26 L. R. A. (N. S.) 665.

Where a statute specifically enumerates various powers which the common council of a municipality may render effectual by means of ordinances, this enumeration is an implied exclusion of the right to act otherwise than as specifically directed. Cum-

nock *v.* Little Rock, 154 Ark. 471, 243 S. W. 57, 25 A. L. R. 608.

When powers with reference to particular subjects are expressly conferred in specific terms, other powers that in their nature or extent would materially increase or be inconsistent with the powers that are expressly given in specific and limited terms are not to be implied, particularly when the powers expressly given do not include all the authority that may have been conferred with reference to the designated subjects. *Malone v. Quincy*, 66 Fla. 52, 62 So. 922, Ann. Cas. 1916 D, 208.

Where a statute expressly enumerates certain occupations or businesses over which municipalities are given control, other occupations or businesses are excluded. *People ex rel. Friend v. Chicago*, 261 Ill. 438, 103 N. E. 609, 49 L. R. A. (N. S.) 438.

A general clause, conferring power upon a municipality, can give no authority to abrogate the limitations contained in special provisions. *Malone v. Quincy*, 66 Fla. 52, 62 So. 922, Ann. Cas. 1916 D, 208.

Under the welfare provision of its charter a city may exercise broad police power in protecting the public health, safety, and comfort, but to prohibit an owner of property from using it for ordinary business purposes, or for any use not in itself a nuisance, where there is no express legislative authority, is not within municipal power. *Julian v. Golden Rule Oil Co.*, 112 Kan. 671, 212 Pac. 884.

Express legislative authority is necessary to give cities the power to create zones or restricted residence districts within a city whereby owners of lands therein shall be prohibited from constructing business houses in which to carry on legitimate lines of business. *Julian v. Golden Rule Oil Co.*, 112 Kan. 671, 212 Pac. 884. See *post* 1315 *et seq.*

Under the power conferred upon a municipality to enact such ordinances as are necessary to promote and safeguard the health, safety, and general welfare of the public, it may require a railroad company to eliminate a grade

crossing. *Durham v. Southern R. Co.*, 185 N. C. 240, 117 S. E. 17, 35 A. L. R. 1313. See also *Newport v. Louisville, etc., R. Co.*, 174 Ky. 799, 192 S. W. 838; *State ex rel. Minneapolis v. St. Paul, etc., R. Co.*, 98 Minn. 380, 108 N. W. 261, 120 Am. St. Rep. 581, 28 L. R. A. (N. S.) 298, 8 Ann. Cas. 1047, affirmed 214 U. S. 497, 53 L. ed. 1060, 29 Sup. Ct. Rep. 698; *Powell v. Seaboard Air Line R. Co.*, 178 N. C. 243, 100 S. E. 424; *Cincinnati v. Cincinnati Traction Co.*, 25 Ohio C. C. (N. S.) 513; *Chattanooga v. Southern R. Co.*, 128 Tenn. 399, 161 S. W. 1000; *Superior v. Roemer*, 154 Wis. 345, 141 N. W. 250. But see *State ex rel. Indianapolis v. Indianapolis Union R. Co.*, 160 Ind. 45, 66 N. E. 163, 60 L. R. A. 831.

Under a city charter which authorized the common council to appoint assessors for the purpose of awarding damages to those through whose property a street might be opened, and to assess such damages on the property benefited, it was decided that the council were not empowered to levy a tax to pay for the other expenses of opening the street. *Reed v. Toledo*, 18 Ohio, 161. So a power to enact by-laws and ordinances to abate and remove nuisances will not authorize the passing of an ordinance to *prevent* nuisances, or to impose penalties for the creation thereof. *Rochester v. Collins*, 12 Barb. 559.

A power to impose penalties for *obstructions* to streets would not authorize the like penalties for *encroachments* upon streets, where, under the general laws of the State, the offenses are recognized as different and distinct. *Grand Rapids v. Hughes*, 15 Mich. 54.

Authority to levy a tax on real and personal estate would not warrant an income tax, especially when such a tax is unusual in the State. *Mayor of Savannah v. Hartridge*, 8 Ga. 23. It will appear, therefore, that powers near akin to those expressly conferred, are not, for that reason, to be taken by implication. And see *Commonwealth v. Erie & N. E. Railroad Co.*, 27 Pa. St. 339. This rule has often been applied where authority has been asserted

on behalf of a municipal corporation to loan its credit to corporations formed to construct works of internal improvement. See *La Fayette v. Cox*, 5 Ind. 38; *Cleburne v. Gulf, &c. Ry. Co.*, 66 Tex. 457, 1 S. W. 342.

The power to create indebtedness does not by implication carry with it a power to tax for its payment. *Jeffries v. Lawrence*, 42 Iowa, 498.

"Power to license or tax an occupation must be expressly granted, . . . or be a necessary incident to a power expressly granted." *Barnard & Miller v. Chicago*, 316 Ill. 519, 147 N. E. 384, 38 A. L. R. 1533.

The ordinary powers of a city do not give it authority to grant a street railway franchise. *Eichels v. Evansville Street Railway Co.*, 78 Ind. 261.

The power "to enact ordinances necessary for government" does not authorize the grant of the franchise of a toll-bridge. *Williams v. Davidson*, 43 Tex. 1. Like power coupled with that to regulate streets and business does not allow regulation of telephone charges. *St. Louis v. Bell Telephone Co.*, 96 Mo. 623, 10 S. W. 197.

Power to buy land for public purposes does not cover a purchase for an agricultural society. *Eufaula v. McNab*, 67 Ala. 588.

Power to make health regulations does not permit the erection of a public slaughter-house. *Huesing v. Rock Island*, 128 Ill. 465, 21 N. E. 558.

Power to regulate wharves does not cover creating a harbor. *Spengler v. Trowbridge*, 62 Miss. 46.

A power to pass ordinances to prohibit the sale or giving away of intoxicating liquors in certain special cases is an implied exclusion of the power to prohibit the sale or giving away in other cases. *State v. Ferguson*, 33 N. H. 424.

Power to regulate ten-pin alleys does not authorize their exclusion from all places within fire limits. *Ex parte Patterson*, 42 Tex. Cr. 256, 58 S. W. 1011, 51 L. R. A. 654.

Authority conferred upon a municipality to regulate a place of amusement does not include power to require attendance of a fireman for the purpose of extinguishing fires and aiding

the audience in their exit, which relates, not to the place, but to the public attending the place. *Chicago v. Weber*, 246 Ill. 304, 92 N. E. 859, 34 L. R. A. (N. S.) 306, 20 Ann. Cas. 359.

It is a rational rule that the power of a municipality to provide water for itself and its inhabitants is a necessary and implied power. *Gadsden v. Mitchell*, 145 Ala. 137, 40 So. 557, 117 Am. St. Rep. 20, 6 L. R. A. (N. S.) 781; *State ex. rel. Ellis v. Tampa Waterworks Co.*, 56 Fla. 858, 47 So. 358, 19 L. R. A. (N. S.) 183; *Fawcett v. Mt. Airy*, 134 N. C. 125, 45 S. E. 1029, 101 Am. St. Rep. 825, 63 L. R. A. 870, overruling *Mayo v. Commissioners*, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163, and *Edgerton v. Goldsboro Water Co.*, 126 N. C. 93, 35 S. E. 243, 48 L. R. A. 444. But see *Mayo v. Dover & Foxcroft Village Fire Co.*, 96 Me. 539, 53 Atl. 62; *Huron Waterworks Co. v. Huron*, 7 S. D. 9, 62 N. W. 975, 58 Am. St. Rep. 817, 30 L. R. A. 848; *Lund v. Salt Lake County*, 58 Utah, 546, 200 Pac. 510. Power to contract for a water-supply does not authorize granting an exclusive privilege for twenty-five years. *Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S. W. 143.

Power to prohibit the use of earth closets cannot be implied from authority to regulate their use, or from authority to issue bonds for the construction and maintenance of water-works and a "system of sewerage." *Malone v. Quincy*, 66 Fla. 52, 62 So. 922, Ann. Cas. 1916 D, 208.

Under the general powers "to regulate the inspection, weighing, and measuring of brick, lumber, firewood, coal, hay, and any article of merchandise", a city has the authority to test private scales, to maintain public scales, and to appoint a public weigh-master to have charge of the scales and to do the weighing. *Chicago v. Wisconsin Lime & Cement Co.*, 312 Ill. 520, 144 N. E. 3; *Chicago v. Kautz*, 313 Ill. 196, 144 N. E. 805, 35 A. L. R. 1050.

In *Dunham v. Rochester*, 5 Cow. 462, 465, it is said: "For all the purposes of jurisdiction, corporations are

like the inferior courts, and must show the power given them in every case. If this be wanting, their proceedings must be holden void whenever they come in question, even collaterally; for they are not judicial and subject to direct review on *certiorari*. 2 Kyd on Corp. 104-107."

The prescribed method of exercising a power must be strictly followed. *Des Moines v. Gilchrist*, 67 Iowa, 210, 25 N. W. 136.

The approving vote of the citizens cannot give an authority the law has not conferred. *McPherson v. Foster*, 43 Iowa, 48. See *Hackettstown v. Swackhamer*, 37 N. J. L. 191.

In *Nashville v. Ray*, 19 Wall. 468, 22 L. ed. 164, four of the eight justices of the Supreme Court denied the power of municipal corporations to borrow money or issue securities unless expressly authorized. Says *Bradley, J.*: "Such a power does not belong to a municipal corporation as an incident of its creation. To be possessed it must be conferred by legislation, either express or implied. It does not belong, as a mere matter of course, to local government to raise loans. Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others." See *Waxahachie v. Brown*, 67 Tex. 519, 4 S. W. 207; *Allen v. La Fayette*, 89 Ala. 641, 8 So. 30, 9 L. R. A. 497; *Penick v. Foster*, 129 Ga. 217, 58 S. E. 773, 12 L. R. A. (N. S.) 1159, 12 Ann. Cas. 346; *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 60 S. E. 149, 121 Am. St. Rep. 244, 15 L. R. A. (N. S.) 567; *Rushe v. Hyattsville*, 116 Md. 122, 81 Atl. 278, Ann. Cas. 1913 D, 73; *Wells v. Salina*, 119 N. Y. 280, 23 N. E. 870, 7 L. R. A. 759; *Luther v. Wheeler*, 73 S. C. 83, 52 S. E. 874, 4 L. R. A. (N. S.) 746, 6 Ann. Cas. 754. Compare *Bank of Chillicothe v. Chillicothe*, 7 Ohio, 354; *Clark v. School District*, 3 R. I. 199; *State v. Common Council of Madison*, 7 Wis. 688; *Mills v. Gleason*, 11 Wis. 470; *Hamlin v. Meadville*, 6 Neb. 227; *State v. Babcock*, 22 Neb. 614, 35

N. W. 941. But it has been held that bonds may be issued in payment for property lawfully purchased, although they could not be issued in order to borrow money. *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. 388.

There is no implied power to exempt from taxation. *Whiting v. West Point*, 88 Va. 905, 14 S. E. 698, 15 L. R. A. 860, 29 Am. St. 750, and note. Nor to establish separate schools for white and negro children. *Knox v. Bd. of Education*, 45 Kan. 152, 25 Pac. 616, 11 L. R. A. 830. Nor to publish ordinances in foreign languages. *Chicago v. McCoy*, 136 Ill. 344, 26 N. E. 363, 11 L. R. A. 413. But power to confine patients with infectious diseases covers renting a pest-house: *Anderson v. O'Conner*, 98 Ind. 168. See also *Hessin v. Manhattan*, 81 Kan. 153, 105 Pac. 44, 25 L. R. A. (N. S.) 228. And paying nurses: *Labrie v. Manchester*, 59 N. H. 120; *Rae v. Flint*, 51 Mich. 526, 16 N. W. 887. Such corporation has implied power to take as trustee for indigent inhabitants: *Estate of Robinson*, 63 Cal. 620; and to defend its marshal sued for false imprisonment. *Cullen v. Carthage*, 103 Ind. 196, 2 N. E. 571; *Roper v. Laurinburg*, 90 N. C. 427.

As to the construction of grants of powers in charters, see also *Nashville v. Ray*, 19 Wall. 468, 22 L. ed. 164; *Milhau v. Sharp*, 17 Barb. 435, 28 Barb. 228, and 27 N. Y. 611; *Douglass v. Placerville*, 18 Cal. 643; *Mount Pleasant v. Breeze*, 11 Iowa, 399; *Hooper v. Emery*, 14 Me. 375; *Mayor, &c. of Macon v. Macon & Western R. R. Co.*, 7 Ga. 221; *Hopple v. Brown*, 13 Ohio St. 311; *Lackland v. Northern Missouri Railroad Co.*, 31 Mo. 180; *Smith v. Morse*, 2 Cal. 524; *Bennett v. Borough of Birmingham*, 31 Pa. St. 15; *Earley's App.*, 103 Pa. St. 273; *Tucker v. Virginia City*, 4 Nev. 20; *Leavenworth v. Norton*, 1 Kan. 432; *Kyle v. Malin*, 8 Ind. 34; *Johnson v. Philadelphia*, 60 Pa. St. 445; *Kniper v. Louisville*, 7 Bush, 599; *Johnston v. Louisville*, 11 Bush, 527; *Williams v. Davidson*, 43 Tex. 1; *Burritt v. New Haven*, 42 Conn. 174; *Logan v. Pyne*, 43 Iowa, 524; *Field v.*

sonable presumption is that the State has granted in clear and unmistakable terms all it has designed to grant at all.

It must follow that, if in any case a party assumes to deal with a corporation on the supposition that it possesses powers which it does not, or to contract in any other manner than is permitted by the charter, he will not be allowed, even though he may have complied with the undertaking on his part, to maintain a suit against the corporation based upon its unauthorized action. Even where a party is induced to enter upon work for a corporation by the false representations of corporate officers in regard to the existence of facts on which by law the power of the corporation to enter upon the work depends, these false representations cannot have the effect to give a power which in the particular case was wanting, or to validate a contract otherwise void, and therefore can afford no ground of action against the corporation; but every party contracting with it must take notice of any want of authority which the public records would show.<sup>1</sup> This is the general rule, and the cases

Des Moines, 39 Iowa, 575; Vance v. Little Rock, 30 Ark. 435; English v. Chicot County, 26 Ark. 454; Pullen v. Raleigh, 68 N. C. 451; Chisholm v. Montgomery, 2 Woods, 584; Burmeister v. Howard, 1 Wash. Ter. 207; Bell v. Plattville, 71 Wis. 139, 36 N. W. 831; Murphy v. Jacksonville, 18 Fla. 318; Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 69 N. E. 451, 59 L. R. A. 631; Cortland v. Larson, 273 Ill. 602, 113 N. E. 51, L. R. A. 1917 A, 314, Ann. Cas. 1916 E, 775; Scott v. La Porte, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675; Richmond v. Richmond Natural Gas Co., 168 Ind. 82, 79 N. E. 1031, 11 Ann. Cas. 746; Henderson v. Young, 119 Ky. 224, 83 S. W. 583; Hopkins v. Richmond, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917 D, 1114.

<sup>1</sup> The common council of Williamsburg had power to open, regulate, grade, and pave streets, but only upon petition signed by one-third of the persons owning lands within the assessment limits. A party entered into a contract with the corporation for improving a street, upon the false representations of the council that such a petition had been presented. Held, that the provision of law being public, and all the proceedings leading to a

determination by the council to make a particular improvement being matters of record, all persons were chargeable with notice of the law and such proceedings; and that, notwithstanding the false representations, no action would lie against the city for work done under the contract. Swift v. Williamsburg, 24 Barb. 427. "If the plaintiff can recover on the state of facts he has stated in his complaint, the restriction and limitations which the legislature sought to impose upon the powers of the common council will go for nothing. And yet these provision are matters of substance, and were designed to be of some service to the constituents of the common council. They were intended to protect the owners of lands and the taxpayers of the city, as well against the frauds and impositions of the contractors who might be employed to make these local improvements, as against the illegal acts of the common council themselves in employing the contractors. But if the plaintiff can recover in this action, of what value or effect are all these safeguards? If the common council desire to make a local improvement, which the persons to be benefited thereby, and to be assessed therefor, are unwilling to have made, the con-

sent of the owners may be wholly dispensed with, according to the plaintiff's theory. The common council have only to represent that the proper petition has been presented and the proper proceedings have been taken, to warrant the improvement. They then enter into the contract. The improvement is made. Those other safeguards for an assessment of the expenses and for reviewing the proceedings may or may not be taken. But when the work is completed and is to be paid for, it is found that the common council have no authority to lay any assessment or collect a dollar from the property benefited by the improvement. The contractor then brings his action, and recovers from the city the damages he has sustained by the failure of the city to pay him the contract price. The ground of his action is the falsity of the representations made to him. But the truth or falsity of such representations might have been ascertained by the party with the use of the most ordinary care and diligence. The existence of the proper petition, and the taking of the necessary initiatory steps to warrant the improvement, were doubtless referred to and recited in the contract made with the plaintiff. And he thus became again directly chargeable with notice of the contents of all these papers. It is obvious that the restrictions and limitations imposed by the law cannot thus be evaded. The consent of the parties interested in such improvements cannot be dispensed with; the responsibility, which the conditions precedent created by the statute impose, cannot be thrown off in this manner. For the effect of doing so is to shift entirely the burden of making these local improvements, to relieve those on whom the law sought to impose the expense, and to throw it on others who are not liable either in law or morals."

So, where the charter of Detroit provided that no public work should be contracted for or commenced until an assessment had been levied to defray the expense, and that no such work should be paid or contracted to be paid for, except out of the proceeds

of the tax thus levied, it was held that the city corporation had no power to make itself responsible for the price of any public work, and that such work could only be paid for by funds actually in the hands of the city treasurer, provided for the specific purpose. *Goodrich v. Detroit*, 12 Mich. 279. But if the city receives the fund and misappropriates it, it will be liable. *Lansing v. Van Gorder*, 24 Mich. 456.

The best considered cases hold that if a contract with a municipal corporation is *ultra vires*, the municipality cannot be held liable under an implied obligation on its part to pay for the benefits it has received under the unauthorized contract. *Thomas v. Richmond*, 12 Wall. 349, 20 L. ed. 453; *Swanson v. Ottumwa*, 131 Iowa, 540, 106 N. W. 9, 5 L. R. A. (N. S.) 860, 9 Ann. Cas. 1117; *Minneapolis, etc., Electric Traction Co. v. Minneapolis*, 124 Minn. 351, 145 N. W. 609, 50 L. R. A. (N. S.) 143; *Contra*, *Schipper v. Aurora*, 121 Ind. 154, 22 N. E. 878.

"The issuing of bills as a currency by" a municipal corporation "without authority is not only contrary to positive law, but, being *ultra vires*, is an abuse of the public franchises which have been conferred upon it; and the receiver of the bills, being chargeable with notice of the wrong, is in *pari delicto* with the officers, and should have no remedy, even for money had and received, against the corporation upon which he has aided in inflicting the wrong." *Thomas v. Richmond*, 12 Wall. 349, 20 L. ed. 453.

In a Minnesota case, a municipal corporation let a contract for the construction of a sewer without complying with charter requirements, and without obtaining the consent of two property owners through whose lands the sewer was to pass or of the Federal authorities for its outlet on government land. Plaintiff sued for the balance of an account for materials furnished the contractor on a bond given, *inter alia*, for the benefit of materialmen. The bondsmen interposed the defense that the contract was void because *ultra vires*, and that, therefore, they were not responsible

on the bond. It was held that the tendency of judicial opinion to refuse to avoid contracts made by private corporations because *ultra vires* does not apply equally to contracts made by municipal corporations, but that to both classes of contracts that doctrine should be so administered as not to defeat the ends of justice or to work a legal wrong; that a contract *ultra vires* in the general and primary sense that it is wholly outside the power of the corporation to make under any circumstances is ordinarily void *in toto*; but that whether a contract strictly within the scope of the corporation's powers, but *ultra vires* in the restricted or secondary sense that the power has been irregularly exercised, or that it was beyond the power of the corporation in some particular or through some undisclosed circumstances, is wholly void or not, depends upon the circumstances of the particular case; that the contract here in issue was *ultra vires* in the secondary and restricted sense only; that the fact that the city had not procured right of way through all the lands of private owners through which it was to pass did not invalidate the contract; that the facts that as to a small portion of the contract with the municipality only it was *ultra vires* in any sense, and that it had been substantially executed by the parties basing rights of action upon it, are strong if not conclusive considerations for refusing to hold it absolutely void; that neither the dictates of public policy nor the analogies of the law justify holding the contract void, as between dealers, who furnished material to the contractor in reliance on the bond, and the sureties thereon, who are in a position favored by the law; that the recital in the bond of the contract as valid and subsisting prevented the sureties thereon from asserting that it was *ultra vires*. *Bell v. Kirkland*, 102 Minn. 213, 113 N. W. 271, 120 Am. St. Rep. 621, 13 L. R. A. (N. S.) 793. See also *Rogers v. Omaha*, 76 Neb. 187, 107 N. W. 214.

Parties dealing with the agents or officers of municipal corporations must, at their own peril, take notice of the

limits of the powers both of the municipal corporation, and of those assuming to act on its behalf. *State v. Kirkley*, 29 Md. 85; *Gould v. Sterling*, 23 N. Y. 456; *Clark v. Des Moines*, 19 Iowa, 199; *Veeder v. Lima*, 19 Wis. 280; *Bryan v. Page*, 51 Tex. 532, 32 Am. Rep. 637; *Tainter v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90; *Barton v. Swepston*, 44 Ark. 437; *Thomas v. Richmond*, 12 Wall. 349, 20 L. ed. 453; *East Oakland v. Skinner*, 94 U. S. 255, 24 L. ed. 125; *Eastern Illinois State Normal School v. Charleston*, 271 Ill. 602, 111 N. E. 573, L. R. A. 1916 D, 991; *Walker v. Richmond*, 173 Ky. 26, 189 S. W. 1122, Ann. Cas. 1918 E, 1084; *Westminster Water Co. v. Westminster*, 98 Md. 551, 56 Atl. 990, 103 Am. St. Rep. 424, 64 L. R. A. 630; *Bell v. Kirkland*, 102 Minn. 213, 113 N. W. 271, 120 Am. St. Rep. 621, 13 L. R. A. (N. S.) 793; *Minneapolis, etc., Electric Traction Co. v. Minneapolis*, 124 Minn. 351, 145 N. W. 609, 50 L. R. A. (N. S.) 143; *Hicksville v. Blakeslee*, 103 Ohio St. 508, 134 N. E. 445, 22 A. L. R. 119; *Dillon Mun. Corp.* § 381. But a *bona fide* holder of municipal obligations has a right to rely upon the truth of their recitals, if they appear to be warranted by the legislation under which they are issued. *Coloma v. Eaves*, 92 U. S. 484, 23 L. ed. 579; *Walnut v. Wade*, 103 U. S. 683, 26 L. ed. 526; *Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424, 2 Sup. Ct. Rep. 704; *New Providence v. Halsey*, 117 U. S. 336, 29 L. ed. 904, 6 Sup. Ct. Rep. 764; *Oregon v. Jennings*, 119 U. S. 74, 30 L. ed. 323, 7 Sup. Ct. Rep. 124; *Aberdeen v. Sykes*, 59 Miss. 236; and cases *post*, pp. 471-479.

Contract for erecting public buildings and providing that only union labor shall be employed thereon is void, as unduly restricting competition and thereby increasing the cost of the work. *Adams v. Brennan*, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. 222. And see in this connection *Atlanta v. Stein*, 111 Ga. 789, 36 S. E. 932, 51 L. R. A. 335; *Fiske v. People*, 188 Ill. 206, 58 N. E. 985; *People v. Coler*, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. 605.

of unauthorized action which may bind the corporation are exceptional, and will be referred to further on.

Municipal corporations exercise the authority conferred upon them by law through votes of the corporators at public meetings, and through officers and agents duly elected or chosen. The corporators are the resident electors, who, under the general laws of the State, may vote at the ordinary elections, though sometimes, in special cases, the franchise has been conferred upon taxpayers exclusively. A meeting of corporators for any purpose of legal action must be regularly convened in such manner or at such time as may have been prescribed by law. If the corporators were to come together at any time without legal permission and assume to act for the corporation, their action would be of no legal force or validity whatever. The State permits them to wield a part of the governmental authority of the State, but only on the conditions which the law has prescribed, and one of these is that it shall be exercised in an orderly manner, at meetings assembled upon due notice and conducted according to legal forms, in order that there may be opportunity for reflection, consultation, and deliberation.<sup>1</sup> The notice may be either general, and given by the law itself, or it may be special, and given by some corporate officer or agent. Annual meetings are commonly provided for by general law, which names a time, and perhaps a place for the purpose. Of this general law every corporator must take notice, and the meetings held in pursuance of it are legal, even though a further notice by publication, which the statute directs, has been omitted.<sup>2</sup> But for special meetings the requirement of special notice is imperative, and it must be given as the statute requires.<sup>3</sup> Sometimes it is directed to be given by publication, sometimes by posted notice, and sometimes by personal notification. If the law requires the order or warrant for the meeting to specify its object, compliance is imperative, and the business which can be lawfully done at the meeting will be strictly limited to the object stated.<sup>4</sup>

<sup>1</sup> *Chamberlain v. Dover*, 13 Me. 466, 29 Am. Dec. 517; *Evans v. Osgood*, 18 Me. 213; *School District v. Atherton*, 12 Met. 105; *Stone v. School District*, 8 Cush. 592; *Bethany v. Sperry*, 10 Conn. 200; *State v. Harrison*, 67 Ind. 71; *Pike County v. Rowland*, 94 Pa. St. 238; *State v. Pettineli*, 10 Nev. 181; *State v. Bonnell*, 35 Ohio St. 10; *Ross v. Crockett*, 14 La. Ann. 811; *Goulding v. Clark*, 34 N. H. 148. See *Stow v. Wise*, 7 Conn. 214, 18 Am. Dec. 99; *Brooklyn Trust Co. v.*

*Hebron*, 51 Conn. 22; *Pierce v. New Orleans Building Co.*, 9 La. 397, 29 Am. Dec. 448; *Atlantic De Laine Co. v. Mason*, 5 R. I. 463.

<sup>2</sup> See *People v. Cowles*, 13 N. Y. 350; *People v. Hartwell*, 12 Mich. 508; *People v. Brenham*, 3 Cal. 477; *State v. Orvis*, 20 Wis. 235; *Dishon v. Smith*, 10 Iowa, 212; *State v. Jones*, 19 Ind. 356.

<sup>3</sup> *Tuttle v. Cary*, 7 Me. 426.

<sup>4</sup> *Little v. Merrill*, 10 Pick. 543; *Bartlett v. Kinsley*, 15 Conn. 327;



Special charters for corporations usually provide for some governing body who shall be empowered to make laws for them within the sphere of the powers conferred, and perhaps to appoint some portion or all of the ministerial and administrative officers. In the case of towns, school districts, etc., the power to make laws is largely confided to the corporators assembled in annual meeting;<sup>1</sup> and in the case of counties, in some county board. The laws, whether designated orders, resolutions, or ordinances, are more often in law spoken of as by-laws, and they must be justified by the grant of power which the State has made. Whatever is *ultra vires* in the case of any delegated authority, is of course void.

Whatever is said above respecting notice for corporate meetings is equally applicable to meetings of the official boards, with this exception: that as the board is composed of a definite number of persons, if these all convene and act they may thereby waive the want of notice. But the meeting of a mere majority without notice to the others would be without legal authority.<sup>2</sup>

### *Corporations by Prescription and Implication.*

The origin of many of the corporate privileges asserted and enjoyed in England is veiled in obscurity, and it is more than probable that in some instances they had no better foundation than an uninterrupted user for a considerable period. In other cases the royal or baronial grant became lost in the lapse of time, and the evidence that it had ever existed might rest exclusively upon reputation, or upon the inference to be drawn from the exercise of corporate functions. In all these cases it seems to be the law that the corporate existence may be maintained on the ground of *prescription*; that is to say, the exercise of corporate rights for a time whereof the memory of man runneth not to the contrary is sufficient evidence that such rights were once granted by competent authority, and are therefore now exercised by right and not by usurpation.<sup>3</sup> And this presumption concludes the crown, notwithstanding the maxim that the crown shall lose no rights by lapse of time. If the right asserted is one of which a grant might be predicated, a jury is bound to pre-

Atwood v. Lincoln, 44 Vt. 332; Holt's Appeal, 5 R. I. 603; Reynolds v. New Salem, 6 Met. 340; Bowen v. King, 34 Vt. 156; Haines v. School District, 41 Me. 246; Bloomfield v. Charter Oak Bank, 121 U. S. 121, 30 L. ed. 923, 7 Sup. Ct. Rep. 865.

<sup>1</sup> See Williams v. Roberts, 88 Ill. 111.

<sup>2</sup> Gordon v. Preston, 1 Watts, 385, 26 Am. Dec. 75.

<sup>3</sup> Introduction to Willcock on Municipal Corporations; The King v. Mayor, &c. of Stratford upon Avon, 14 East, 348; Robie v. Sedgwick, 35 Barb. 319. See Londonderry v. Andover, 28 Vt. 416.

sume a grant from that prescription.<sup>1</sup> In this particular the claim to a corporate franchise stands on the same ground as any claim of private right which requires a grant for its support, and is to be sustained under the same circumstances of continuous assertion and enjoyment.<sup>2</sup> And even the grant of a charter by the crown will not preclude the claim to corporate rights by prescription; for a new charter does not extinguish old privileges.<sup>3</sup>

A corporation may also be established upon presumptive evidence that a charter has been granted within the time of memory. Such evidence is addressed to a jury, and though not conclusive upon them, yet, if it reasonably satisfies their minds, it will justify them in a verdict finding the corporate existence. "There is a great difference," says Lord *Mansfield*, "between length of time which operates as a bar to a claim, and that which is only used by way of evidence. A jury is concluded by length of time which operates as a bar; as where the Statute of Limitations is pleaded in bar to a debt: though the jury is satisfied that the debt is due and unpaid, it is still a bar. So in the case of prescription. If it be time out of mind, a jury is bound to preclude the right from that prescription, if there could be a legal commencement of the right. But any written evidence, showing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription. But length of time used merely by way of evidence may be left to the consideration of the jury, to be credited or not, and to draw their inference one way or the other according to circumstances."<sup>4</sup> The same ruling has been had in several cases in the courts of this country, where corporate powers had been exercised, but no charter could be produced. In one of these cases, common reputation that a charter had once existed was allowed to be given to the jury; the court remarking upon the notorious fact that two great fires in the capital of the colony had destroyed many of the public records.<sup>5</sup> In other cases there was evidence of various acts which could only lawfully and properly be done by a corporation, covering a period of thirty, forty, or fifty years, and done with the knowledge of the State and without question.<sup>6</sup> The inference of corporate powers,

<sup>1</sup> *Mayor of Hull v. Horner*, Cowp. 104, per Lord *Mansfield*. Compare *People v. Maynard*, 15 Mich. 463; *State v. Bunker*, 59 Me. 366.

<sup>2</sup> 2 Kent, 277; Angell & Ames on Corp. § 70, 1 Kyd on Corp. 14.

<sup>3</sup> *Hadduck's Case*, T. Raym. 439; *The King v. Mayor, &c. of Stratford upon Avon*, 14 East, 348; *Bow v.*

*Allenstown*, 34 N. H. 351. See *Jameson v. People*, 16 Ill. 257.

<sup>4</sup> *Mayor of Hull v. Horner*, Cowp. 104, 108; citing, among other cases, *Bedle v. Beard*, 12 Co. 5.

<sup>5</sup> *Dillingham v. Snow*, 5 Mass. 547. And see *Bow v. Allenstown*, 34 N. H. 351; *Bassett v. Porter*, 4 Cush. 487.

<sup>6</sup> *Stockbridge v. West Stockbridge*,

however, is not one of law; but it is to be drawn as a fact by the jury.<sup>1</sup>

Wherever a corporation is found to exist by prescription, the same rule as to construction of powers, we apprehend, would apply as in other cases. The presumption as to the powers granted would be limited by the proof of the usage, and nothing could be taken by intendment which the usage did not warrant.

Corporations are also said sometimes to exist by implication. When that power in the State which can create corporations grants to individuals such property, rights, or franchises, or imposes upon them such burdens, as can only be properly held, enjoyed, continued, or borne, according to the terms of the grant, by a corporate entity, the intention to create such corporate entity is to be presumed, and corporate capacity is held to be conferred so far as is necessary to effectuate the purpose of the grant or burden. On this subject it will be sufficient for our purpose to refer to authorities named in the note.<sup>2</sup> In these cases the rule of strict construction of corporate powers applies with unusual force.

### *Municipal By-Laws.*

The power of municipal corporations to make by-laws is limited in various ways.

1. It is controlled by the Constitution of the United States and of the State. The restrictions imposed by those instruments, which

12 Mass. 400; *New Boston v. Dunbarton*, 12 N. H. 409, and 15 N. H. 201; *Bow v. Allentown*, 34 N. H. 351; *Trott v. Warren*, 11 Me. 227. See also *Henderson v. Davis*, 106 N. C. 88, 11 S. E. 573.

In the absence of a statute on the subject, the courts in the exercise of a wise discretion, upon grounds of public policy, should refuse to repeal the charter of a municipal corporation which has stood unchallenged for a period of ten or fifteen years, when the municipality has acquired property and contracted debts, and assumed jurisdiction over the streets and alleys of the city and undertaken to preserve the public peace of the community. *State ex rel. Chandler v. Huff*, 105 Mo. App. 354, 79 S. W. 1010. See also *People v. Hanker*, 197 Ill. 409, 64 N. E. 253; *State v. Westport*, 116 Mo. 582, 22 S. W. 888; *State v. Mansfield*, 99 Mo. App. 146, 72 S. W. 471.

A municipal corporation may "by custom, usage, and prescription" acquire a corporate name. *Ex parte Keeling*, 54 Tex. Crim. Rep. 118, 121 S. W. 605, 130 Am. St. Rep. 884.

<sup>1</sup> *New Boston v. Dunbarton*, 15 N. H. 201; *Bow v. Allentown*, 34 N. H. 351; *Mayor of Hull v. Horner*, 14 East, 102.

<sup>2</sup> *Dyer*, 400, cited by Lord *Kenyon*, in *Russell v. Men of Devon*, 2 T. R. 667, and in 2 Kent, 276; *Viner's* Abr. tit. "Corporation"; *Conservators of River Tone v. Ash*, 10 B. & C. 349, 10 B. & C. 383, citing case of *Sutton Hospital*, 10 Co. 28; per *Kent*, Chancellor, in *Denton v. Jackson*, 2 Johns. Ch. 320; *Coburn v. Ellenwood*, 4 N. H. 99; *Atkinson v. Bemis*, 11 N. H. 44; *North Hempstead v. Hempstead*, 2 Wend. 109; *Thomas v. Dakin*, 22 Wend. 9; per *Shaw*, Ch. J., in *Stebbins v. Jennings*, 10 Pick. 172; *Mahony v. Bank of the State*, 4 Ark. 620.

directly limit the legislative power of the State, rest equally upon all the instruments of government created by the State.<sup>1</sup> If a State cannot pass an *ex post facto* law, or law impairing the obligation of contracts, neither can any agency do so which acts under the State with delegated authority.<sup>2</sup> By-laws, therefore, which in their operation would be *ex post facto*, or violate contracts, are not within the power of municipal corporations; and whatever the people by the State constitution have prohibited the State government from doing, it cannot do indirectly through the local governments.<sup>3</sup>

Only where a contract made in good faith cannot otherwise be enforced, will the doctrine of implication be upheld. *Blair v. West Point*, 2 McCrary, 459, and cases cited.

<sup>1</sup> In relation to the Constitution of the United States a municipal ordinance is to be regarded as in effect a statute of the State, adopted under a power granted by the State legislature, and hence it is an act of the State within the Fourteenth Amendment. *North American Cold Storage Co. v. Chicago*, 211 U. S. 306, 53 L. ed. 195, 29 Sup. Ct. Rep. 101, 15 Ann. Cas. 276.

<sup>2</sup> *Angell & Ames on Corporations*, §322; *Stuyvesant v. Mayor, &c. of New York*, 7 Cow. 588; *Brooklyn Central Railroad Co. v. Brooklyn City Railroad Co.*, 32 Barb. 358; *Illinois Conference Female College v. Cooper*, 25 Ill. 148. *Illinois Conference Female College v. Cooper*, 25 Ill. 148 was a case where a by-law of an educational corporation was held void, as violating the obligation of a contract previously entered into by the corporation in a certificate of scholarship which it had issued. See also *Davenport, &c. Co. v. Davenport*, 13 Iowa, 229; *Saving Society v. Philadelphia*, 31 Pa. St. 175; *Haywood v. Savannah*, 12 Ga. 404.

If an ordinance and its acceptance make a contract, it cannot be impaired by subsequent ordinances. *People v. Chicago W. D. Ry. Co.*, 118 Ill. 113, 7 N. E. 116; *Kansas City v. Corrigan*, 86 Mo. 67.

<sup>3</sup> Although an ordinance adopted under legislative authority is presumed to be valid, it must nevertheless be declared invalid if it clearly

impairs rights guaranteed by the Constitution. *State ex rel. Lachtman v. Houghton*, 134 Minn. 226, 158 N. W. 1017, L. R. A. 1917 F, 1050.

Any exertion of municipal authority or of the police power is subject to the provisions of organic law that are designed to conserve private rights. *Maxwell v. Miami*, 87 Fla. 107, 100 So. 147, 33 A. L. R. 682.

"An unreasonable or unnecessary exertion of municipal authority or of the police power in the manner or extent in which private personal or property rights are curtailed, or impaired, violates organic law, in that it deprives persons of liberty and property without authority or due process of law. Municipalities are given police powers to conserve, not to impair, private rights." *Maxwell v. Miami*, 87 Fla. 107, 100 So. 147, 33 A. L. R. 682.

In some jurisdictions it has been held that general zoning ordinances are a valid exercise of the police power, but upon this question the authorities are not unanimous. See *post*, pp. 1315-1318.

A municipal ordinance provided that the owners of all vehicles used upon the streets should pay an annual license fee as follows: For each wagon used for the purpose of delivering coal oil, gasoline, or other similar commodities, \$50; for each wagon used for hauling ice, \$25 each for the first two owned by an individual, firm, or corporation, and \$12.50 each for all wagons over two. The maximum on other vehicles was fixed at \$10 each, and some kinds as low as \$1.50 each. It was held that the ordinance was invalid, in that it violated a constitu-

2. Municipal by-laws must also be in harmony with the general laws of the State, and with the provisions of the municipal charter. Whenever they come in conflict with either, the by-law must give way.<sup>1</sup> The charter, however, may expressly or by necessary implication exclude the general laws of the State on any particular subject,

tional provision that no privileges or immunities should be granted to any citizen, or class of citizens, which, upon the same terms, should not equally belong to all citizens. *Waters-Pierce Oil Co. v. Hot Springs*, 85 Ark. 509, 109 S. W. 293, 16 L. R. A. (N. S.) 1035.

An ordinance forbidding any person "knowingly to associate with persons having the reputation of being thieves is invalid." *Ex parte Smith*, 135 Mo. 223, 36 S. W. 628, 58 Am. St. 576, 33 L. R. A. 606.

Under the Kansas Constitution no city can by imposing a liquor license tax encourage a forbidden business without incurring a liability to be ousted of its corporate powers. *State v. Topeka*, 30 Kan. 653, 2 Pac. 587, 31 Kan. 452, 2 Pac. 593.

Where an ordinance applies to all citizens alike, the fact that only part of the citizens desire to do the acts prohibited, does not make it class legislation. *Thomas v. Indianapolis*, 195 Ind. 440, 145 N. E. 550, 35 A. L. R. 1194.

An ordinance of the city of New Orleans, prohibiting operators of vehicles for hire from using certain streets as stands for their business, was held not to violate any constitutional provision. *New Orleans v. Calamari*, 150 La. 737, 91 So. 172, 22 A. L. R. 106.

<sup>1</sup> *Wood v. Brooklyn*, 14 Barb. 425; *Mayor, &c. of New York v. Nichols*, 4 Hill, 209; *Petersburg v. Metzker*, 21 Ill. 205; *Southport v. Ogden*, 23 Conn. 128; *Andrews v. Insurance Co.*, 37 Me. 256; *Canton v. Nist*, 9 Ohio St. 439; *Carr v. St. Louis*, 9 Mo. 191; *Commonwealth v. Erie & Northeast Railroad Co.*, 27 Pa. St. 339; *Burlington v. Kellar*, 18 Iowa, 59; *Conwell v. O'Brien*, 11 Ind. 419; *March v. Commonwealth*, 12 B. Monr. 25; *Georgia R., etc., Co. v. Railroad Commission*, 149 Ga. 1, 98 S. E. 696, 5 A. L. R. 1; *Mix v. Nez Perce County*, 18 Idaho,

695, 112 Pac. 215, 32 L. R. A. (N. S.) 534; *Marengo v. Rowland*, 263 Ill. 531, 105 N. E. 285, Ann. Cas. 1915 C, 198; *Kansas City v. Jordan*, 99 Kan. 814, 163 Pac. 188, Ann. Cas. 1918 B, 273; *Dayton v. South Covington, etc., St. R. Co.*, 177 Ky. 202, 197 S. W. 670, L. R. A. 1918 B, 476, Ann. Cas. 1918 E, 229; *Levering v. Williams*, 134 Md. 48, 106 Atl. 176, 4 A. L. R. 374; *Power v. Nordstrom*, 150 Minn. 228, 184 N. W. 967, 18 A. L. R. 733; *Mayhew v. Eugene*, 56 Ore. 102, 104 Pac. 727, Ann. Cas. 1912 C, 33; *Mantel v. State*, 55 Tex. Crim. Rep. 456, 117 S. W. 855, 131 Am. St. Rep. 818; *Zucarro v. State*, 82 Tex. Crim. Rep. 1, 197 S. W. 982, L. R. A. 1918 B, 354; *Puget Sound Traction, etc., Co. v. Grassmeyer*, 102 Wash. 482, 173 Pac. 504, L. R. A. 1918 F, 469; *Bissett v. Littleton*, 87 W. Va. 127, 104 S. E. 289, 20 A. L. R. 1478. See *Baldwin v. Green*, 10 Mo. 410; *Cowen v. West Troy*, 43 Barb. 48; *State v. Georgia Medical Society*, 38 Ga. 608; *Pesterfield v. Vickers*, 3 Cold. 205; *Mays v. Cincinnati*, 1 Ohio St. 268; *Wirth v. Wilmington*, 68 N. C. 24; *Flood v. State*, 19 Tex. App. 584; *Bohmy v. State*, 21 Tex. App. 597, 2 S. W. 886; *Shreveport v. Prescott*, 51 La. Ann. 1895, 26 So. 664, 46 L. R. A. 193; *Katzenberger v. Lawo*, 90 Tenn. 235, 16 S. W. 611, 13 L. R. A. 185, 25 Am. St. 681.

Ordinance cannot authorize keeping within city limits a greater quantity of explosives than statute allows. *Cameron v. Kenyon-Connell Comm'l Co.*, 22 Mont. 312, 56 Pac. 358, 44 L. R. A. 508.

An ordinance which attempts to regulate the transportation of intoxicating liquors within the city for legal purposes, and to prohibit such transportation for illegal purposes, but which does not permit the transportation of such liquors for all of the purposes recognized as legal by the law of the

and allow the corporation to pass local laws at discretion, which may differ from the rule in force elsewhere.<sup>1</sup> But in these cases the control of the State is not excluded if the legislature afterward see fit to exercise it; nor will conferring a power upon a corporation to pass by-laws and impose penalties for the regulation of any specified subject necessarily supersede the State law on the same subject, but the State law and the by-law may both stand together if not inconsistent.<sup>2</sup> Indeed, an act may be a penal offence under the laws of the State, and further penalties, under proper legislative authority, be imposed for its commission by municipal by-laws, and the enforcement of the one would not preclude the enforcement of the other.<sup>3</sup>

State, is invalid. *Kansas City v. Jordan*, 99 Kan. 814, 163 Pac. 188, Ann. Cas. 1918 B, 273.

Ordinance granting exclusive privilege for thirty years to construct and maintain waterworks to supply town with water is void as creating a monopoly. *Thrift v. Elizabeth City*, 122 N. C. 31, 30 S. E. 349, 44 L. R. A. 427.

Ordinance cannot *penalize* the employment of a laborer by a contractor for more than eight hours a day upon city works. *Re Kuback*, 85 Cal. 274, 24 Pac. 737, 9 L. R. A. 482, 20 Am. St. 226.

Where an act is expressly or by implication permitted by the State law, it cannot be forbidden by the corporation. Thus, the statutes of New York established certain regulations for the putting up and marking of pressed hay, and provided that such hay might be sold without deduction for tare, and by the weight as marked, or any other standard weight that should be agreed upon. It was held that the city of New York had no power to prohibit under a penalty the sale of such hay without inspection; this being obviously inconsistent with the statute which gave a right to sell if its regulations were complied with. *Mayor, &c. of New York v. Nichols*, 4 Hill, 209.

An ordinance is not rendered invalid by the fact that a person in violating it, may, at the same time, violate a State statute, if the violation of the ordinance does not necessarily require a violation of the statute. *Thomas v.*

*Indianapolis*, 195 Ind. 440, 145 N. E. 550, 35 A. L. R. 1194.

<sup>1</sup> *State v. Clark*, 1 Dutch. 54; *State v. Dwyer*, 21 Minn. 512; *Covington v. East St. Louis*, 78 Ill. 548; *Coulterville v. Gillen*, 72 Ill. 599; *McPherson v. Chebanse*, 114 Ill. 46, 28 N. E. 454; *St. Johnsbury v. Thompson*, 59 Vt. 300, 9 Atl. 571.

Peculiar and exceptional regulations may even be made applicable to particular portions of a city only, and yet not be invalid. *Goddard, Petitioner*, 16 Pick. 504; *Commonwealth v. Patch*, 97 Mass. 221, per *Hoar*, J.; *St. Louis v. Weber*, 44 Mo. 547.

<sup>2</sup> *City of St. Louis v. Bentz*, 11 Mo. 61; *City of St. Louis v. Cafferata*, 24 Mo. 94; *Rogers v. Jones*, 1 Wend. 261; *Levy v. State*, 6 Ind. 281; *Mayor, &c. of Mobile v. Allaire*, 14 Ala. 400; *Elk Point v. Vaughn*, 1 Dak. 113; *People v. Hanrahan*, 75 Mich. 611, 42 N. W. 1124; *In re Hoffman*, 155 Cal. 114, 99 Pac. 517, 132 Am. St. Rep. 75; *Seager v. Foster*, 185 Iowa, 32, 169 N. W. 681, 8 A. L. R. 690.

Whenever the legislature enacts a general law declaring a State policy in regard to the prohibition of gambling or the regulation of the sale of intoxicating liquors, such law supersedes any special charter rights that cities within the State have been given in regard thereto. *Mix v. Board of Com'rs of Nez Perce County*, 18 Idaho, 695, 112 Pac. 215, 32 L. R. A. (n. s.) 534.

<sup>3</sup> Such is the clear weight of authority, though the decisions are not uniform. We quote from *Rogers v.*

Jones, 1 Wend. 261: "But it is said that the by-law of a town or corporation is void, if the legislature have regulated the subject by law. If the legislature have passed a law regulating as to certain things in a city, I apprehend the corporation are not thereby restricted from making further regulations. Cases of this kind have occurred and never been questioned on that ground; it is only to notice a case or two out of many. The legislature have imposed a penalty of one dollar for servile labor on Sunday; the corporation of New York have passed a by-law imposing the penalty of five dollars for the same offence. As to storing gunpowder in New York, the legislature and corporation have each imposed the same penalty. Suits to recover the penalty have been sustained under the corporation law. It is believed that the ground has never been taken that there was a conflict with the State law. One of these cases is reported in 12 Johns. 122. The question was open for discussion, but not noticed."

In *Mayor, &c. of Mobile v. Allaire*, 14 Ala. 400, the validity of a municipal by-law, imposing a fine of fifty dollars for an assault and battery committed within the city, was brought in question. *Collier*, Ch. J., says (p. 403): "The object of the power conferred by the charter, and the purpose of the ordinance itself, was not to punish for an offence against the criminal justice of the country, but to provide a mere *police regulation*, for the enforcement of good order and quiet within the limits of the corporation. So far as an offence has been committed against the public peace and morals, the corporate authorities have no power to inflict punishment, and we are not informed that they have attempted to arrogate it. It is altogether immaterial whether the State tribunal has interfered and exercised its power in bringing the defendant before it to answer for the assault and battery; for whether he has there been punished or acquitted is alike unimportant. The offence against the corporation and the State we have seen are distinguishable and wholly disconnected,

and the prosecution at the suit of each proceeds upon a different hypothesis; the one contemplates the observance of the peace and good order of the city; the other has a more enlarged object in view, the maintenance of the peace and dignity of the State." See also *Mayor, &c. of Mobile v. Rouse*, 8 Ala. 515; *Intendant, &c. of Greensboro' v. Mullins*, 13 Ala. 341; *Mayor, &c. of New York v. Hyatt*, 3 E. D. Smith, 156; *People v. Stevens*, 13 Wend. 341; *Blatchley v. Moser*, 15 Wend. 215; *Amboy v. Sleeper*, 31 Ill. 499; *State v. Crummey*, 17 Minn. 72; *State v. Oleson*, 26 Minn. 507, 5 N. W. 959; *Greenwood v. State*, 6 Bax. 567, 32 Am. Rep. 539; *Brownville v. Cook*, 4 Neb. 101; *Levy v. State*, 6 Ind. 281; *Ambrose v. State*, 6 Ind. 351; *Lawrenceburg v. Wuest*, 16 Ind. 337; *St. Louis v. Bentz*, 11 Mo. 61; *St. Louis v. Cafferata*, 24 Mo. 94; *State v. Gordon*, 60 Mo. 383; *St. Louis v. Schoenbusch*, 95 Mo. 618, 8 S. W. 791; *Shafer v. Mumma*, 17 Md. 331; *Brownville v. Cook*, 4 Neb. 101; *State v. Ludwig*, 21 Minn. 202; *Bloomfield v. Trimble*, 54 Iowa, 399, 37 Am. Rep. 212; *Chicago Packing, &c. Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545; *Hankins v. People*, 106 Ill. 628; *Fennell v. Bay City*, 36 Mich. 186; *McRea v. Americus*, 59 Ga. 168; *Wong v. Astoria*, 13 Oreg. 538, 11 Pac. 295; *Hughes v. People*, 8 Col. 536, 9 Pac. 50; *Greenville v. Kemmis*, 58 S. C. 427, 36 S. E. 727, 50 L. R. A. 725; *Thiesen v. McDavid*, 34 Fla. 440, 16 So. 321, 26 L. R. A. 234; *Ogden v. City of Madison*, 111 Wis. 413, 87 N. W. 568, 55 L. R. A. 506; *Borak v. Birmingham*, 191 Ala. 75, 67 So. 389, Ann. Cas. 1916 C, 1061; *Chicago v. Union Ice Cream Mfg. Co.*, 252 Ill. 311, 96 N. E. 872, Ann. Cas. 1912 D, 675; *Thomas v. Indianapolis*, 195 Ind. 440, 145 N. E. 550, 35 A. L. R. 1194; *Rossberg v. State*, 111 Md. 394, 74 Atl. 581, 134 Am. St. Rep. 626; *Brazier v. Philadelphia*, 215 Pa. St. 297, 64 Atl. 508, 7 Ann. Cas. 548; *Seattle v. McDonald*, 47 Wash. 298, 91 Pac. 952, 17 L. R. A. (N. S.) 49.

An ordinance passed by a city council dealing with a subject with which it is authorized to deal by its charter,

will not be held void because the penalty prescribed for violation thereof is in excess of that prescribed by State law for the violation of a State statute creating a similar offense, where the common council of such municipality is authorized to prescribe such penalties for the violation of its ordinances as in the opinion of the council may be necessary to enforce obedience thereto. *State v. Wertz*, 91 W. Va. 622, 114 S. E. 242, 29 A. L. R. 391.

Under a statute forbidding cities to punish acts punishable by State law, a city may punish selling liquor without a city license, as this is not an offense against the State law. *Frankfort v. Aughe*, 114 Ind. 77, 15 N. E. 802. On the other hand it was held in *State v. Cowan*, 29 Mo. 330, that where a municipal corporation was authorized to take cognizance of and punish an act as an offense against its ordinances which was also an offense against the general laws of the State, and this power was exercised and the party punished, he could not afterwards be proceeded against under the State law. "The constitution," say the court, "forbids that a person shall be twice punished for the same offence. To hold that a party can be prosecuted for an act under the State laws, after he has been punished for the same act by the municipal corporation within whose limits the act was done, would be to overthrow the power of the General Assembly to create corporations to aid in the management of the affairs of the State. For a power in the State to punish, after a punishment had been inflicted by the corporate authorities, could only find a support in the assumption that all the proceedings on the part of the corporation were null and void. The circumstance that the municipal authorities have not exclusive jurisdiction over the acts which constitute offences within their limits does not affect the question. It is enough that their jurisdiction is not excluded. If it exists, — although it may be concurrent, — if it is exercised, it is valid and binding so long as it is a constitutional principle that no man may be punished twice for the same offence." A similar ruling is laid down in *People*

*v. Hanrahan*, 75 Mich. 611, 42 N. W. 1124, and the case seems to be supported by *State v. Welch*, 36 Conn. 216. The case of *Slaughter v. People*, 2 Doug. (Mich.) 334, goes still farther.

Those which hold that the party may be punished under both the State and the municipal law are within the principle of *Fox v. State*, 5 How. 410, 12 L. ed. 213; *Moore v. People*, 14 How. 13, 14 L. ed. 306. And see *Phillips v. People*, 55 Ill. 429; *State v. Rankin*, 4 Cold. 145; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717.

Some cases have held that a municipality may not prohibit by ordinance that which is already made penal by State statute, unless there is express and specific legislative authority for the same. *In re Sic*, 73 Cal. 142, 14 Pac. 405; *Menken v. Atlanta*, 78 Ga. 668, 2 S. E. 559; *Thrower v. Atlanta*, 124 Ga. 1, 52 S. E. 76, 110 Am. St. Rep. 147, 1 L. R. A. (N. S.) 382, 4 Ann. Cas. 1; *Ex parte Bourgeois*, 60 Miss. 663; *State v. Keith*, 94 N. C. 933; *Judy v. Lashley*, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413. See *Loeb v. Attica*, 82 Ind. 175. Especially is this so where the Constitution prescribes that all prosecutions shall be conducted in the name and by the authority of the State. *Ex parte Fagg*, 38 Tex. Cr. 573, 44 S. W. 294, 40 L. R. A. 212.

In *Jefferson City v. Courtmire*, 9 Mo. 692, it was held that authority to a municipal corporation to "regulate the police of the city" gave it no power to pass an ordinance for the punishment of indictable offences. To the same effect is *State v. Savannah*, 1 T. U. P. Charl. 235, 4 Am. Dec. 708; *Slaughter v. People*, 2 Doug. (Mich.) 334; *Jenkins v. Thomasville*, 35 Ga. 145; *Vason v. Augusta*, 38 Ga. 542; *Reich v. State*, 53 Ga. 73; *Washington v. Hammond*, 76 N. C. 33; *New Orleans v. Miller*, 7 La. Ann. 651. And see also *State v. McNally*, 48 La. Ann. 1450, 21 So. 27, 36 L. R. A. 533.

The penal enactments of a corporation, like those of the State, must be several (*De Ben v. Gerard*, 4 La. Ann. 30), and will be strictly construed. *St. Louis v. Goebel*, 32 Mo. 295.

An ordinance punishing as a crime



3. Municipal by-laws must also be reasonable. Whenever they appear not to be so, the court must, as a matter of law, declare them void.<sup>1</sup> [But it has been held that a by-law expressly authorized by the legislature cannot be held unreasonable;<sup>2</sup> and where the question

a failure to build a sidewalk is void. *Port Huron v. Jenkinson*, 77 Mich. 414, 43 N. W. 23. Compare *James v. Pine Bluff*, 49 Ark. 199, 4 S. W. 760.

<sup>1</sup> 2 Kyd on Corporations, 107; *Davies v. Morgan*, 1 Cramp. & J. 587; *Chamberlain of London v. Compton*, 7 D. & R. 597; *Clark v. Le Cren*, 9 B. & C. 52; *Gosling v. Velej*, 12 Q. B. 328; *Dunham v. Rochester*, 5 Cow. 462; *Mayor, &c. of Memphis v. Winfield*, 8 Humph. 707; *Hayden v. Noyes*, 5 Conn. 391; *Waters v. Leech*, 3 Ark. 110; *White v. Mayor*, 2 Swan, 364; *Ex parte Burnett*, 30 Ala. 461; *Craig v. Burnett*, 32 Ala. 728; *Austin v. Murray*, 16 Pick. 121; *Goddard, Petitioner*, 16 Pick. 504; *Commonwealth v. Worcester*, 3 Pick. 461; *Commissioners v. Gas Co.*, 12 Pa. St. 318; *State v. Jersey City*, 29 N. J. L. 170; *Gallatin v. Bradford*, 1 Bibb. 209; *Western Union Telegraph Co. v. Carew*, 15 Mich. 525; *State v. Freeman*, 38 N. H. 426; *Pedrick v. Bailey*, 12 Gray, 161; *St. Louis v. Weber*, 44 Mo. 550; *Peoria v. Calhoun*, 29 Ill. 317; *St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462; *Mader v. Topeka*, 106 Kan. 867, 189 Pac. 969, 15 A. L. R. 340; *State v. Gurry*, 121 Md. 534, 88 Atl. 546, 47 L. R. A. (N. S.) 1087, Ann. Cas. 1915 B, 957; *Baltimore v. Hampton Court Co.*, 138 Md. 271, 113 Atl. 850, 15 A. L. R. 304.

An ordinance as to obstructing streets with cars, unreasonable in its operation only in one locality, will be enforced elsewhere. *Pennsylvania R. Co. v. Jersey City*, 47 N. J. L. 286.

"The necessity and reasonableness of an ordinance when passed in pursuance of the charter powers of a municipality is primarily committed to the council, and unless the ordinance is purely arbitrary, oppressive, or capricious, the courts will not interfere to prevent its enforcement." *Baltimore v. Wollman*, 123 Md. 310, 91 Atl. 339;

*Baltimore v. Hampton Court Co.*, 138 Md. 271, 113 Atl. 850, 15 A. L. R. 304.

In *Ex parte Bahen*, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618, an ordinance prohibiting burials on lots not purchased before its enactment for such purpose was held void upon the theory that it was unreasonable in that the right to restrain burials rests upon the theory that all burials are injurious to the public. See *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

Ordinance penalizing the sale or gift of street railway transfer tickets contrary to regulations of company issuing them is not unreasonable. *Ex parte Lorenzen*, 128 Cal. 431, 61 Pac. 68, 50 L. R. A. 55.

<sup>2</sup> *Chicago v. Hebard Express, etc., Co.*, 301 Ill. 570, 134 N. E. 27, 20 A. L. R. 206; *A Coal Float v. Jeffersonville*, 112 Ind. 15, 13 N. E. 115; *Beiling v. Evansville*, 144 Ind. 644, 42 N. E. 621, 35 L. R. A. 272; *Mader v. Topeka*, 106 Kan. 867, 189 Pac. 969, 15 A. L. R. 340; *State v. Mayo*, 106 Me. 62, 75 Atl. 295, 26 L. R. A. (N. S.) 502; *In re Anderson*, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421; *Roswell v. Bateman*, 20 N. M. 77, 146 Pac. 950, L. R. A. 1917 D, 365, Ann. Cas. 1918 D, 426; *O'Haver v. Montgomery*, 120 Tenn. 448, 111 S. W. 449, 127 Am. St. Rep. 1014; *Invader Oil & Refining Co. v. Fort Worth (Tex. Civ. App.)*, 229 S. W. 616.

"Usually an ordinance will not be declared unreasonable, if it is within the express power of the municipal authorities which ordain it. The question usually arises regarding a regulatory ordinance claimed to be within the merely implied powers of a municipal corporation." *In re Kansas City Ordinance No. 39,946*, 298 Mo. 569, 252 S. W. 404, 28 A. L. R. 295.

"If a municipal corporation is, in specific and defined language, given the power to enact a particular

of the reasonableness depends upon evidence, and it relates to a subject within the jurisdiction of the corporation, it will be presumed to be reasonable until the contrary is shown.<sup>1]</sup> To render by-laws reasonable, they should tend in some degree to the accomplishment of the objects for which the corporation was created and

ordinance, that is, if the power and the manner of its exercise are both conferred by the legislature, the courts may not adjudge it invalid merely because it is unreasonable, but only if it is unconstitutional. But if the power be given in general terms or if the method of its exercise is not prescribed, the courts may declare it invalid, if unreasonable, even though it may not contravene any specific constitutional provision." *Munson v. Colorado Springs*, 35 Colo. 506, 84 Pac. 683, 6 L. R. A. (N. S.) 432.

<sup>1</sup> *Western Union Telegraph Co. v. New Hope*, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204; *Atlantic, etc., Telegraph Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; *Sullivan v. Shreveport*, 251 U. S. 169, 64 L. ed. 205, 40 Sup. Ct. Rep. 102; *Lusk v. Dora*, 224 Fed. 650; *Miller v. Birmingham*, 151 Ala. 469, 44 So. 388, 125 Am. St. Rep. 31; *Ft. Smith v. Hunt*, 72 Ark. 556, 82 S. W. 163, 105 Am. St. Rep. 51, 66 L. R. A. 238; *Laurel Hill Cemetery v. San Francisco*, 152 Cal. 464, 93 Pac. 70, 27 L. R. A. (N. S.) 260, 14 Ann. Cas. 1080; *Chicago, etc., R. Co. v. Carlinville*, 200 Ill. 314, 65 N. E. 730, 93 Am. St. Rep. 190, 60 L. R. A. 391; *Chicago v. Washingtonian Home*, 289 Ill. 206, 124 N. E. 416, 6 A. L. R. 1284; *Iowa City v. Glassman*, 155 Iowa, 671, 136 N. W. 899, 40 L. R. A. (N. S.) 852; *Com. v. Patch*, 97 Mass. 221; *People v. Detroit United Ry.*, 134 Mich. 682, 97 N. W. 36, 104 Am. St. Rep. 626, 63 L. R. A. 746; *People v. Gibbs*, 186 Mich. 128, 152 N. W. 1053, Ann. Cas. 1917 B, 830; *St. Louis v. Weber*, 44 Mo. 547; *Peterson v. State*, 79 Neb. 132, 112 N. W. 306, 126 Am. St. Rep. 651, 14 L. R. A. (N. S.) 292; *State v. Withnell*, 91 Neb. 101, 135 N. W. 376, 40 L. R. A. (N. S.) 898; *Fifth Ave. Coach Co. v. New York*, 194 N. Y. 19, 86 N. E. 824, 21 L. R. A. (N. S.) 744, 16 Ann. Cas. 695; *Cleveland, etc.,*

*R. Co. v. Grambo*, 103 Ohio St. 471, 134 N. E. 648, 20 A. L. R. 1214; *Clarson v. Milwaukee*, 30 Wis. 316.

To overturn an ordinance as being arbitrary, unreasonable, or discriminatory, the evidence of such facts should be clear and satisfactory. *Evison v. Chicago, St. P., M. & O. R. Co.*, 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434; *Peterson v. State*, 79 Neb. 132, 112 N. W. 306, 14 L. R. A. (N. S.) 292, 126 Am. St. Rep. 651; *Standard Oil Co. v. Kearney*, 106 Neb. 558, 184 N. W. 109, 18 A. L. R. 95.

The courts can declare an ordinance invalid only when it is palpably unreasonable and oppressive. *State v. Weddington*, 188 N. C. 643, 125 S. E. 257, 37 A. L. R. 573. To be invalid because unreasonable its unreasonable character must be so clearly apparent as to indicate a mere arbitrary exercise of the power vested in the council. *State v. Barge*, 82 Minn. 256, 84 N. W. 911, 53 L. R. A. 428; *Wygant v. McLauchlan*, 39 Oreg. 429, 64 Pac. 867, 54 L. R. A. 636, 87 Am. St. 673; *State v. Robart*, 83 Minn. 257, 86 N. W. 93, 333, 54 L. R. A. 947.

"Where an ordinance is legally passed with due authority under the organic law of the state and city, the courts will not declare it unreasonable, unless no difference of opinion can exist upon the question. A clear case must be made to authorize the courts to interfere on that ground." *Wagner v. St. Louis*, 284 Mo. 410, 224 S. W. 413, 12 A. L. R. 495.

Unless it appears upon the face of an ordinance establishing rules for the parking of automobiles, that such rules are arbitrary and unreasonable, the courts must assume that they were adopted to meet some existing emergency and that the city authorities were warranted in passing them. *Kenyon Hotel Co. v. Oregon Short Line R. Co.*, 62 Utah, 364, 220 Pac. 382, 33 A. L. R. 343.

its powers conferred.<sup>1</sup> A by-law, that persons chosen annually as stewards of the Society of Scriveners should furnish a dinner on election day to the freemen of the society, — the freemen not being the electors nor required to attend, and the office of steward being for no other purpose but that of giving the dinner, — was held not connected with the business of the corporation, and not tending to promote its objects, and therefore unreasonable and void.<sup>2</sup> And where a statute permitted a municipal corporation to license the sale of intoxicating drinks and to charge a license fee therefor, a by-law requiring the payment of a license fee of one thousand dollars was held void as not advancing the purpose of the law, but as being in its nature prohibitory.<sup>3</sup> And if a corporation has power to prohibit the carrying on of dangerous occupations within its limits, a by-law which should permit one person to carry on such an occupation and prohibit another, who had an equal right, from pursuing the same business; or which should allow the business to be carried on in existing buildings, but prohibit the erection of others for it, would be unreasonable.<sup>4</sup> And a right to license an employment does

<sup>1</sup> "Whether a particular ordinance is unreasonable, and therefore void, is a question for the court; but in determining it the court will have regard to all the circumstances of the city and the objects sought to be attained, and the necessity which exists for the ordinance. 1 Dillon Mun. Corp. § 327; Toledo, etc., R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; Miller v. Fitchburg, 180 Mass. 32, 61 N. E. 277." Hopkins v. Richmond, 117 Va. 692, 86 S. E. 139, Ann. Cas. 1917 D, 1114.

<sup>2</sup> Society of Scriveners v. Brooking, 3 Q. B. 95. See, on this general subject, Dillon, Mun. Corp. §§ 251-264.

<sup>3</sup> *Ex parte* Burnett, 30 Ala. 461; Craig v. Burnett, 32 Ala. 728.

Authority to levy a license tax does not authorize the levy of one so heavy as to be prohibitory, where the business upon which it is levied is useful and legitimate. Morton v. Macon, 111 Ga. 162, 36 S. E. 627, 50 L. R. A. 485.

A by-law declaring the keeping on hand of intoxicating liquors a nuisance was held unreasonable and void in Sullivan v. Oneida, 61 Ill. 242. That which is not a nuisance in fact cannot be made such by municipal ordinance. Chicago, &c. R. R. Co.

v. Joliet, 79 Ill. 25; State v. Mott, 61 Md. 297, *post*, p. 1324, note 2.

<sup>4</sup> Mayor, &c. of Hudson v. Thorne, 7 Paige, 261.

An ordinance which forbids the establishment and maintenance of livery stables within a specified part of the town, and then expressly exempts from its operation the stables already established, is void. Crowley v. West, 52 La. Ann. 526, 27 So. 53, 47 L. R. A. 652, 78 Am. St. 355.

A power to prevent and regulate the carrying on of manufactures dangerous in causing or promoting fires does not authorize an ordinance prohibiting the erection of wooden buildings within the city, or to limit the size of buildings which individuals shall be permitted to erect on their own premises. *Ibid.* See also Newton v. Belger, 143 Mass. 598, 10 N. E. 464.

An ordinance for the destruction of property as a nuisance without a judicial hearing is void. Darst v. People, 51 Ill. 286. See cases p. 1324, n. 2, *post*.

An ordinance for the arrest and imprisonment without warrant of a person refusing to assist in extinguishing a fire is void. Judson v. Reardon, 16 Minn. 431.

not imply a right to charge a license fee therefor with a view to revenue, unless such seems to be the manifest purpose of the power; but the authority of the corporation will be limited to such a charge for the license as will cover the necessary expenses of issuing it, and the additional labor of officers and other expenses thereby imposed. A license is issued under the police power; but the exaction of a license fee with a view to revenue would be an exercise of the power of taxation; and the charter must plainly show an intent to confer that power, or the municipal corporation cannot assume it.<sup>1</sup> A

<sup>1</sup> *State v. Roberts*, 11 Gill & J. 506; *Mays v. Cincinnati*, 1 Ohio St. 268; *Cincinnati v. Bryson*, 15 Ohio, 625; *Freeholders v. Barber*, 6 N. J. Eq. 64; *Kip v. Paterson*, 26 N. J. L. 298; *State v. Hoboken*, 41 N. J. L. 71; *Bennett v. Borough of Birmingham*, 31 Pa. St. 15; *Commonwealth v. Stodder*, 2 Cush. 562; *Chilvers v. People*, 11 Mich. 43; *Mayor, &c. of Mobile v. Yuille*, 3 Ala. 137; *Johnson v. Philadelphia*, 60 Pa. St. 445; *State v. Herod*, 29 Iowa, 123; *Burlington v. Bumgardner*, 42 Iowa, 673; *Mayor, &c. of New York v. Second Avenue R. R. Co.*, 32 N. Y. 261; *Home Ins. Co. v. Augusta*, 50 Ga. 530; *Cairo v. Bross*, 101 Ill. 475; *Muhlenbrinck v. Commissioners*, 42 N. J. L. 364, 36 Am. Rep. 518; *Mestayer v. Corrigé*, 38 La. Ann. 708; *Wisconsin Tel. Co. v. Oshkosh*, 62 Wis. 32, 21 N. W. 828, *Vansant v. Harlem Stage Co.*, 59 Md. 330; *Ft. Smith v. Hunt*, 72 Ark. 556, 82 S. W. 163, 105 Am. St. Rep. 51, 66 L. R. A. 238; *Terre Haute v. Kersey*, 159 Ind. 300, 64 N. E. 469, 95 Am. St. Rep. 298; *State v. Sheridan*, 25 Wyo. 347, 170 Pac. 1, 1 A. L. R. 955.

"We declare the true rule to be, in the case of useful trades and employments, and *a fortiori* in other cases, that, as an exercise of police power merely, the amount exacted for a license, though designed for regulation and not for revenue, is not to be confined to the expense of issuing it; but that a reasonable compensation may be charged for the additional expense of municipal supervision over the particular business or vocation, at the place where it is licensed. For this purpose, the services of officers may be required, and incidental ex-

penses may be otherwise incurred in the faithful enforcement of such police inspection or superintendence." *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85; *Standard Chemical & Oil Co. v. Troy*, 201 Ala. 89, 77 So. 383, L. R. A. 1918 C, 522.

The courts will not inquire very closely into the expense of a license with a view to adjudge it a tax, where it does not appear to be unreasonable in amount in view of its purpose as a regulation. *Ash v. People*, 11 Mich. 347; *Van Baalen v. People*, 40 Mich. 458; *People v. Russell*, 49 Mich. 617, 14 N. W. 568; *Wolf v. Lansing*, 53 Mich. 367, 19 N. W. 38; *Johnson v. Philadelphia*, 60 Pa. St. 445; *Burlington v. Putnam Ins. Co.*, 31 Iowa, 102; *Boston v. Schaffer*, 9 Pick. 415; *Welch v. Hotchkiss*, 39 Conn. 140; *State v. Hoboken*, 41 N. J. L. 71; *Mankato v. Fowler*, 32 Minn. 364, 20 N. W. 361; *Jackson v. Newman*, 59 Miss. 385; *Ex parte Gregory*, 20 Tex. App. 210; *Fayetteville v. Carter*, 52 Ark. 301, 12 S. W. 573; *Littlefield v. State*, 42 Neb. 223, 60 N. W. 724, 28 L. R. A. 588, 47 Am. St. 697; *Miller v. Birmingham*, 151 Ala. 469, 44 So. 388, 125 Am. St. Rep. 31; *Ft. Smith v. Hunt*, 72 Ark. 556, 82 S. W. 163, 105 Am. St. Rep. 51, 66 L. R. A. 238. Liquor license fee of \$2000 in a city of 4000 inhabitants sustained in *Ex parte Sikes*, 102 Ala. 173, 15 So. 522, 24 L. R. A. 774. Ordinance requiring payment of license fee of \$150 per annum by all persons buying claims, held void as to one who bought a few city warrants for purposes of investment only. *Bitzer v. Thompson*, 20 Ky. L. 1318, 49 S. W. 199, 44 L. R. A. 141.

by-law, to be reasonable, should be certain.<sup>1</sup> If it affixes a penalty for its violation, it would seem that such penalty should be a fixed and certain sum, and not left to the discretion of the officer or court

A higher license imposed on a non-resident than on a resident for purposes of revenue is void. *Morgan v. Orange*, 50 N. J. L. 389, 13 Atl. 240.

In Illinois the imposition of license fees for revenue has been sustained. *U. S. Dist. Co. v. Chicago*, 112 Ill. 19, and cases cited. But see *Lemont v. Jenks*, 197 Ill. 363, 64 N. E. 362, 90 Am. St. Rep. 172. Under the California Constitution of 1879 licenses may be imposed for regulation or revenue, or both. *In re Guerrero*, 69 Cal. 88, 10 Pac. 261.

In some cases it has been held that license fees might be imposed under the police power with a view to operate as a restriction upon the business or thing licensed. *Carter v. Dow*, 16 Wis. 299; *Tenney v. Lenz*, 16 Wis. 566; *Schmidt v. Indianapolis*, 168 Ind. 631, 80 N. E. 632, 120 Am. St. Rep. 385, 14 L. R. A. (N. S.) 787; *Minneota v. Martin*, 124 Minn. 498, 145 N. W. 383, 51 L. R. A. (N. S.) 40, Ann. Cas. 1915 B, 812; *Litchville v. Hanson*, 19 N. D. 672, 124 N. W. 1119, Ann. Cas. 1912 D, 876. See *State v. Cassidy*, 22 Minn. 312; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *St. Johnsbury v. Thompson*, 59 Vt. 200, 9 Atl. 571; *Russellville v. White*, 41 Ark. 485. But in such cases, where the right to impose such license fees can be fairly deduced from the charter, it would perhaps be safer and less liable to lead to confusion and difficulty to refer the corporate authority to the taxing power, rather than exclusively to the power of regulation. See *Dunham v. Trustees of Rochester*, 5 Cow. 462, upon the extent of the police power.

Fees which are imposed under the inspection laws of the State are akin to license fees, and if exacted not for revenue, but to meet the expenses of regulation, are to be referred to the police power. *Cincinnati Gas Light Co. v. State*, 18 Ohio St. 237.

A city cannot exact a license fee from a national bank. *Carthage v. National Bank*, 71 Mo. 508, 36 Am.

Rep. 494. On this subject in general, see *post*, 1044; *Dillon, Mun. Corp.* §§ 291-308.

<sup>1</sup> *Kreulhaus v. Birmingham*, 164 Ala. 623, 51 So. 297, 26 L. R. A. (N. S.) 492; *District of Columbia v. Keen*, 31 App. Cas. (D. C.) 541, 14 Ann. Cas. 1002; *Bills v. Goshen*, 117 Ind. 221, 20 N. E. 115; *State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. 652; *St. Paul v. Schleh*, 101 Minn. 425, 112 N. W. 532, 118 Am. St. Rep. 638; *Helena v. Gray*, 7 Mont. 486, 17 Pac. 564; *Wasem v. Fargo*, 49 N. D. 168, 190 N. W. 546, 25 A. L. R. 758; *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141, 18 N. W. 764.

What shall be a violation of an ordinance cannot be left to implication. *Helena v. Gray*, 7 Mont. 486, 17 Pac. 564.

Ordinance requiring use of device, which shall prevent escape of sparks as effectually as by any means in use for the purpose, is bad. *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141, 18 N. W. 764.

Under power to prohibit driving at a rate of speed deemed inconsistent with public safety, the city may not prohibit driving at a speed which shall be found to be immoderate under the circumstances. *Com. v. Roy*, 140 Mass. 432, 4 N. E. 814.

A license fee may not be left to be fixed for each case, or to be determined by the mayor. *Bills v. Goshen*, 117 Ind. 221, 20 N. E. 115; *State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. 652.

Ordinance requiring that any awning over a sidewalk must be "upon a suitable frame" is void for uncertainty. *State v. Clarke*, 69 Conn. 371, 37 Atl. 975, 39 L. R. A. 670, 61 Am. St. 45. So, one requiring a street railway company to provide "in some reasonable manner for the sprinkling of the streets through which their cars run." *State v. New Orleans City & R. R. Co.*, 49 La. Ann. 1571, 22 So. 839, 39 L. R. A. 618.

Law prescribing different maximum

which is to impose it on conviction;<sup>1</sup> though a by-law imposing a penalty *not exceeding* a certain sum has been held not to be void for uncertainty;<sup>2</sup> [and it has been held that while an ordinance which prescribes a penalty may leave a margin for the discretion of the court so that the fine or imprisonment imposed may be graded in proportion to the aggravation of the circumstances, it is void for uncertainty, where it only prescribes a minimum, and not a maximum penalty.<sup>3</sup> If a statute or by-law, incorporated by reference into a subsequent by-law, makes the latter certain, it will render it valid, though without the provisions so incorporated it would have been void for uncertainty.<sup>4</sup>]

So a by-law, to be reasonable, should be in harmony with the general principles of the common law.<sup>5</sup> If it is in general restraint

loads for "narrow-tired" and "broad-tired" wagons using specified gravel roads is void for uncertainty in not defining "broad-tired" and "narrow-tired." *Cook v. State*, 26 Ind. Ap. 278, 59 N. E. 489.

Statute authorizing revocation of physician's license "for grossly unprofessional conduct of a character likely to deceive or defraud the public" is void for uncertainty. *Matthews v. Murphy*, 23 Ky. L. 750, 63 S. W. 785.

An ordinance prohibiting the location and operation of a woodyard "within 150 feet of any inhabited portion of any residence district", is void for uncertainty. *St. Paul v. Schleh*, 101 Minn. 425, 112 N. W. 532, 118 Am. St. Rep. 638.

An ordinance which provides that no undertaking establishment shall be established or maintained within those parts of the city occupied mainly for residences is invalid because of uncertainty. *Wasem v. Fargo*, 49 N. D. 168, 190 N. W. 546, 25 A. L. R. 758.

<sup>1</sup> *Melick v. Washington*, 47 N. J. L. 254; *State v. Crenshaw*, 94 N. C. 877.

<sup>2</sup> *Mayor, &c. of Huntsville v. Phelps*, 27 Ala. 55, overruling *Mayor, &c. of Mobile v. Yuille*, 3 Ala. 137. And see *Piper v. Chappell*, 14 M. & W. 624.

<sup>3</sup> *Arnett v. Cardwell*, 135 Ky. 14, 121 S. W. 964.

<sup>4</sup> *Southern Operating Co. v. Chattanooga*, 128 Tenn. 196, 159 S. W. 1091, *Ann. Cas.* 1914 D, 720.

<sup>5</sup> To be reasonable a by-law should

be equal in its operation. *Tugman v. Chicago*, 78 Ill. 405; *Barling v. West*, 29 Wis. 307. In *Chicago v. Kautz*, 313 Ill. 196, 144 N. E. 805, 35 A. L. R. 1050, the court said: "While a city has, under its general charter power to enact ordinances of a regulatory nature, authority to pass all necessary police ordinances to carry into effect these regulations, such regulatory ordinances must be reasonable, and must not unnecessarily contravene the natural rights of individuals affected by them. Under the guise of police regulations the personal rights or liberties of citizens cannot be arbitrarily invaded. In order to hold valid an ordinance of a regulatory nature, enacted under general charter powers, the court must be able to see that the ordinance tends in some degree toward the prevention of an offense or the preservation of public health, morals, safety, or welfare. *Elie v. Adams Exp. Co.*, 300 Ill. 340, 133 N. E. 243; *Cortland v. Larson*, 273 Ill. 602, L. R. A. 1917 A, 314, 113 N. E. 51, *Ann. Cas.* 1916 E, 775; *People v. Weiner*, 271 Ill. 74, 110 N. E. 870, L. R. A. 1916 C, 775, *Ann. Cas.* 1917 C, 1065. If under the guise of protecting the public interests, the ordinance arbitrarily interferes with private business and imposes unusual and unnecessarily restrictive regulations upon lawful occupations, it is void. *Chicago v. Hebard Exp. & Van. Co.*, 301 Ill. 570, 134 N. E. 27, 20 A. L. R. 206; *McCray v. Chicago*,

292 Ill. 60, 126 N. E. 557, *Haskell v. Howard*, 269 Ill. 550, 109 N. E. 992, L. R. A. 1916 B, 893; *Frost v. Chicago*, 178 Ill. 250, 52 N. E. 869, 49 L. R. A. 657, 69 Am. St. Rep. 301; *Toledo W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611."

The following are cases in which municipal ordinances have been passed upon and their reasonableness determined: *Markets*: Prohibiting sales outside of. Reasonable — *Buffalo v. Webster*, 10 Wend. 99; *Bush v. Seabury*, 8 Johns. 418; *Bowling Green v. Carson*, 10 Bush, 64; *Le Claire v. Davenport*, 13 Iowa, 210; *Winnsboro v. Smart*, 11 Rich. L. 551; *St. Louis v. Weber*, 14 Mo. 547; *State v. Perry*, 151 N. C. 661, 65 S. E. 915, 134 Am. St. Rep. 1002. Unreasonable — *Caldwell v. Alton*, 33 Ill. 416; *Bloomington v. Wahl*, 46 Ill. 489; *Bethune v. Hayes*, 28 Ga. 560. Compare *Hughes v. Recorder's Court*, 75 Mich. 574, 42 N. W. 984, with *People v. Kier*, 78 Mich. 98, 43 N. W. 1039. See *Gossigi v. New Orleans*, (La. Ann.) 4 So. 15; *Ex parte Byrd*, 84 Ala. 17. Requiring permission to occupy stands. Reasonable — *Nightingale, Petitioner*, 11 Pick. 167. Imposing tax on stands. Reasonable — *Cincinnati v. Buckingham*, 10 Ohio, 257. Unreasonable — *Kip v. Paterson*, 26 N. J. L. 298. Imposing a license fee of \$12.50 per quarter for the privilege of selling fresh meats in the city. Unreasonable — *Stamps v. Burk*, 83 Ark. 351, 104 S. W. 153.

Prohibiting wagons standing in market. Unreasonable — *Commonwealth v. Brooks*, 109 Mass. 355; *Commonwealth v. Wilkins*, 121 Mass. 356.

*Licensing hucksters*: Reasonable — *Cherokee v. Fox*, 34 Kan. 16, 7 Pac. 625. Unreasonable — *Dunham v. Rochester*, 5 Cow. 462; *St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462; *Muhlenbrinck v. Commissioners*, 42 N. J. L. 364, 36 Am. Rep. 518; *Frommer v. Richmond*, 31 Gratt. 646; *Barling v. West*, 29 Wis. 307, 9 Am. Rep. 576.

*Auctions*: Prohibiting sales at, on streets. Reasonable — *White v. Kent*, 11 Ohio St. 550. After sunset. Unreasonable — *Hayes v. Appleton*, 24 Wis. 542. Imposing heavy license on.

Reasonable — *Decorah v. Dunstan*, 38 Iowa, 96; *Wiggins v. Chicago*, 68 Ill. 372; *Fretwell v. Troy*, 18 Kan. 271. Making it penal to sell without a license. Reasonable — *Goshen v. Kern*, 63 Ind. 468.

*Saloons and Restaurants*: Closing for the night. Reasonable — *Staats v. Washington*, 45 N. J. L. 318; *Platteville v. Bell*, 43 Wis. 488; *Smith v. Knoxville*, 3 Head, 245; *State v. Welch*, 36 Conn. 215; *State v. Freeman*, 38 N. H. 426; *Maxwell v. Jonesboro*, 11 Heisk. 257; *Baldwin v. Chicago*, 68 Ill. 418; *State v. Callaway*, 11 Idaho, 719, 84 Pac. 27, 114 Am. St. Rep. 285, 4 L. R. A. (N. S.) 109; *Paul v. Washington*, 134 N. C. 363, 47 S. E. 793, 65 L. R. A. 902. Unreasonable — *Ward v. Greenville*, 8 Baxt. 228, 35 Am. Rep. 700. Closing on certain days. Unreasonable — *Grills v. Jonesboro*, 8 Baxt. 247. On Sunday. Reasonable — *Gabel v. Houston*, 29 Tex. 335; *State v. Ludwig*, 21 Minn. 202; *Hudson v. Geary*, 4 R. I. 485; *State v. Calloway*, 11 Idaho, 719, 84 Pac. 27, 114 Am. St. Rep. 285, 4 L. R. A. (N. S.) 109. Between certain hours, unless by permission of the president of the village. Unreasonable — *Little Chute v. Van Camp*, 136 Wis. 526, 117 N. W. 1012, 128 Am. St. Rep. 1100. Forbidding sale of liquor at restaurants. Reasonable — *State v. Clark*, 28 N. H. 176. Forbidding female waiters in saloons. Reasonable — *Bergman v. Cleveland*, 39 Ohio St. 651. Requiring unobstructed view into all parts of interior from street, from sunset to sunrise, and prohibiting the letting in or out of any person during the hours when the saloon is lawfully required to be closed. Unreasonable — *Bennett v. Pulaski*, (Tenn. Ch. Ap.) 52 S. W. 913, 47 L. R. A. 278. Prohibiting use of screens, blinds, etc., to obstruct view from street into saloon. Unreasonable — *Champer v. Greencastle*, 138 Ind. 339, 35 N. E. 14, 46 Am. St. Rep. 390, 24 L. R. A. 768. Forbidding infants and females in saloons. Reasonable — *Com. v. Price*, 123 Ky. 163, 94 S. W. 32, 13 Ann. Cas. 489. Unreasonable — *State v. Nelson*, 10 Idaho, 522, 79 Pac.

79, 109 Am. St. Rep. 226, 67 L. R. A. 808, 3 Ann. Cas. 322.

*Streets and Highways:* Limiting weight of vehicles and loads. Reasonable — *Nagle v. Augusta*, 5 Ga. 546; *Froelich v. Cleveland*, 99 Ohio St. 376, 124 N. E. 212; *White v. Turner*, 114 Wash. 405, 195 Pac. 240. Unreasonable — *Brown v. Nichols*, 93 Kan. 737, 145 Pac. 561, L. R. A. 1915 D, 327. Prohibiting traffic in heavily loaded wagons on certain street except upon permission of village trustees. Unreasonable — *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696. Requiring heavily loaded vehicles to keep to specified portion of street when that portion is unfit for use. Unreasonable — *State v. Boardman*, 93 Me. 73, 44 Atl. 118, 46 L. R. A. 750.

*Hackney Carriages:* Reasonable — to regulate fares. *Commonwealth v. Gage*, 114 Mass. 328. To put under direction of police. *Commonwealth v. Matthews*, 122 Mass. 60; *St. Paul v. Smith*, 27 Minn. 364, 7 N. W. 734, 38 Am. Rep. 296; *Veneman v. Jones*, 118 Ind. 41, 20 N. E. 644. To exclude from certain streets. *Commonwealth v. Stodder*, 2 Cush. 562. To require a license. *Brooklyn v. Breslin*, 57 N. Y. 591; *City Council v. Pepper*, 1 Rich. L. 364; *Frankfort, &c. R. Co. v. Philadelphia*, 58 Pa. St. 119; *St. Louis v. Green*, 70 Mo. 562. Unreasonable — To grant one person exclusive right to run omnibuses in the city. *Logan v. Pyne*, 43 Iowa, 524, 22 Am. Rep. 261.

*Motor Vehicles:* Requiring indemnity bond as condition precedent to issuing license to operate for transportation of passengers. Reasonable — *Hazleton v. Atlanta*, 144 Ga. 775, 87 S. E. 1043; *Huston v. Des Moines*, 176 Iowa, 455, 156 N. W. 883; *New Orleans v. LeBlanc*, 139 La. 113, 71 So. 248; *Com. v. Slocum*, 230 Mass. 180, 119 N. E. 687; *Com. v. Theberga*, 231 Mass. 386, 121 N. E. 30; *Ex parte Bogle*, 78 Tex. Cr. Rep. 1, 179 S. W. 1193; *Ex parte Parr*, 82 Tex. Crim. Rep. 525, 200 S. W. 404. Unreasonable — *State ex rel. Stephenson v. Dillon*, 82 Fla. 276, 89 So. 558, 22 A. L. R. 227; *Jitney Bus Asso. v. Wilkes-Barre*,

256 Pa. St. 462, 100 Atl. 954. Limiting speed. Reasonable — *Com. v. Crowinshield*, 187 Mass. 221, 72 N. E. 963, 68 L. R. A. 245; *Brazier v. Philadelphia*, 215 Pa. St. 297, 64 Atl. 508, 7 Ann. Cas. 548. Requiring compliance with traffic directions of police force. Unreasonable — *St. Louis v. Allen*, 275 Mo. 501, 204 S. W. 1083, L. R. A. 1918 F, 1110. Creating one way streets. Reasonable — *Com. v. Nolan*, 189 Ky. 34, 224 S. W. 506, 11 A. L. R. 202. Regulating parking. Reasonable — *Sanders v. Atlanta*, 147 Ga. 819, 95 S. E. 695; *Pugh v. Des Moines*, 176 Iowa, 593, 156 N. W. 892, L. R. A. 1917 F, 345; *Kenyon Hotel Co. v. Oregon Short Line R. Co.*, 62 Utah, 364, 220 Pac. 382, 33 A. L. R. 343. Unreasonable — *New Orleans v. Badie*, 146 La. 550, 83 So. 826.

*Railroads:* Regulating speed of. Reasonable — *Pennsylvania Company v. James*, 81½ Pa. St. 194; *Whitson v. Franklin*, 34 Ind. 392; *Chicago, etc., R. Co. v. Carlinville*, 200 Ill. 314, 65 N. E. 730, 93 Am. St. Rep. 190, 60 L. R. A. 391; *Cincinnati, etc., R. Co. v. Com.*, 126 Ky. 712, 104 S. W. 771, 17 L. R. A. (N. S.) 561; *Peterson v. State*, 79 Neb. 132, 112 N. W. 306, 126 Am. St. Rep. 651, 14 L. R. A. (N. S.) 292. Unreasonable — Outside of inhabited portion of city. *Meyers v. Chicago, R. I. & P. Co.*, 57 Iowa, 555, 10 N. W. 896. But see *Knobloch v. Chicago, &c. Ry. Co.*, 31 Minn. 402, 18 N. W. 106. Requiring flagman at crossing which is not dangerous. Unreasonable — *Toledo, &c. R. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Southern Indiana R. Co. v. Bedford*, 165 Ind. 272, 75 N. E. 268, 6 Ann. Cas. 509. Prohibiting removal of snow by street railway companies without consent of street superintendent. Reasonable — *Union Railway Company v. Cambridge*, 11 Allen, 287. Obstructing streets with cars. Reasonable — *Penna. R. R. Co. v. Jersey City*, 47 N. J. L. 286. Requiring that crossings be kept lighted. Reasonable — *Pittsburgh, etc., R. Co. v. Hartford City*, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L. R. A. (N. S.) 461; *Chicago, etc., R. Co. v. Salem*, 170 Ind. 153, 82 N. E. 913, 19 L. R. A.



(N. S.) 658. Unreasonable — *Chicago v. Pennsylvania Co.*, 252 Ill. 185, 96 N. E. 833, 36 L. R. A. (N. S.) 573, Ann. Cas. 1912 D, 400.

*Burials*: Prohibiting in town or city. Unreasonable — *Austin v. Murray*, 16 Pick. 121; *Bryan v. Birmingham*, 154 Ala. 447, 45 So. 922, 129 Am. St. Rep. 63; *Wygant v. McLaughlan*, 39 Oreg. 492, 64 Pac. 867, 87 Am. St. Rep. 673, 54 L. R. A. 636. Prohibiting within certain limits. Reasonable — *Coates v. New York*, 7 Cowen, 585. Prohibiting burial in city of persons dying therein without permit from board of health. Reasonable — *Meyers v. Clarke*, 122 Ky. 866, 90 S. W. 1049, 93 S. W. 43, 5 L. R. A. (N. S.) 727. Subjecting private cemeteries to control of city sexton. Unreasonable — *Bogert v. Indianapolis*, 13 Ind. 134. Requiring city sexton to expend \$500 on the cemetery and to bury paupers free. Unreasonable — *Beroujohn v. Mobile*, 27 Ala. 58. See p. 1321, n. 2, *post*.

*Fire Limits*: Establishing. Reasonable — *King v. Davenport*, 98 Ill. 305, 38 Am. Rep. 89; *Monroe v. Hoffman*, 29 La. Ann. 651, 29 Am. Rep. 345; *Respublica v. Duquet*, 2 Yeates, 493; *Wadleigh v. Gilman*, 12 Me. 403, 28 Am. Dec. 188; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *Salem v. Maynes*, 123 Mass. 372; *Troy v. Winters*, 4 Thomp. & C. (N. Y.) 256; *McKibbin v. Fort Smith*, 35 Ark. 352; *St. Louis v. Nash*, 266 Mo. 523, 181 S. W. 1145, Ann. Cas. 1918 B, 134; *Olympia v. Mann*, 1 Wash. 389, 25 Pac. 337, 12 L. R. A. 150. See *post*, p. 1313. Requiring a building license fee. Reasonable — *Welch v. Hotchkiss*, 39 Conn. 140, 12 Am. Rep. 383. Forbidding frame buildings in small towns. Unreasonable — *Kneedler v. Norristown*, 100 Pa. St. 368.

*Houses of Ill Fame*: Reasonable — Prohibiting keeping of. *State v. Williams*, 11 S. C. 288; *Childress v. Mayor*, 3 Sneed, 356; *State v. Mack*, 41 La. Ann. 1079, 6 So. 808; *New Orleans v. Miller*, 142 La. 163, 76 So. 596, L. R. A. 1918 B, 331. Imposing penalty on owner of. *McAlister v. Clark*, 33 Conn. 91. Licensing. *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471.

Arresting and fining lewd women. *Shafer v. Mumma*, 17 Md. 331; *Braddy v. Milledgeville*, 74 Ga. 516. Unreasonable — Demolishing. *Welch v. Stowell*, 2 Doug. (Mich.) 332. Forbidding prostitute occupying any room in city. *Milliken v. City Council*, 54 Tex. 388, 38 Am. Rep. 629. Forbidding all persons except nearest male relative to associate with prostitutes in any public place. *Hechinger v. Maysville*, 22 Ky. L. R. 486, 57 S. W. 619, 49 L. R. A. 114. But prostitutes may be forbidden to be upon the public streets between the hours of 7 P.M. and 4 A.M. without reasonable necessity for so being. *Dunn v. Commonwealth*, 105 Ky. 834, 49 S. W. 813, 43 L. R. A. 701.

*Slaughter Houses*: Prohibiting in certain parts of city. Reasonable — *Cronin v. People*, 82 N. Y. 318, 37 Am. Rep. 564; *Metropolitan Board of Health v. Heister*, 37 N. Y. 661; *Milwaukee v. Gross*, 21 Wis. 241; *Zimmerman v. Gritzmacher*, 53 Oreg. 206, 98 Pac. 875, 99 Pac. 1135, 21 L. R. A. (N. S.) 299. See *Wreford v. People*, 14 Mich. 41.

*Laundries*: Forbidding, except in brick or stone buildings, upheld. *Matter of Yick Wo*, 68 Cal. 294, 9 Pac. 139; *rev. Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064. Limited to a certain part of a city. *In re Hang Kie*, 69 Cal. 149, 10 Pac. 327; and to certain hours. *Ex parte Moynier*, 65 Cal. 33, 2 Pac. 728. Ordinance prohibiting within certain district, and declaring such as are within the district nuisances, is unconstitutional. *In re Hong Wah*, 82 Fed. 623.

*Theaters and Other Places of Amusement*: Requiring attendance of fireman at expense of owner or management. Reasonable — *Tannenbaum v. Rehm*, 152 Ala. 494, 44 So. 532, 11 L. R. A. (N. S.) 700, 126 Am. St. Rep. 52; *New Orleans v. Hop Lee*, 104 La. 601, 29 So. 214; *Harrison v. Baltimore*, 1 Gill (Md.) 264. See also *Hartford v. Parsons*, 87 Conn. 412, 87 Atl. 736, Ann. Cas. 1916 A, 1182. Unreasonable — *Chicago v. Weber*, 246 Ill. 304, 92 N. E. 859, 34 L. R. A. (N. S.) 306, 20 Ann. Cas. 359.

*Distribution of Advertising Matter:* Regulating or prohibiting in streets or other public places. Reasonable — *Wettengel v. Denver*, 20 Colo. 552, 39 Pac. 343; *In re Anderson*, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421; *People v. Horwitz*, 27 N. Y. Crim. Rep. 237, 140 N. Y. Supp. 437. Unreasonable — *People v. Armstrong*, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578.

*Brick Kilns:* Forbidding construction in city. Reasonable — *State ex rel. Krittenbrink v. Withnell*, 91 Neb. 101, 135 N. W. 376, 40 L. R. A. (N. S.) 898. Unreasonable — *Denver v. Rogers*, 46 Colo. 479, 104 Pac. 1042, 25 L. R. A. (N. S.) 247.

The following are cases in which municipal ordinances have been declared reasonable — Prohibiting keeping of swine in a city or in thickly populated sections thereof. *Commonwealth v. Patch*, 97 Mass. 221; *State v. Holcomb*, 68 Iowa, 107, 26 N. W. 33; *Miller v. Syracuse*, 168 Ind. 230, 80 N. E. 411, 120 Am. St. Rep. 366, 8 L. R. A. (N. S.) 471; *State v. Rice*, 158 N. C. 635, 74 S. E. 582, 39 L. R. A. (N. S.) 266; *Darlington v. Ward*, 48 S. C. 570, 26 S. E. 906, 38 L. R. A. 326. *Ex parte Botts*, 69 Tex. Crim. Rep. 161, 154 S. W. 221, 44 L. R. A. (N. S.) 629. But see *Comfort v. Koscinko*, 88 Miss. 611, 41 So. 268, 9 Ann. Cas. 178. Prohibiting swine running at large. *Waco v. Powell*, 32 Tex. 258; *Crosby v. Warren*, 1 Rich. 385; *Whitfield v. Longest*, 6 Ired. L. 268; *Roberts v. Ogle*, 30 Ill. 459; *Gosselink v. Campbell*, 4 Iowa, 296. Prohibiting cattle running at large. *Commonwealth v. Bean*, 14 Gray, 52. Impounding such and selling after notice. *Cartersville v. Lanham*, 67 Ga. 753; but only the expense of impounding can be retained, not a fine upon the owner. *Wilcox v. Hemming*, 58 Wis. 144, 15 N. W. 435. Regulating the disposal of garbage or ashes. *Baltimore v. Hampton Court Co.*, 138 Md. 271, 113 Atl. 850, 15 A. L. R. 304; *Wheeler v. Boston*, 233 Mass. 275, 123 N. E. 684, 15 A. L. R. 275; *Valley Spring Hog Ranch v. Plagmann*, 282 Mo. 1, 220 S. W. 1, 15 A. L. R. 266. Making it

unlawful for any one not having a contract with the city to carry on business of collecting and disposing of garbage and providing that city may contract with a suitable person for exclusive right to dispose of garbage. *Valley Spring Hog Ranch Co. v. Plagmann*, 282 Mo. 1, 220 S. W. 1, 15 A. L. R. 266. Granting exclusive rights to remove carcasses of animals, dirt, or offal from city. *Vandine, Petitioner*, 6 Pick. 187, 17 Am. Dec. 351; *contra*, *River Rendering Co. v. Behr*, 77 Mo. 91. Requiring consent of mayor to maintain an awning. *Pedrick v. Bailey*, 12 Gray, 161. Requiring sidewalk to be cleared of snow. *Goddard, Petitioner*, 16 Pick. 504, 28 Am. Dec. 259; *Kirby v. Boylston Market Ass'n*, 14 Gray, 249; *Kansas City v. Holmes*, 274 Mo. 159, 202 S. W. 392, L. R. A. 1918 D, 1016; *Helena v. Kent*, 32 Mont. 279, 80 Pac. 258, 4 Ann. Cas. 235; *State v. McCrillis*, 28 R. I. 165, 66 Atl. 301, 9 L. R. A. (N. S.) 635, 13 Ann. Cas. 701; *contra*, *Gridley v. Bloomington*, 88 Ill. 555; *State v. Jackman*, 69 N. H. 318, 41 Atl. 347, 42 L. R. A. 438; *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640; *McGuire v. District of Columbia*, 24 App. (D. C.) 22, 65 L. R. A. 430. Requiring hoist-way to be closed after business hours. *New York v. Williams*, 15 N. Y. 502. Requiring a drawbridge to be closed after a vehicle had been kept waiting ten minutes. *Chicago v. McGinn*, 51 Ill. 266. Prohibiting laying of gas mains in winter. *Northern Liberties v. Gas Co.*, 12 Pa. St. 318. Requiring hay or coal to be weighed by city weighers. *Stokes v. New York*, 14 Wend. 87; *Yates v. Milwaukee*, 12 Wis. 673; *O'Maley v. Freeport*, 96 Pa. St. 24. Regulating price and weight of bread. *Mayor v. Yuille*, 3 Ala. 137, 36 Am. Dec. 441; *Page v. Fazackerly*, 36 Barb. 392; *Guillotte v. New Orleans*, 12 La. Ann. 432. Prohibiting peddling without a license. *Huntington v. Cheesbro*, 57 Ind. 74. Prohibiting sale of adulterated milk. *Polinsky v. People*, 73 N. Y. 65. Prohibiting sale of milk without license. *Chicago v. Bartree*, 100 Ill. 57; *People v. Mulholland*, 19 Hun, 548, 82 N. Y. 324, 37 Am. Rep.

56S. Punishing vagrants. *St. Louis v. Bentz*, 11 Mo. 61. Imposing license tax on peddlers. *Ex parte Ah Foy*, 57 Cal. 92. Prohibiting keeping more than five tons of straw in one block at one time unless in a fire-proof inclosure. *Clark v. South Bend*, 85 Ind. 276. Prohibiting erection of livery stable on a block without consent of the owners of half the block. *State v. Beattie*, 16 Mo. App. 131. Requiring street railway company to report quarterly the number of passengers carried. *St. Louis v. St. Louis R. R. Co.*, 89 Mo. 44, 1 S. W. 305. Prohibiting boys from getting on or off locomotives. *Bearden v. Madison*, 73 Ga. 184. Prohibiting stopping a vehicle in the street more than twenty minutes. *Com. v. Fenton*, 139 Mass. 195, 29 N. E. 653. Forbidding preaching on Boston Common without permission. *Com. v. Davis*, 140 Mass. 485, 4 N. E. 577. Prohibiting cornet playing in street without license. *Com. v. Plaisted*, 148 Mass. 375, 19 N. E. 224. Prohibiting public meetings on public streets without a permit. *People ex rel. Doyle v. Atwell*, 232 N. Y. 96, 133 N. E. 364, 25 A. L. R. 107; *Fitts v. Atlanta*, 121 Ga. 567, 49 S. E. 793, 67 L. R. A. 803, 104 Am. St. Rep. 167. See also *Love v. Judge of Recorder's Ct.* 128 Mich. 545, 87 N. W. 785, 55 L. R. A. 618. Requiring license for collecting, storing, and dealing in rags in thickly settled portions of city. *Commonwealth v. Hubley*, 172 Mass. 58, 51 N. E. 448, 42 L. R. A. 403, 70 Am. St. 242. Requiring a railroad to light the tracks operated by it within the city limits, and to use the same kind of lights and to light for the same period of the night as in the public streets. *Cincinnati, H. & D. R. Co. v. Bowling Green*, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422; upon compelling railroad to light its tracks in city, see note to this case in L. R. A. Prohibiting dogs from running at large in streets and alleys and providing for the summary destruction of all dogs so caught running at large, unless they are ransomed within twenty-four hours, notice to owners of collared dogs being provided for. *Hagerstown v. Witmer*, 86 Md. 293,

37 Atl. 965, 39 L. R. A. 649. Punishing cruelty to animals in public places. *State v. Karstendiek*, 49 La. Ann. 1621, 22 So. 845, 39 L. R. A. 520; see upon municipal power as to nuisances affecting public morals, decency, peace, and good order, note to this case in L. R. A.; upon nuisances relating to trade or business, note in L. R. A. to *Ex parte Lacey*, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. 93, which holds that the establishment of steam shoddy machines and of steam carpet-beating machines within one hundred feet of churches, &c., may be prohibited. Public scavengers may be required to take out licenses and to secure permit from board of health before removing contents of any privy vault. *State v. McMahon*, 69 Minn. 265, 72 N. W. 79, 38 L. R. A. 675. Making lower water-rates to those who use large quantities. *Silkman v. Bd. of Water Com'rs*, 152 N. Y. 327, 46 N. E. 612, 37 L. R. A. 827. Requiring garbage-collectors to take out licenses. *State v. Orr*, 68 Conn. 101, 35 Atl. 770, 34 L. R. A. 279. Requiring milk-venders to take out licenses and have their herds subjected to the "tuberculin test." *State v. Nelson*, 66 Minn. 166, 68 N. W. 1066, 34 L. R. A. 318, 61 Am. St. 399. Requiring that only police officers may prosecute for violation of a specified ordinance. *State v. Robitshek*, 60 Minn. 123, 61 N. W. 1023, 33 L. R. A. 33. Where a sewer-assessment has been successfully contested, the city may require that the amount of the assessment be paid as a condition precedent to permitting the contestant to connect with the sewer. *Herrmann v. State*, 54 Ohio St. 506, 43 N. E. 990, 32 L. R. A. 734. Requiring license fee of \$25 per annum from junk-dealers, \$50 per annum from pawnbrokers, bonds of \$2,000 and \$5,000 respectively, indorsements of twelve freeholders upon each application for license, and prohibiting purchases from boys and from drunkards and intoxicated persons, reserving power to revoke license at any time. *Grand Rapids v. Brandy*, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 116, 55 Am. St. 472; and upon power to control such dealers, see note hereto in

L. R. A.; see also *Rosenbaum v. Newbern*, 118 N. C. 83, 24 S. E. 1, 32 L. R. A. 123. Requiring itinerant traders to pay a license fee of \$50 per quarter, traders having a fixed place of business being exempt. *Re Haskell*, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527. Prohibiting use of salt upon street-railway tracks, except at street corner curves. *State v. Elizabeth*, 58 N. J. L. 619, 34 Atl. 146, 32 L. R. A. 170. Requiring roofed passageway over sidewalks where buildings are being constructed above first story. *Smith v. Milwaukee B. & T. Exchange*, 91 Wis. 360, 64 N. W. 1041, 30 L. R. A. 504, 51 Am. St. 912. Requiring boarding-house keepers, &c., to furnish street commissioner with list of boarders liable to poll-tax, and to pay a fine for failure so to do. *Topeka v. Boutwell*, 53 Kan. 20, 35 Pac. 819, 27 L. R. A. 593. Forbidding any unmarried minor to enter bar-room unless as agent or servant. *State v. Austin*, 114 N. C. 855, 19 S. E. 919, 25 L. R. A. 283, 41 Am. St. 817. Contracting for a supply of gas and water for a reasonable period, although such period extends beyond the official life of any member of the city council. *Vincennes v. Citizens' Gas L. & C. Co.*, 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; *contra*, *Shelden v. Fox*, 48 Kan. 356, 29 Pac. 759, 16 L. R. A. 257, and note. Requiring both driver and conductor on every street car in use on streets. *South Covington & C. St. R. Co. v. Berry*, 93 Ky. 43, 18 S. W. 1026, 15 L. R. A. 604, and note, 40 Am. St. 161. Regulating weight of loaves of bread offered for sale and punishing sale of short-weight loaves. *People v. Wagner*, 86 Mich. 594, 49 N. W. 609, 13 L. R. A. 286, and note, 24 Am. St. 141. Prohibiting suspension of electric wires over or upon roofs of buildings. *El. Impr. Co. v. San Francisco*, 45 Fed. 593, 13 L. R. A. 311, and note on police power. Levying license fee of \$5 per month upon venders of fresh meats outside the public markets. *Atkins v. Phillips*, 26 Fla. 281, 8 So. 429, 10 L. R. A. 158. Prohibiting keeping or storing of large quantities of inflammable or explosive oils within city limits. Rich-

mond *v. Dudley*, 129 Ind. 112, 28 N. E. 312, 13 L. R. A. 587, and note, 28 Am. St. 180. Requiring petition of two-thirds of land-owners of a block before permitting a saloon to be opened in it, if none has ever been in the block before. *Martens v. People*, 186 Ill. 314, 57 N. E. 871. Prohibiting picketing in labor controversies. — *In re Williams*, 158 Cal. 550, 111 Pac. 1035; *Walters v. Indianapolis*, 191 Ind. 671, 134 N. E. 482; *Thomas v. Indianapolis*, 195 Ind. 440, 145 N. E. 550, 35 A. L. R. 1194; *Ex parte Stout*, 82 Tex. Crim. Rep. 183, 198 S. W. 967, L. R. A. 1918 C, 277. Fixing a minimum wage for work done on public improvements. *Malette v. Spokane*, 77 Wash. 205, 137 Pac. 496, 51 L. R. A. (N. S.) 686.

The following have been held unreasonable, — Prohibiting putting up of steam-engine in city. *Baltimore v. Redecke*, 49 Md. 217, 33 Am. Rep. 239. Prohibiting one person carrying on a certain business and allowing another to carry on the same business. *Hudson v. Thorne*, 7 Paige, 261; *Tugman v. Chicago*, 78 Ill. 405. Prohibiting laying of gas-pipes across the streets. *Northern Liberties v. Gas Co.*, 12 Pa. St. 318. Levying tax for building a sidewalk in uninhabited portion of the city. *Corrigan v. Gage*, 68 Mo. 541. Prohibiting use of Babcock's fire extinguishers and imprisoning those who used them. *Teutonia Ins. Co. v. O'Connor*, 27 La. Ann. 371. Requiring every person entering his drain in a sewer to pay his share of the expense of making such sewer. *Boston v. Shaw*, 1 Metc. 130. Refusing to supply water to certain premises. *Dayton v. Quigley*, 29 N. J. Eq. 77. Arresting free negroes found on street after 10 P.M. *Mayor v. Winfield*, 8 Humph. 707. Requiring druggist to furnish the names of parties to whom he sells liquors. *Clinton v. Phillips*, 58 Ill. 102, 11 Am. Rep. 52. Discriminating between dealers within and without the city. *Nashville v. Althorp*, 5 Cold. 554; *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642. Discriminating between railroads as to speed allowable under like circumstances. *Lake View v. Tate*, 130 Ill.

247, 22 N. E. 791. Forbidding all street parades with music except by permission. *Matter of Frazee*, 63 Mich. 396, 30 N. W. 72; *Anderson v. Wellington*, 40 Kan. 173, 19 Pac. 719; *contra, Re Flaherty*, 105 Cal. 553, 38 Pac. 981, 27 L. R. A. 529. Requiring a license for the doing of any scavenger work whatever. *State v. Hill*, 126 N. C. 1139, 36 S. E. 326, 50 L. R. A. 473. Prohibiting a saloon keeper, his clerks, agents, and employees, from entering the saloon at any time during Sunday without written permission from mayor. *Newbern v. McCann*, 105 Tenn. 159, 58 S. W. 114, 50 L. R. A. 476. Prohibiting any woman from going into a place where liquor is sold or standing within fifty feet of such place. *Gastineau v. Com.*, 22 Ky. L. R. 157, 56 S. W. 705, 49 L. R. A. 111; for constitutionality of discriminations against women in police regulations, see note to this case in L. R. A. Prohibiting the use of colored nettings and similar materials to cover fruits exposed for sale in baskets. *Frost v. Chicago*, 178 Ill. 250, 52 N. E. 869, 49 L. R. A. 657, 69 Am. St. 301. Levying a wheel tax upon all vehicles used upon the streets. *Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408, 67 Am. St. 224. Discriminating against department stores. *Chicago v. Netcher*, 183 Ill. 104, 55 N. E. 707, 48 L. R. A. 261, and see note to this case in L. R. A. upon discriminations against department stores. Requiring that city shall furnish materials and construct sewer connections up to within three feet of building to be connected. *Slaughter v. O'Berry*, 126 N. C. 181, 35 S. E. 241, 48 L. R. A. 442. Prohibiting suspending any sign whatever above a sidewalk. *State v. Higgs*, 126 N. C. 1014, 35 S. E. 473, 48 L. R. A. 446. Prohibiting the receipt, from a carrier, of intoxicating liquors purchased beyond the city limits, until a license tax has been paid upon such liquors. *Henderson v. Heyward*, 109 Ga. 373, 34 S. E. 590, 47 L. R. A. 366, 77 Am. St. 384. Prohibiting the sale of clothing on Sunday, but permitting that of most other kinds of goods. *Denver v. Bach*, 26 Col. 530, 58 Pac.

1089, 46 L. R. A. 848. Imposing unreasonable and discriminatory license fees upon draymen, hackmen, &c. *State v. Finch*, 78 Minn. 118, 80 N. W. 856, 46 L. R. A. 437. Requiring a license for business of contracting for public work. *Figg v. Thompson*, 20 Ky. L. 1322, 49 S. W. 202, 44 L. R. A. 135. Requiring punishment to be by imprisonment alone, instead of permitting payment of fine. *Calhoun v. Little*, 106 Ga. 336, 32 S. E. 86, 43 L. R. A. 630, 71 Am. St. 254. Prohibiting hackmen and draymen from stopping their vehicles on certain streets, except for purpose of receiving or delivering persons or goods. *Ex parte Battis*, 40 Tex. Cr. 112, 48 S. W. 513, 43 L. R. A. 863, 76 Am. St. 708. Prohibiting drummers, cabmen, hackmen, &c., from entering a passenger station to solicit custom. *Cosgrove v. Augusta*, 103 Ga. 835, 31 S. E. 445, 42 L. R. A. 711, 68 Am. St. 149. But see *Lindsay v. Anniston*, 104 Ala. 257, 16 So. 545, 53 Am. St. Rep. 44, 27 L. R. A. 436; *Vann v. State*, 45 Tex. Crim. Rep. 434, 77 S. W. 813, 108 Am. St. Rep. 961. Prohibiting minors from being upon streets after 9 p.m. unless attended by guardians, or in search of physician. *Ex parte McCarver*, 38 Tex. Cr. 448, 46 S. W. 936, 42 L. R. A. 587, 73 Am. St. 946. Prohibiting during summer months sale of fresh pork, or sausage made thereof. *Helena v. Dwyer*, 64 Ark. 424, 42 S. W. 1071, 39 L. R. A. 266, 62 Am. St. 206. Declaring, without regard to time or place, the emission of dense black or thick gray smoke a nuisance. *St. Louis v. Heitzberg P. & P. Co.*, 141 Mo. 375, 42 S. W. 954, 39 L. R. A. 551, 64 Am. St. 516; upon municipal control over smoke as nuisance, see note to this case in L. R. A. Requiring street contractors to use asphaltum controlled by a monopoly. *Fishburn v. Chicago*, 171 Ill. 338, 49 N. E. 532, 39 L. R. A. 482, 63 Am. St. 236. Placing harassing and arbitrary restrictions on dealers in second-hand goods. *State v. Itzcovitch*, 49 La. Ann. 366, 21 So. 544, 37 L. R. A. 673, 62 Am. St. 648. See also *Morton v. Macon*, 111 Ga. 162, 36 S. E. 627. Prohibiting traffic in second-hand clothing, &c.

*State v. Taft*, 118 N. C. 1190, 23 S. E. 970, 32 L. R. A. 122, 54 Am. St. 768. Prohibiting a railroad company from fencing its grounds inside the city limits. *Grossman v. Oakland*, 30 Oreg. 478, 41 Pac. 5, 36 L. R. A. 593, 60 Am. St. 832. Prohibiting driving faster than six miles per hour when applied to fire engine. *State v. Shepard*, 64 Minn. 287, 67 N. W. 62, 36 L. R. A. 305. Unreasonable to restrict owner of dead animal to a particular spot outside of city in which to deposit same. *Schoen Brothers v. Atlanta*, 97 Ga. 697, 25 S. E. 380, 33 L. R. A. 804. Levying license fee of \$10 per day on itinerant merchants. *Carrolton v. Bazzette*, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522. Requiring the laying of a cement sidewalk where, less than six months before, a duly authorized sidewalk of plank had been constructed and was yet sound and in good condition. *Hawes v. Chicago*, 158 Ill. 653, 42 N. E. 373, 30 L. R. A. 225. Prohibiting erection of any building or addition to building within city limits, except by permission of building inspector. *Sioux Falls v. Kirby*, 6 S. D. 62, 60 N. W. 156, 25 L. R. A. 621. General welfare clause does not warrant an ordinance requiring inspection of steam boilers, &c. *State v. Robertson*, 45 La. Ann. 954, 13 So. 164, 20 L. R. A. 691, 40 Am. St. 272. Requiring distance of billboard from street line to be five feet greater than height of board. *Crawford v. Topeka*, 51 Kan. 756, 33 Pac. 476, 20 L. R. A. 692, 37 Am. St. 323. Requiring permission from a city officer for street parades, but exempting from such requirement funerals, fire companies, State militia, and political parties having a State organization. *Re Garabad*, 84 Wis. 585, 54 N. W. 1104, 19 L. R. A. 858, and note on ordinances relating to street parades. See also that ordinances vesting arbitrary powers are void. *Richmond v. Dudley*, 129 Ind. 112, 28 N. E. 312, 13 L. R. A. 587, 28 Am. St. 180; but see *Olympia v. Mann*, 1 Wash. 389, 25 Pac. 330, 337, 12 L. R. A. 150, and note; *Child v. Bemus*, 71 R. I. 230, 21 Atl. 539, 12 L. R. A. 57. Requiring license fee of \$25 per day from auc-

tioneers of imported goods. *Re Sipe*, 49 Ohio St. 536, 31 N. E. 884, 17 L. R. A. 184. Requiring license fee of non-resident peddlers. *Sayre v. Phillips*, 148 Pa. 482, 24 Atl. 76, 16 L. R. A. 49, and note, 33 Am. St. 842. Prohibiting absolutely the making repairs to the amount of \$300 or more upon any wooden building within specified limits. *Mt. Vernon F. Nat. Bank v. Sarlls*, 129 Ind. 201, 28 N. E. 434, 13 L. R. A. 481, and note. Prohibiting importation or sale of second-hand clothing unless owner first proves that it did not come from an infected region. *Kosciusko v. Slomberg*, 68 Miss. 469, 9 So. 297, 12 L. R. A. 528, 24 Am. St. 281. Permitting fine of \$1,000 for visiting a disorderly house. *Re Ah You*, 88 Cal. 99, 25 Pac. 974, 11 L. R. A. 408, 22 Am. St. 280. Penalizing a mere private trespass. *Bregguglia v. Lord*, 53 N. J. L. 168, 20 Atl. 1082, 11 L. R. A. 407. Levying license tax upon agents of non-resident insurance companies, but not upon those of local companies. *Simrall v. Covington*, 90 Ky. 444, 14 S. W. 369, 9 L. R. A. 556, 29 Am. St. 398. Penalizing breach of contract with city. *Newport v. Newport & C. Bridge Co.*, 90 Ky. 193, 13 S. W. 720, 8 L. R. A. 484. Making arbitrary distinctions. *Lake View v. Tate*, 130 Ill. 247, 22 N. E. 791, 6 L. R. A. 268. Requiring letting of public printing only to members of Allied Printing Trades Council. *Atlanta v. Stein*, 111 Ga. 789, 36 S. E. 932, 51 L. R. A. 335. Fixing liquor license fee \$300 higher for any place on main street than for any other place in town. *Harrodsburg v. Renfro*, 22 Ky. L. R. 806, 58 S. W. 795, 51 L. R. A. 897. Requiring six inch tires for loaded wagons weighing more than a ton and driven upon parkways. *State v. Rohart*, 83 Minn. 257, 86 N. W. 93, 333, 54 L. R. A. 947. Prohibiting getting off trains or boats at any point within the State at time of yellow fever outbreak, as applied to passengers from a non-infected district (board of health rule). *Wilson v. Alabama G. S. Ry. Co.*, 77 Miss. 714, 28 So. 567, 78 Am. St. 543. Restricting employment upon public works to members of labor unions. *Fiske v. People*, 188 Ill. 206,

of trade, — like the by-law that no person shall exercise the art of painter in the city of London, not being free of the company of painters, — it will be void on this ground.<sup>1</sup> To take an illustration from a private corporation: It has been held that a by-law of a bank, that all payments made or received by the bank must be examined at the time, and mistakes corrected before the dealer leaves, was unreasonable and invalid, and that a recovery might be had against the bank for an over-payment discovered afterwards,

58 N. E. 985. Requiring permit from municipal authorities to authorize keeping of domestic animals within city limits. *Hagerstown v. Baltimore, etc., R. Co.*, 107 Md. 178, 68 Atl. 490, 126 Am. St. Rep. 382. Prohibiting gasoline filling stations for automobiles between designated points. *Standard Oil Co. v. Kearney*, 106 Neb. 558, 184 N. W. 109, 18 A. L. R. 95. Imposing an annual license fee of \$50 for each wagon used for the purpose of delivering coal oil, gasoline, or other similar commodities. *Waters-Pierce Oil Co. v. Hot Springs*, 85 Ark. 509, 109 S. W. 293, 16 L. R. A. (N. S.) 1035. Permitting inspectors to require coal in process of delivery, which has been weighed by public weighmasters, to be taken to other scales for re-weighing. *Chicago v. Kautz*, 313 Ill. 196, 144 N. E. 805, 35 A. L. R. 1050. Requiring contractor installing heating system to file bond to indemnify purchaser. *Harrigan & Reid Co. v. Burton*, 224 Mich. 564, 195 N. W. 60, 33 A. L. R. 142. Prohibiting the sale of Coca-cola on Sunday, though made in connection with a meal. *State v. Weddington*, 188 N. C. 643, 125 S. E. 257, 37 A. L. R. 573. For other ordinances held void for unreasonableness, see *Grand Rapids v. Newton*, 111 Mich. 48, 69 N. W. 84, 66 Am. St. 387, 35 L. R. A. 226; *Ottumwa v. Zekind*, 95 Iowa, 622, 64 N. W. 646, 58 Am. St. 447, 29 L. R. A. 734; *Des Moines C. Ry. Co. v. Des Moines*, 90 Iowa, 770, 58 N. W. 906, 26 L. R. A. 767; *Ex parte Sing Lee*, 96 Cal. 354, 31 Pac. 245, 31 Am. St. 218, 24 L. R. A. 195; *Avis v. Vine-land*, 55 N. J. L. 285, 26 Atl. 149, 23 L. R. A. 685; *State v. Tenant*, 110 N. C. 609, 14 S. E. 387, 28 Am. St. 715, 15 L. R. A. 423; *Ex parte Vance*, 42

Tex. Cr. App. 619, 62 S. W. 568; *Mills v. Missouri K. T. R. Co.*, 94 Tex. 242, 59 S. W. 874; *Ex parte Patterson*, 42 Tex. Cr. App. 256, 58 S. W. 1011.

<sup>1</sup> *Clark v. Le Cren*, 9 B. & C. 52; *Chamberlain of London v. Compton*, 7 D. & R. 597. Compare *Hayden v. Noyes*, 5 Conn. 391; *Willard v. Killingworth*, 8 Conn. 247.

But a by-law is not void, as in restraint of trade, which requires loaves of bread baked for sale to be of specified weight and properly stamped, or which requires bakers to be licensed. *Mayor, &c. of Mobile v. Yuille*, 3 Ala. 137. See *Buffalo v. Webster*, 10 Wend. 99.

A by-law forbidding the maintenance of slaughter-houses within a city is not void as in restraint of trade. *Cronin v. People*, 82 N. Y. 318, 37 Am. Rep. 564; *Ex parte Heilbron*, 65 Cal. 609, 4 Pac. 648.

Meat sellers in one part of a city may not be allowed to sell from shops only, while in another they may sell from wagons also. *St. Louis v. Spiegel*, 90 Mo. 587, 2 S. W. 839.

Without special legislative authority a merchant who has paid his license tax cannot be obliged to keep a sales-book open to inspection. *Long v. Taxing District*, 7 Lea, 134.

An ordinance is bad which forbids importing and dealing in cast-off garments, but which excepts from its provisions the sale of such articles when not imported. *Greensboro v. Ehrenreich*, 80 Ala. 579.

Upon powers of cities to regulate markets, see *State v. Sarradat*, 46 La. Ann. 700, 15 So. 87, 24 L. R. A. 584, and note, and further upon validity of statutes and ordinances upon the ground of reasonableness or unreasonableness. See *ante*, p. 422, n. 5.

notwithstanding the by-law.<sup>1</sup> So a by-law of a town, which, under pretense of regulating the fishery of clams and oysters within its limits, prohibits all persons except the inhabitants of the town from taking shell-fish in a navigable river, is void as in contravention of common right.<sup>2</sup> And for like reasons a by-law is void which abridges the rights and privileges conferred by the general laws of the State, unless express authority therefor can be pointed out in the corporate charter.<sup>3</sup> And a by-law which assumes to be a police regulation, but deprives a party of the use of his property without regard to the public good, under the pretense of the preservation of health, when it is manifest that such is not the object and purpose of the regulation, will be set aside as a clear and direct infringement of the right of property without any compensating advantages.<sup>4</sup> [And where a

<sup>1</sup> *Mechanics' and Farmers' Bank v. Smith*, 19 Johns. 115; *Gallatin v. Bradford*, 1 Bibb, 209. Although these are cases of private corporations, they are cited here because the rules governing the authority to make by-laws are the same with both classes of corporations.

<sup>2</sup> *Hayden v. Noyes*, 5 Conn. 391. As it had been previously held that every person has a common-law right to fish in a navigable river or arm of the sea, until by some legal mode of appropriation this common right was extinguished (*Peck v. Lockwood*, 5 Day, 22), the by-law in effect deprived every citizen, except residents of the township, of rights which were *vested*, so far as from the nature of the case a right could be vested. See also *Marietta v. Fearing*, 4 Ohio, 427. That a right to *regulate* does not include a right to *prohibit*, see also *Ex parte Burnett*, 30 Ala. 461; *Austin v. Murray*, 16 Pick. 121; *Portland v. Schmidt*, 13 Oreg. 17; *Bronson v. Oberlin*, 41 Ohio St. 476. And see *Milhau v. Sharp*, 17 Barb. 435, 28 Barb. 228, and 27 N. Y. 611, and cases *supra*, p. 310 *et seq.*

<sup>3</sup> *Dunham v. Trustees of Rochester*, 5 Cow. 462; *Mayor, &c. of New York v. Nichols*, 4 Hill, 209; *St. Paul v. Traeger*, 25 Minn. 248, 33 Am. Rep. 462. See *Strauss v. Pontiac*, 40 Ill. 301; *Mayor of Athens v. Georgia R. R. Co.*, 72 Ga. 800.

An ordinance granting the exclusive privilege to take every animal which

dies in a city without regard to its being a nuisance is void. *River Rendering Co. v. Behr*, 77 Mo. 91.

Hacks cannot be permitted to stand permanently in a street so as to cut off access to adjoining premises. *Branahan v. Hotel Co.*, 39 Ohio St. 333.

Unless by express authority, a wooden building put up contrary to an ordinance cannot be forfeited. *Kneidler v. Norristown*, 100 Pa. St. 368.

Ordinance prohibiting barbers from working on Sunday, but not other shopkeepers, is void. *Tacoma v. Krech*, 15 Wash. 296, 46 Pac. 255, 34 L. R. A. 68.

An ordinance, passed without express legislative authority, which provides that it shall be unlawful to erect a filling station, within a hundred feet of a residence, to be used in furnishing customers gasoline and oil for motor vehicles without the consent of the city commissioners, is an arbitrary and unreasonable exercise of municipal authority, and is void. *Julian v. Golden Rule Oil Co.*, 112 Kan. 671, 212 Pac. 884. See also *Standard Oil Co. v. Kearney*, 106 Neb. 558, 184 N. W. 109, 18 A. L. R. 95.

<sup>4</sup> By a by-law of the town of Charlestown, all persons were prohibited, without license from the selectmen, from burying any dead body brought into town on any part of their own premises or elsewhere within the town. By the court, *Wilde, J.*: "A by-law, to be valid, must be reasonable; it must be *legi fidei rationi consona*. Now if



by-law, without express legislative authority, declares that to be a nuisance which is not so in fact, it is void.<sup>1</sup> But the mere fact that

this regulation or prohibition had been limited to the populous part of the town, and were made in good faith for the purpose of preserving the health of the inhabitants, which may be in some degree exposed to danger by the allowance of interments in the midst of a dense population, it would have been a very reasonable regulation. But it cannot be pretended that this by-law was made for the preservation of the health of the inhabitants. Its restraints extend many miles into the country, to the utmost limits of the town. Now such an unnecessary restraint upon the right of interring the dead we think essentially unreasonable. If Charlestown may lawfully make such a by-law as this, all the towns adjoining Boston may impose similar restraints, and consequently all those who die in Boston must of necessity be interred within the precincts of the city. That this would be prejudicial to the health of the inhabitants, especially in the hot season of the year, and when epidemic diseases prevail, seems to be a well-established opinion. Interments, therefore, in cities and large populous towns, ought to be discountenanced, and no obstacles should be permitted to the establishment of cemeteries at suitable places in the vicinity. The by-law in question is therefore an unreasonable restraint upon many of the citizens of Boston, who are desirous of burying their dead without the city, and for that reason is void." *Austin v. Murray*, 16 Pick. 121, 125.

So in *Wreford v. People*, 14 Mich. 41, the common council of Detroit, under a power granted by statute to compel the owners and occupants of slaughter-houses to cleanse and abate them whenever necessary for the health of the inhabitants, assumed to pass an ordinance altogether prohibiting the slaughtering of animals within certain limits in the city; and it was held void. See further, *State v. Jersey City*, 29 N. J. L. 170.

Power to control the erection of dwellings with reference to health does

not allow regulation of the thickness of outer walls. *Hubbard v. Paterson*, 45 N. J. L. 310.

Municipal by-laws may impose penalties on parties guilty of a violation thereof, but they cannot impose forfeiture of property or rights, without express legislative authority. *State v. Ferguson*, 33 N. H. 424; *Phillips v. Allen*, 41 Pa. St. 481. Nor can municipal corporations, by their by-laws, take into their own hands the punishment of offenses against the general laws of the State. See *Chariton v. Barber*, 54 Iowa, 360, 6 N. W. 528, 37 Am. Rep. 209; *Kirk v. Nowill*, 1 T. R. 118; *White v. Tallman*, 26 N. J. L. 67; *Hart v. Albany*, 9 Wend. 571; *Peoria v. Calhoun*, 29 Ill. 317; *St. Paul v. Coulter*, 12 Minn. 41.

In Chicago, where there is both a city and a town organization, it has been held competent for both to require those who carry on a noisome trade to take out a license. *Chicago Packing, &c. Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545.

Upon the whole subject of municipal by-laws, see *Angell & Ames on Corp. c. 10*; *Grant on Corp. 76 et seq.* See also *Redfield on Railways* (3d ed.), Vol. I. p. 88; *Dillon, Mun. Corp. c. 12*. The subject of the reasonableness of by-laws was considered at some length in *People v. Medical Society of Erie*, 24 Barb. 570, and *Same v. Same*, 32 N. Y. 187. See note to *Ward v. Greencastle*, 35 Am. Rep. 702.

<sup>1</sup> *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Arkadelphia v. Clark*, 52 Ark. 23; *Lonoke v. Chicago, etc.*, R. Co., 92 Ark. 546, 123 S. W. 395, 135 Am. St. Rep. 200; *Denver v. Mullin*, 7 Colo. 353, 3 Pac. 697; *Denver v. Rogers*, 46 Colo. 479, 104 Pac. 1042, 25 L. R. A. (N. S.) 247; *Black v. President, etc., of Town of Jacksonville*, 36 Ill. 301; *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698; *Carthage v. Munsell*, 203 Ill. 474, 67 N. E. 831; *Bushnell v. Chicago, etc.*, R. Co., 259 Ill. 391, 102 N. E. 785, 49 L. R. A. (N. S.) 718; *Cortland v. Larson*, 273 Ill. 602, 113 N. E. 51, L. R. A. 1917 A,

a by-law forbids acts heretofore innocent and lawful affords no ground for holding it unreasonable.<sup>1]</sup>

### *Delegation of Municipal Powers.*

Another and very important limitation which rests upon municipal powers is that they shall be executed by the municipality itself, or by such agencies or officers as the statute has pointed out. So far as its functions are legislative, they rest in the discretion and judgment of the municipal body intrusted with them, and that body cannot refer the exercise of the power to the discretion and judgment of its subordinates or of any other authority.<sup>2</sup> So strictly is

314, Ann. Cas. 1916 E, 775; Evansville v. Miller, 146 Ind. 613, 45 N. E. 1054, 38 L. R. A. 161; State ex rel. City of Indianapolis v. Indianapolis Union R. Co., 160 Ind. 45, 66 N. E. 163, 60 L. R. A. 831; Miller v. Syracuse, 168 Ind. 230, 80 N. E. 411, 120 Am. St. Rep. 366, 8 L. R. A. (N. S.) 471; Indianapolis v. Miller, 168 Ind. 285, 80 N. E. 626, 8 L. R. A. (N. S.) 822; Everett v. Council Bluffs, 46 Iowa, 66; Boyd v. Board of Councilmen, 117 Ky. 199, 77 S. W. 669, 111 Am. St. Rep. 240; New Orleans v. Lenfant, 126 La. 455, 52 So. 575, 29 L. R. A. (N. S.) 642; Hagerstown v. Baltimore, etc., R. Co., 107 Md. 178, 68 Atl. 490, 126 Am. St. Rep. 382; St. Louis v. Regina Flour Mill Co., 141 Mo. 389, 42 S. W. 1148; Crossman v. Galveston, 112 Tex. 303, 247 S. W. 810, 26 A. L. R. 1210.

"It is a doctrine not to be tolerated in this country that a municipal corporation without any general laws, either of the city or the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities." Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984.

Upon power of municipal corporations to define, prevent, and abate nuisances, see note 36 L. R. A. 593. See also Orlando v. Pragg, 31 Fla. 111,

12 So. 368, 19 L. R. A. 196, and note, 34 Am. St. 17.

<sup>1</sup> Des Moines v. Manhattan Oil Co., 193 Iowa, 1096, 184 N. W. 823, 23 A. L. R. 1322.

<sup>2</sup> A city council cannot delegate to any of its officers discretionary authority which is vested by statute or charter in it. People ex rel. Healy v. Clean Streets Co., 225 Ill. 470, 80 N. E. 298, 116 Am. St. Rep. 156, 9 L. R. A. (N. S.) 455.

Power to prescribe width and other features of sidewalks cannot be delegated. McCrowell v. Bristol, 89 Va. 652, 16 S. E. 867, 20 L. R. A. 653. Nor can that to fix street-grade. Zabel v. Louisville B. O. Home, 92 Ky. 89, 17 S. W. 212, 13 L. R. A. 668. Nor that to regulate liquor-selling. State v. Trenton, 51 N. J. L. 498, 18 Atl. 116, 5 L. R. A. 352.

A municipal board of education cannot confer its powers involving the exercise of discretion on another, and therefore cannot authorize an agent to construct an addition to a school building giving the agent authority to determine the character, size, materials, and cost of the addition. County Board of Education v. Durham, 198 Ky. 733, 249 S. W. 1028. See also New Orleans v. Sanford, 137 La. 628, 69 So. 35, L. R. A. 1916 A, 1228. But a council may by ordinance adopt a code compiled by a city attorney. Garrett v. Janes, 65 Md. 260, 3 Atl. 597; Western & A. R. R. Co. v. Young, 83 Ga. 512, 10 S. E. 197. And a person desiring to move a building

this rule applied, that when a city charter authorized the common council of the city to make by-laws and ordinances ordering and directing any of the streets to be pitched, leveled, paved, flagged, &c., or for the altering or repairing the same, "within such time and in such manner as they may prescribe under the superintendence and direction of the city superintendent", and the common council passed an ordinance directing a certain street to be pitched, leveled, and flagged, "in such manner as the city superintendent, under the direction of the committee on roads of the common council, shall direct and require", the ordinance was held void, because it left to the city superintendent and the committee of the common council the decision which, under the law, must be made by the council itself. The trust was an important and delicate one, as the expenses of the improvement were, by the statute, to be paid by the owners of the property in front of which it was made. It was in effect a power of taxation; and taxation is the exercise of sovereign authority; and nothing short of the most positive and explicit language could justify the court in holding that the legislature intended to confer such a power, or permit it to be conferred, on a city officer or committee. The statute in question not only contained no such language, but, on the contrary, clearly expressed the intention of confining the exercise of this power to the common council, the members of which were elected by and responsible to those whose property they were thus allowed to tax.<sup>1</sup>

through the streets may be required to obtain permission of mayor. *Wilson v. Eureka City*, 173 U. S. 32, 43 L. ed., 603; 19 Sup. Ct. Rep. 317, aff. 15 Utah, 53, 48 Pac. 41, 150, 62 Am. St. 904. And it is not a delegation of legislative power to require that "no person shall, in or upon any of the public grounds, make any public address, . . . except in accordance with a permit from the mayor", but merely a casting of an administrative function upon the mayor. *Davis v. Massachusetts*, 167 U. S. 43, 42 L. ed. 71, 17 Sup. Ct. Rep. 731, aff. 162 Mass. 510, 39 N. E. 113, 26 L. R. A. 712, 44 Am. St. 389.

Making grant of privilege depend upon consent of majority of lot owners in the block in which the privilege is to be exercised is not a delegation of power. *Chicago v. Stratton*, 162 Ill. 494, 44 N. E. 853, 35 L. R. A. 84, 53 Am. St. 325; *contra*, *St. Louis v.*

*Russell*, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721, and note on delegation of municipal power. But authority to keep a private market conditioned upon the grantee obtaining the consent of a majority of the property owners in the neighborhood has been held to be an invalid delegation of power. *State v. Garibaldi*, 44 La. Ann. 809, 11 So. 36. Compare *New Orleans v. Smythe*, 116 La. 685, 41 So. 33.

<sup>1</sup> *Thompson v. Schermerhorn*, 6 N. Y. 92. See also *Smith v. Morse*, 2 Cal. 524; *Oakland v. Carpentier*, 13 Cal. 540; *Whyte v. Nashville*, 2 Swan, 364; *East St. Louis v. Wehrung*, 50 Ill. 28; *Ruggles v. Collier*, 43 Mo. 353; *State v. Jersey City*, 25 N. J. L. 309; *Hydes v. Joyes*, 4 Bush, 464; *Lyon v. Jerome*, 26 Wend. 485; *State v. Pater-son*, 34 N. J. L. 163, 168; *State v. Fiske*, 9 R. I. 94; *Kinmundy v. Mahan*, 72 Ill. 462; *Davis v. Reed*, 65 N. Y. 566;

This restriction, it will be perceived, is the same which rests upon the legislative power of the State, and it springs from the same reasons. The people in the one case in creating the legislative department, and the legislature in the other in conferring the corporate powers, have selected the depositary of the power which they have designed should be exercised, and in confiding it to such depositary have impliedly prohibited its being exercised by any other agency. A trust created for any public purpose cannot be assignable at the will of the trustee.<sup>1</sup>

### *Irrepealable Legislation.*

Equally incumbent upon the State legislature and these municipal bodies is the restriction that they shall adopt no irrepealable legislation. No legislative body can so part with its powers by any proceeding as not to be able to continue the exercise of them. It can and should exercise them again and again, as often as the public

Supervisors of Jackson *v.* Brush, 77 Ill. 59; Thomson *v.* Booneville, 61 Mo. 282; *In re* Quong Woo, 13 Fed. 229; Cornell *v.* State, 6 Lea, 624; Benjamin *v.* Webster, 100 Ind. 15; Minneapolis Gaslight Co. *v.* Minneapolis, 36 Minn. 159, 30 N. W. 450; Dillon, Mun. Corp. § 60. Compare *In re* Guerrero, 69 Cal. 88, 10 Pac. 261.

<sup>1</sup> The charter of Washington gave the corporation authority "to authorize the drawing of lotteries, for effecting any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish; provided that the amount raised in each year shall not exceed ten thousand dollars. And provided also that the object for which the money is intended to be raised shall be first submitted to the President of the United States, and shall be approved by him." *Marshall*, Ch. J., speaking of this authority, says: "There is great weight in the argument that it is a trust, and an important trust, confided to the corporation itself, for the purpose of effecting important improvements in the city, and ought, therefore, to be executed under the immediate authority and inspection of the corporation. It is reasonable to suppose that Congress, when grant-

ing a power to authorize gaming, would feel some solicitude respecting the fairness with which the power should be used, and would take as many precautions against its abuse as was compatible with its beneficial exercise. Accordingly, we find a limitation upon the amount to be raised, and on the object for which the lottery may be authorized. It is to be for any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish; and is subjected to the judgment of the President of the United States. The power thus cautiously granted is deposited with the corporation itself, without an indication that it is assignable. It is to be exercised, like other corporate powers, by the agents of the corporation under its control. While it remains where Congress has placed it, the character of the corporation affords some security against its abuse, — some security that no other mischief will result from it than is inseparable from the thing itself. But if the management, control, and responsibility may be transferred to any adventurer who will purchase, all the security for fairness which is furnished by character and responsibility is lost." *Clark v. Washington*, 12 Wheat. 40, 54, 6 L. ed. 544, 549.

interests require.<sup>1</sup> Such a body has no power, even by contract, to control and embarrass its legislative powers and duties.<sup>2</sup> On this ground it has been held, that a grant of land by a municipal corporation, for the purposes of a cemetery, with a covenant for quiet enjoyment by the grantee, could not preclude the corporation, in the exercise of its police powers, from prohibiting any further use of the land for cemetery purposes, when the advance of population threatened to make such use a public nuisance.<sup>3</sup> So when "a lot is

<sup>1</sup> *East Hartford v. Hartford Bridge Co.*, 10 How. 511; *Dillon, Mun. Corp.* § 61.

<sup>2</sup> *Georgia R. etc., Co. v. Railroad Commission*, 149 Ga. 1, 98 S. E. 696, 5 A. L. R. 1; *Westminster Water Co. v. Westminster*, 98 Md. 551, 56 Atl. 990, 103 Am. St. Rep. 424, 64 L. R. A. 630; *Brick Presbyterian Church v. Mayor, etc., of New York*, 5 Cow. 538; *Le Feber v. West Allis*, 119 Wis. 608, 97 N. W. 203, 100 Am. St. Rep. 917.

A contract by a city, by which the police power is attempted to be forever abdicated, is *ultra vires* and void. *State ex rel. Minneapolis v. St. Paul, etc., R. Co.*, 98 Minn. 380, 108 N. W. 261, 120 Am. St. Rep. 581, 28 L. R. A. (N. S.) 398, 8 Ann. Cas. 1047.

The exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution. *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; *Chicago, etc. R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *Northern Pacific R. Co. v. Minnesota*, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341. But in a Georgia case the court said: "We readily assent to the proposition that the regulation of passenger tariffs, the fixing of fares upon street railways, as well as upon steam railways, is a matter falling within the police power, and that neither the legislature of the State nor the legis-

lative body of any municipality can, by ordinances or contracts, abridge the exercise of the police power of the State, but we do not think that in all cases and in reference to every subject which might fall within the police power of the State it is incompetent for a municipality or other corporation to make a contract in reference to such subject-matter, where the State has not seen fit to exercise the police power in reference thereto." *Georgia R., etc., Co. v. Railroad Commission*, 149 Ga. 1, 98 S. E. 696, 5 A. L. R. 1.

Permission to build out over and under a sidewalk is a mere revocable license. *Winter v. City Council*, 83 Ala. 589, 3 So. 235. So with awnings. *Augusta v. Burum*, 93 Ga. 68, 19 S. E. 820, 26 L. R. A. 340, and note, on right to maintain awnings in streets. But after telephone poles have been erected by a company in certain streets designated by the city, it cannot revoke the designation at its mere will. *Hudson Tel. Co. v. Jersey City*, 49 N. J. L. 303, 8 Atl. 123.

A city which has been authorized to provide for the erection and maintenance of waterworks, and to that end to contract with parties to build and operate them, may, in exercising this power, exclude itself from constructing and operating waterworks for a period of years. *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253. See also *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

<sup>3</sup> *Brick Presbyterian Church v. City of New York*, 5 Cow. 538; *Coast v. Mayor, etc., of New York*, 7 Cow. 585;

granted as a place of deposit for gunpowder, or other purpose innocent in itself at the time; it is devoted to that purpose till, in the progress of population, it becomes dangerous to the property, the safety, or the lives of hundreds; it cannot be that the mere form of the grant, because the parties choose to make it particular instead of general and absolute, should prevent the use to which it is limited being regarded and treated as a nuisance, when it becomes so in fact. In this way the legislative powers essential to the comfort and preservation of populous communities might be frittered away into perfect insignificance. To allow rights thus to be parceled out and secured beyond control would fix a principle by which our cities and villages might be broken up. Nuisances might and undoubtedly would be multiplied to an intolerable extent.”<sup>1</sup>

And on the same ground it is held that a municipal corporation, having power to establish, make, grade, and improve streets, does not, by once establishing the grade, preclude itself from changing it as the public needs or interest may seem to require, notwithstanding the incidental injury which must result to those individuals who have erected buildings with reference to the first grade.<sup>2</sup> So a

*New York v. Second Avenue R. R. Co.*, 32 N. Y. 261. Compare *Kincaid's Appeal*, 66 Pa. St. 411, 5 Am. Rep. 377.

<sup>1</sup> *Coats v. Mayor, &c. of New York*, 7 Cow. 585; *Davenport v. Richmond*, 81 Va. 636. See also *Davis v. Mayor, &c. of New York*, 14 N. Y. 506; *Attorney-General v. Mayor, &c. of New York*, 3 Duer, 119; *State v. Graves*, 19 Md. 351; *Goszler v. Georgetown*, 6 Wheat. 593, 5 L. ed. 339; *Louisville City R. R. Co. v. Louisville*, 8 Bush, 415.

<sup>2</sup> *Callendar v. Marsh*, 1 Pick. 417; *Griggs v. Foote*, 4 Allen, 195; *Graves v. Otis*, 2 Hill, 466; *Green v. Reading*, 9 Watts, 382, 36 Am. Dec. 127; *O'Connor v. Pittsburg*, 18 Pa. St. 187; *Reading v. Keppleman*, 61 Pa. St. 233; *Skinner v. Hartford Bridge Co.*, 29 Conn. 523; *Fellows v. New Haven*, 44 Conn. 240, 26 Am. Rep. 447; *La Fayette v. Bush*, 19 Ind. 326; *La Fayette v. Fowler*, 34 Ind. 140; *Creal v. Keokuk*, 4 Greene (Iowa), 47; *Hendershott v. Ottumwa*, 46 Iowa, 658; *Murphy v. Chicago*, 29 Ill. 279; *Quincy v. Jones*, 76 Ill. 231; *Rounds v. Mumford*, 2 R. I. 154; *Rome v. Omburg*, 28 Ga. 46; *Roll v. Augusta*, 34

Ga. 326; *Macon v. Hill*, 58 Ga. 595; *Reynolds v. Shreveport*, 13 La. Ann. 426; *White v. Yazoo City*, 27 Miss. 357; *Humes v. Mayor, &c.*, 1 Humph. 403; *St. Louis v. Gurno*, 12 Mo. 414; *Taylor v. St. Louis*, 14 Mo. 20; *Schattner v. Kansas City*, 35 Mo. 162; *Keasy v. Louisville*, 4 Dana, 154, 29 Am. Dec. 395; *Blount v. Janesville*, 31 Wis. 648; *Nevins v. Peoria*, 41 Ill. 502; *Shawneetown v. Mason*, 82 Ill. 337; *Weymann v. Jefferson*, 61 Mo. 55, Compare *Louisville v. Rolling Mill Co.*, 3 Bush, 416; *Denver v. Vernia*, 8 Col. 399, 8 Pac. 656.

No legal damage is done by establishing a grade where none had existed. *Gardiner v. Johnston*, 16 R. I. 94, 12 Atl. 888.

A city having power to grade and level streets is not in the absence of a constitutional or statutory provision to the contrary, liable for consequential damages to persons whose lands are not taken. *Radcliff's Ex'rs v. Brooklyn*, 4 N. Y. 195; *Smith v. Washington*, 20 How. 135, 15 L. ed. 858; *Snyder v. Rockport*, 6 Ind. 237; *Pontiac v. Carter*, 32 Mich. 164; *Cole v. Muscatine*, 14 Iowa, 296; *Russell v. Burlington*, 30 Iowa, 262; *Burlington v.*

Gilbert, 31 Iowa, 356; Roberts v. Chicago, 26 Ill. 249; Delphi v. Evans, 36 Ind. 90; Simmons v. Camden, 26 Ark. 276; 7 Am. Rep. 620; Dorman v. Jacksonville, 13 Fla. 538, 7 Am. Rep. 253; Dore v. Milwaukee, 42 Wis. 108; Lee v. Minneapolis, 22 Minn. 13; Lynch v. New York, 76 N. Y. 60; Cheever v. Shedd, 13 Blatch. 258; Mead v. Portland, 200 U. S. 148, 50 L. ed. 413, 26 Sup. Ct. Rep. 171; Ettor v. Tacoma, 228 U. S. 148, 57 L. ed. 773, 33 Sup. Ct. Rep. 428; Gonzales v. Pensacola, 65 Fla. 241, 61 So. 503, Ann. Cas. 1915 C, 1290; Valparaiso v. Spaeth, 166 Ind. 14, 76 N. E. 514, 8 Ann. Cas. 1021; Morris v. Indianapolis, 177 Ind. 369, 94 N. E. 705, Ann. Cas. 1915 A, 65; Crane v. Harrison, 40 Idaho, 229, 232 Pac. 578, 38 A. L. R. 15; Talcott v. Des Moines, 134 Iowa, 113, 109 N. W. 311, 120 Am. St. Rep. 419, 12 L. R. A. (N. S.) 696; Criesa v. Des Moines, 158 Iowa, 343, 138 N. W. 922, 48 L. R. A. (N. S.) 899; Howell v. New York, etc., R. Co., 221 Mass. 169, 108 N. E. 934, L. R. A. 1917 C, 1131; Austin v. Detroit, etc., Ry., 134 Mich. 149, 96 N. W. 35, 2 Ann. Cas. 530; Stocking v. Lincoln, 93 Neb. 798, 142 N. W. 104, 46 L. R. A. (N. S.) 107; Sauer v. New York, 180 N. Y. 27, 72 N. E. 579, 70 L. R. A. 717; Bennett v. Winston-Salem Southbound R. Co., 170 N. C. 389, 87 S. E. 133, L. R. A. 1916 D, 1074; Mayrant v. Columbia, 77 S. C. 281, 57 S. E. 857, 10 L. R. A. (N. S.) 1094; Kimball v. Salt Lake City, 32 Utah, 253, 90 Pac. 395, 125 Am. St. Rep. 859, 10 L. R. A. (N. S.) 483; Spokane v. Ladies' Benev. Soc., 83 Wash. 382, 145 Pac. 443, Ann. Cas. 1916 E, 367. The law would seem to be otherwise declared in Ohio. See Rhodes v. Cincinnati, 10 Ohio, 160; McCombs v. Akron, 15 Ohio, 474; s. c. 18 Ohio, 229; Crawford v. Delaware, 7 Ohio St. 459; Akron v. Chamberlain Co., 34 Ohio St. 328, 32 Am. Rep. 367; Cohen v. Cleveland, 43 Ohio St. 190. See also Nashville v. Nichol, 59 Tenn. 338. It is also otherwise in Illinois under its present Constitution. Elgin v. Eaton, 83 Ill. 535; Rigney v. Chicago, 102 Ill. 64. In Alabama not every change in grade gives ground for recovery.

Montgomery v. Townsend, 80 Ala. 489.

Under constitutions which provide that private property shall not be damaged for public use without just compensation, or which contain provisions of a similar import, a recovery may be had for damages resulting from the grading, or from a change in the grade, of a street or highway. Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317; Moore v. Atlanta, 70 Ga. 611; Sallden v. Little Falls, 102 Minn. 358, 113 N. W. 884, 120 Am. St. Rep. 635, 13 L. R. A. (N. S.) 790; Wallenberg v. Minneapolis, 111 Minn. 471, 127 N. W. 422, 856, 20 Ann. Cas. 873; Harman v. Omaha, 17 Neb. 548, 23 N. W. 503; Stocking v. Lincoln, 93 Neb. 798, 142 N. W. 104, 46 L. R. A. (N. S.) 107; Edwards v. Thrash, 26 Okla. 472, 109 Pac. 832, 138 Am. St. Rep. 975; Kimball v. Salt Lake City, 32 Utah, 253, 90 Pac. 395, 125 Am. St. Rep. 859, 10 L. R. A. (N. S.) 483; Webber v. Salt Lake City, 40 Utah, 221, 120 Pac. 503, 37 L. R. A. (N. S.) 1115; Hinkley v. Seattle, 74 Wash. 101, 132 Pac. 855, 46 L. R. A. (N. S.) 727, Ann. Cas. 1915 A, 580; Crowe v. Charlestown, 62 W. Va. 91, 57 S. E. 330, 13 Ann. Cas. 1110; Kunst v. Grafton, 67 W. Va. 20, 67 S. E. 74, 26 L. R. A. (N. S.) 1201; Ray v. Huntington, 81 W. Va. 607, 95 S. E. 23, L. R. A. 1918 D, 931.

By statute in a number of the States a recovery may be had for an injury to private property resulting from the grading, or a change in the grade, of a street or highway. Ettor v. Tacoma, 228 U. S. 148, 57 L. ed. 773, 33 Sup. Ct. Rep. 428; Griswold v. Guilford, 75 Conn. 192, 52 Atl. 742; Gorham v. New Haven, 76 Conn. 192, 58 Atl. 1; Hyde v. Fall River, 189 Mass. 439, 75 N. E. 953, 2 L. R. A. (N. S.) 269; Ackerman v. Nutley, 70 N. J. L. 438, 57 Atl. 150; Smith v. Boston, etc., R. Co., 181 N. Y. 132, 73 N. E. 679; *In re* Borup, 182 N. Y. 222, 74 N. E. 838, 108 Am. St. Rep. 796; *In re* Grade Crossing Commissioners, 207 N. Y. 52, 100 N. E. 714, Ann. Cas. 1914 C, 271; Scranton Gas, etc., Co v. Scranton, 214 Pa. St. 586, 64 Atl. 84, 6 L. R. A. (N. S.) 1033, 6 Ann. Cas. 388; Kimball

corporation having power under the charter to establish and regulate streets cannot under this authority, without explicit legislative consent, permit individuals to lay down a railway in one of its streets, and confer privileges exclusive in their character and designed to be perpetual in duration.<sup>1</sup> In a case where this was attempted, it has

*v. Salt Lake City*, 32 Utah, 253, 90 Pac. 395, 125 Am. St. Rep. 859, 10 L. R. A. (N. S.) 483.

By statute in Indiana a change of grade causing special injury and damage warrants a recovery. *Lafayette v. Nagle*, 113 Ind. 425, 15 N. E. 1. The Iowa statute is similar. *Phillips v. Council Bluffs*, 63 Iowa, 576, 19 N. W. 672; *Millard v. Webster City*, 113 Iowa, 220, 84 N. W. 1044; *Richardson v. Webster City*, 111 Iowa, 427, 82 N. W. 920. Compare *Alexander v. Milwaukee*, 16 Wis. 247. City liable in Kansas. *Leavenworth v. Duffy*, 63 Kan. 884, 62 Pac. 433.

Courts will not undertake to control municipal discretion in the matter of improving streets. *Dunham v. Hyde Park*, 75 Ill. 371; *Brush v. Carbondale*, 78 Ill. 74.

The owner of a lot on a city street acquires no prescriptive right to collateral support for his buildings which can render the city liable for injuries caused by grading the street. *Mitchell v. Rome*, 49 Ga. 19, 15 Am. Rep. 669; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243. *Contra*, *Nichols v. Duluth*, 40 Minn. 389, 42 N. W. 84. But the failure to use due care and prudence in grading may render the city liable. *Bloomington v. Brokaw*, 77 Ill. 194.

<sup>1</sup> Nor can it contract away the power of the State to oust the corporation grantee from its privileges. *State v. East Fifth St. Ry. Co.*, 140 Mo. 539, 41 S. W. 955, 38 L. R. A. 218, 62 Am. St. 742. Ordinance giving right to lay double tracks may be repealed. *Lake Roland El. R. Co. v. Baltimore*, 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126. For other cases denying power to make exclusive grants, see *Detroit Citizens' S. R. Co. v. Detroit*, 110 Mich. 384, 68 N. W. 304, 35 L. R. A. 859, 64 Am. St. 350; *Vincennes v. Citizens' Gas L. & C. Co.*, 132 Ind. 114, 31 N. E. 573, 16 L. R. A. 485; *Altgelt v. San*

*Antonio*, 81 Tex. 436, 17 S. W. 75, 13 L. R. A. 383, and note; *Syracuse W. Co. v. Syracuse*, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546.

Even where a company has a right, under a contract, to place electric wires beneath the surface of the streets, the right is subject to such reasonable regulations as the city deems best to make for the public safety and convenience. *Missouri v. Murphy*, 170 U. S. 78, 42 L. ed. 955, 18 Sup. Ct. Rep. 505, aff. 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798. Upon power of city to allow subway under street for wires, *State v. Murphy*, 134 Mo. 548, 35 S. W. 1132, 56 Am. St. 515, 34 L. R. A. 369, and note; also note to *State v. Murphy*, 31 L. R. A. 798. Duty to keep streets safe: *West. U. Tel. Co. v. State*, 82 Md. 293, 33 Atl. 763, 51 Am. St. 464, 31 L. R. A. 572, and note.

An ordinance authorizing a railroad company to build bridges of a certain pattern over its roadway, and providing that the beginning to erect such bridges should be deemed an acceptance of the terms of the ordinance, and a supersession of all contracts existing prior thereto, did not give rise to a contract, but was a mere license, revocable at any time. *Wabash R. Co. v. Defiance*, 167 U. S. 88, 42 L. ed. 87, 17 Sup. Ct. Rep. 748, aff. 52 Ohio St. 262, 40 N. E. 89. Upon liability for cost of changing grade at railroad crossing, see *Kelly v. Minneapolis*, 57 Minn. 294, 59 N. W. 304, 26 L. R. A. 92, and note, 47 Am. St. 605.

Upon right to regulate the placing and use of telegraph, telephone, and other electric wires in and above streets, see *St. Louis v. Western U. Tel. Co.*, 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485.

City cannot authorize the erection in its streets of what amounts to a private nuisance. *Chicago G. W. R. Co. v. First M. E. Church*, 42 C. C.



A. 178, 102 Fed. 85, 50 L. R. A. 488; *Baltimore & P. R. Co. v. Fifth Bapt. Church*, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719. City cannot levy a wheel tax upon all vehicles used on streets, where the property has already been assessed for taxation under the general property tax. *Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907, 49 L. R. A. 408, 67 Am. St. 224. See also *Davis v. Petrinovich*, 112 Ala. 654, 21 So. 344, 36 L. R. A. 615.

Where a city is bound to maintain sidewalks upon its streets in a safe condition, the obligation extends to boulevards also, even though they are primarily under the control of park and boulevard commissioners. *Burridge v. Detroit*, 117 Mich. 557, 76 N. W. 84, 42 L. R. A. 684, 72 Am. St. 582. A street may be set apart for use exclusively as a pleasure driveway, and heavily loaded vehicles excluded from it. *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. 155.

Upon municipal power over nuisances affecting highways and waters, see *Hagerstown v. Witmer*, 86 Md. 293, 37 Atl. 965, 39 L. R. A. 649, and note; over nuisances in highways caused by street railroads and other electrical companies, note to 39 L. R. A. 609.

City cannot arbitrarily tear up and remove a track which has been laid under permission granted by valid ordinance. Some notice and opportunity to be heard must first be given. *Cape May v. Cape M., Del. Bay & S. P. R. Co.*, 60 N. J. L. 224, 37 Atl. 892, 39 L. R. A. 609. Upon regulation of speed of vehicles in streets, see note 36 L. R. A. 305.

Reasonable license fees may be exacted for use of streets by vehicles, and fact that vehicles are owned outside city and only occasionally used within it is immaterial. *Tomlinson v. Indianapolis*, 144 Ind. 142, 43 N. E. 9, 36 L. R. A. 413, and note; *Mason v. Cumberland*, 92 Md. 451, 48 Atl. 136.

Fenders may be required on street cars. *State v. Cape May*, 59 N. J. L. 396, 36 Atl. 696, 36 L. R. A. 653. And speed of street cars may be regulated.

*Ibid.*, 59 N. J. L. 393, 36 Atl. 679, 36 L. R. A. 656. Cars may be required to stop before crossing streets. *Ibid.*, 59 N. J. L. 404, 36 Atl. 678, 36 L. R. A. 657. Railroad cannot under general power to regulate streets be compelled to erect gates and keep watchman at crossing. *Pittsburgh, C. C. & St. L. R. Co. v. Crown Point*, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684.

City cannot divest itself of power to regulate use of streets. *State v. Murphy*, 134 Mo. 548, 35 S. W. 1142, 34 L. R. A. 369, 56 Am. St. 515; and that the municipality holds streets, parks, and the like in trust for the public, see *St. Paul v. Chicago, M. & St. P. R. Co.*, 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184. See also *Columbus Gas Light and Coke Co. v. Columbus*, 50 Ohio St., 65, 33 N. E. 292, 40 Am. St. 648, 19 L. R. A. 510. On power to regulate use of streets by electric companies, see *State v. Murphy*, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798, and note in L. R. A.

Rights of owners of abutting property to access and to light and air cannot be materially impeded. *Block v. Salt Lake R. T. Co.*, 9 Utah, 31, 33 Pac. 229, 24 L. R. A. 610; *Lockwood v. Wabash R. Co.*, 122 Mo. 86, 26 S. W. 698, 24 L. R. A. 516, 43 Am. St. 547; *Schopp v. St. Louis*, 117 Mo. 131, 22 S. W. 898, 20 L. R. A. 783; *Moose v. Carson*, 104 N. C. 431, 10 S. E. 689, 7 L. R. A. 548, and note, 17 Am. St. 681; *Gargan v. Louisville, N. A. & C. R. Co.*, 89 Ky. 212, 12 S. W. 259, 6 L. R. A. 340. Residents may be required to keep the sidewalks in front of their premises free from snow and ice. *Carthage v. Frederick*, 122 N. Y. 268, 25 N. E. 480, 10 L. R. A. 178, and note, 19 Am. St. 490. Contractor cannot be granted right to place boxes upon streets and use them for posting bills, even though they are made and maintained without cost to city, and according to specifications of board of public improvements, and designed specially for the reception of litter and refuse that would otherwise be cast into the streets. *State v. St. Louis*, 161 Mo. 371, 61 S. W. 658.

For other cases upon regulation of

been said by the court: "The corporation has the exclusive right to control and regulate the use of the streets of the city. In this respect it is endowed with legislative sovereignty. The exercise of that sovereignty has no limit, so long as it is within the objects and trusts for which the power is conferred. An ordinance regulating a street is a legislative act, entirely beyond the control of the judicial power of the State. But the resolution in question is not such an act. Though it relates to a street, and very materially affects the mode in which that street is to be used, yet in its essential features it is a contract. Privileges exclusive in their nature and designed to be perpetual in their duration are conferred. Instead of regulating the use of the street, the use itself to the extent specified in the resolution is granted to the associates. For what has been deemed an adequate consideration, the corporation has assumed to surrender a portion of their municipal authority, and has in legal effect agreed with the defendants that, so far as they may have occasion to use the street for the purpose of constructing and operating their railroad, the right to regulate and control the use of that street shall not be exercised. . . . It cannot be that powers vested in the corporation as an important public trust can thus be frittered away, or parcelled out to individuals or joint-stock associations, and secured to them beyond control." <sup>1</sup>

streets, see *Argentine v. Atchison T. & S. F. Ry. Co.*, 55 Kan. 730, 41 Pac. 946, 30 L. R. A. 255; *Mt. Carmel v. Shaw*, 155 Ill. 37, 39 N. E. 584, 27 L. R. A. 580; *Indianapolis v. Consumers' Gas Co.*, 140 Ind. 107, 39 N. E. 433, 49 Am. St. 183, 27 L. R. A. 514; *Tate v. Greensboro*, 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671; *Savage v. Salem*, 23 Oreg. 381, 31 Pac. 832, 37 Am. St. 688, 24 L. R. A. 787; *New Haven v. New Haven & D. Ry. Co.*, 62 Conn. 252, 25 Atl. 316, 18 L. R. A. 256; *People v. Ft. Wayne & E. Ry. Co.*, 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752; *Chase v. Oshkosh*, 81 Wis. 313, 51 N. W. 560, 29 Am. St. 898, 15 L. R. A. 553, and note (shade trees); *American R. Tel. Co. v. Hess*, 125 N. Y. 641, 26 N. E. 919, 21 Am. St. 764, 13 L. R. A. 454; *State v. Trenton*, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410; note to 8 L. R. A. 828.

<sup>1</sup> *Milhau v. Sharp*, 17 Barb. 435, s. c. 28 Barb. 228, and 27 N. Y. 611; *Birmingham, &c. St. Ry. Co. v. Bir-*

*mingham St. Ry. Co.*, 79 Ala. 465; *Nash v. Lowry*, 37 Minn. 261; *Jackson, &c. R. Co. v. Interstate, &c. Co.*, 24 Fed. 306. See also *Davis v. Mayor, &c. of New York*, 14 N. Y. 506; *State v. Mayor, &c.*, 3 Duer, 119; *State v. Graves*, 19 Md. 351; *Detroit Citizens' Street R. Co. v. Detroit Ry.*, 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; *Montgomery First Nat. Bank v. Tyson*, 133 Ala. 459, 32 So. 144, 91 Am. St. Rep. 46, 59 L. R. A. 399; *Ft. Smith v. Hunt*, 72 Ark. 556, 82 S. W. 163, 105 Am. St. Rep. 51, 66 L. R. A. 238; *Augusta v. Reynolds*, 122 Ga. 754, 50 S. E. 998, 106 Am. St. Rep. 147, 67 L. R. A. 564; *People v. Harris*, 203 Ill. 272, 67 N. E. 785, 96 Am. St. Rep. 304; *People v. Clean St. Co.*, 225 Ill. 470, 80 N. E. 298, 116 Am. St. Rep. 156, 9 L. R. A. (N. S.) 455; *Sears v. Chicago*, 247 Ill. 204, 93 N. E. 158, 139 Am. St. Rep. 319, 20 Ann. Cas. 539; *Vandalia R. Co. v. State*, 166 Ind. 219, 76 N. E. 980, 117 Am. St. Rep. 370; *Lacey v. Oskaloosa*, 143 Iowa, 704, 121 N. W.

So, it has been held that the city of Philadelphia exercised a portion of the public right of eminent domain in respect to the streets within its limits, subject only to the higher control of the State and the use of the people; and therefore a written license granted by

542, 31 L. R. A. (N. S.) 853; *Braner v. Baltimore Refrigerating, etc., Co.*, 99 Md. 367, 58 Atl. 21, 105 Am. St. Rep. 304, 66 L. R. A. 403; *Com. v. Morrison*, 197 Mass. 199, 83 N. E. 415, 125 Am. St. Rep. 338, 14 L. R. A. (N. S.) 194; *Peters v. St. Louis*, 226 Mo. 62, 125 S. W. 1134, 21 Ann. Cas. 1069; *Chapman v. Lincoln*, 84 Neb. 534, 121 N. W. 596, 25 L. R. A. (N. S.) 400; *Cereghino v. Oregon Short Line R. Co.*, 26 Utah, 467, 73 Pac. 634, 99 Am. St. Rep. 843; *Davis v. Spragg*, 72 W. Va. 672, 79 S. E. 652, 48 L. R. A. (N. S.) 173; *Tilly v. Mitchell, etc., Co.*, 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007. Compare *Chicago, etc., R. Co. v. People*, 73 Ill. 541.

Upon municipal power to impose conditions in granting right to street railway to occupy streets, &c., see *Galveston & W. R. Co. v. Galveston*, 90 Tex. 398, 39 S. W. 96, 36 L. R. A. 33, and note; rights of street railways to use streets, *People v. Newton*, 112 N. Y. 396, 19 N. E. 831, 3 L. R. A. 174, and note; *Adams v. Chicago, B. & N. R. Co.*, 39 Minn. 286, 39 N. W. 629, 1 L. R. A. 493, and note, 12 Am. St. 644; upon general relations between street railways and municipalities, note to 43 L. ed. U. S. 67. Right to lay tracks is subject to regulation by subsequent ordinance. *Baltimore v. Baltimore Tr. & G. Co.*, 166 U. S. 673, 41 L. ed. 1160, 17 Sup. Ct. Rep. 696. See also *Clarksburg El. L. Co. v. Clarksburg*, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142; *Cleveland v. Augusta*, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638.

The power of a municipality to compel a separation of grades at a railroad crossing cannot be surrendered nor divested, nor abridged nor bartered away. *State v. Chicago, etc., R. Co.*, 135 Minn. 277, 160 N. W. 773, L. R. A. 1917 C, 1174.

City cannot authorize the permanent occupation of a portion of the street for a private purpose, as by

an awning. Resolution authorizing such is revocable at any time, although the licensee may have spent a large sum in the erection of the awning. *Hibbard, S., B. & Co. v. Chicago*, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621. Compare *Chicago, &c. R. R. Co. v. People*, 73 Ill. 541. Nor can an exclusive privilege be granted to a gas company to use the streets. *Gas Co. v. Parkersburg*, 30 W. Va. 435, 4 S. E. 650; *Cincinnati Gaslight Co. v. Avondale*, 43 Ohio St. 257, 1 N. E. 527; *Citizens' Gas, &c. Co. v. Elwood*, 114 Ind. 332, 16 N. E. 624. The consent of the legislature in any such case would relieve it of all difficulty, except so far as questions might arise concerning the right of individuals to compensation, as to which, see *post*, ch. 15.

Although a gas company has permission from a municipality to lay its pipes under the streets, it may be required to remove the same at its own expense in order to make way for a system of drainage which is required in the interest of the public health, and this without compensation. *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471. A grant of an "exclusive privilege of laying pipes for carrying gas in said city", &c., does not prevent a city's erecting its own gasworks, particularly where the legislature in incorporating the gas company reserved the power to amend, alter, or repeal its charter, and later authorized the city to construct its own gasworks. *Hamilton Gaslight & C. Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90.

In *Milhau v. Sharp*, 17 Barb. 435, s. c. 28 Barb. 228, and 27 N. Y. 611, it was held that a corporation, with authority "from time to time to regulate the rates of fare to be charged for the carriage of persons", could not by resolution divest itself thereof as to the carriages employed on a street railway.

the city, though upon a valuable consideration, authorizing the holder to connect his property with the city railway by a turnout and track, was not such a contract as would prevent the city from abandoning or removing the railway whenever, in the opinion of the city authorities, such action would tend to the benefit of its police.<sup>1</sup> [An ordinance which allows a claim and directs its payment may be repealed at any time before payment is made.<sup>2</sup>]

While thus held within the limitations which govern the legislative authority of the State, these corporations are also entitled to the protections and immunities which attend State action, and which exempt it from liability to those who may incidentally suffer damage in consequence.<sup>3</sup> As no State does nor can undertake to protect its people against incidental injuries resulting from its adopting or failing to adopt any proposed legislative action, so no similar injury resulting from municipal legislative action or nonaction can be made the basis of a legal claim against a municipal corporation. The justice or propriety of its opening or discontinuing a street, of its paving or refusing to pave a thoroughfare or alley, of its erecting a desired public building, of its adopting one plan for a public building or work rather than another, or of the exercise of any other discretionary authority committed to it as a part of the governmental machinery of the State, is not suffered to be brought in question in an action at law, and submitted to the determination of court and jury.<sup>4</sup> If, therefore, a city temporarily suspends useful legisla-

<sup>1</sup> *Branson v. Philadelphia*, 47 Pa. St. 329. Compare *Louisville City R. Co. v. Louisville*, 8 Bush, 415. And see *Stevens v. Muskegon*, 111 Mich. 72, 69 N. W. 227, 36 L. R. A. 777.

<sup>2</sup> *State ex rel. Bayer v. Funk*, 105 Oreg. 134, 209 Pac. 113, 25 A. L. R. 625.

<sup>3</sup> A municipal corporation is not liable in an action for false imprisonment where imprisonment was under a judgment for violation of an ordinance, even though the judgment was erroneous or even void. *Bartlett v. Columbus*, 101 Ga. 300, 28 S. E. 599, 44 L. R. A. 795. Nor for the destruction of property in time of flood in order to prevent still greater loss. *Aitken v. Wells River*, 70 Vt. 308, 40 Atl. 829, 41 L. R. A. 566, 67 Am. St. 672. Nor for injury resulting from the negligence of the employee of a public institution maintained by the county as a governmental agency (re-

form school). *McAndrews v. Hamilton County*, 105 Tenn. 399, 58 S. W. 483.

<sup>4</sup> *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. 995, 23 Sup. Ct. Rep. 817; *Dobbins v. Los Angeles*, 139 Cal. 179, 72 Pac. 970, 96 Am. St. Rep. 95; *Schmidt v. Indianapolis*, 168 Ind. 631, 80 N. E. 632, 120 Am. St. Rep. 385, 14 L. R. A. (N. S.) 787; *Gardiner v. Bluffton*, 173 Ind. 454, 89 N. E. 853, 90 N. E. 898, Ann. Cas. 1912 A, 713; *Wilson v. Ottumwa*, 181 Iowa, 303, 164 N. W. 613, L. R. A. 1918 B, 468; *Dudley v. Flemingsburg*, 115 Ky. 5, 72 S. W. 327, 103 Am. St. Rep. 253, 60 L. R. A. 575, 1 Ann. Cas. 958; *Claussen v. City of Luverne*, 103 Minn. 491, 115 N. W. 643, 15 L. R. A. (N. S.) 698, 14 Ann. Cas. 673; *Cassidy v. St. Joseph*, 247 Mo. 197, 152 S. W. 306; *Kansas City v. Liebi*, 298 Mo. 569, 252 S. W. 404, 28 A. L. R. 295; *Mansfield v. Bristol*, 76 Ohio St. 270,

81 N. E. 631, 118 Am. St. Rep. 852, 10 L. R. A. (n. s.) 806, 10 Ann. Cas. 767; *Marth v. Kingfisher*, 22 Okla. 602, 98 Pac. 436, 18 L. R. A. (n. s.) 1238; *Howard v. Philadelphia*, 250 Pa. St. 184, 95 Atl. 388, L. R. A. 1916 B, 917; *Douglass v. Greenville*, 92 S. C. 374, 75 S. E. 687, 49 L. R. A. (n. s.) 958; *Tilley v. Mitchell, etc., Co.*, 121 Wis. 1, 98 N. W. 969, 105 Am. St. Rep. 1007. But see *Havre De Grace v. Fletcher*, 112 Md. 562, 77 Atl. 114; *Consolidated Apartment House v. Baltimore*, 131 Md. 523, 102 Atl. 920.

In *Griffin v. New York*, 9 N. Y. 456, 459, in which it was held that an action would not lie against a city for injury occasioned by a failure to keep its streets free from obstructions, the following remarks are made: "The functions of a common council as applied to this subject are those of a local legislature within certain limits, and are not of a character to render the city responsible for the manner in which the authority is exercised, or in which the ordinances are executed, any more than the State would be liable for the want of adequate administrative laws, or from any imperfections in the manner of carrying them out." "A doctrine that should hold the city pecuniarily liable in such a case would oblige its treasury to make good to every citizen any loss which he might sustain for the want of adequate laws upon every subject of municipal jurisdiction, and on account of every failure in the perfect and infallible execution of those laws. There is no authority for such a doctrine, and we are satisfied it does not exist." See also *Evansville v. Senhenn*, 151 Ind. 42, 47 N. E. 634, 51 N. E. 88, 41 L. R. A. 728, 68 Am. St. 218.

Where a city under proper authority has vacated part of a street, an abutter on another part of it has no ground of complaint. *Whitsett v. Union D. & R. Co.*, 10 Col. 243, 15 Pac. 339.

A court cannot control the discretion of a city in opening and working streets. *Bauman v. Detroit*, 58 Mich. 444, 25 N. W. 391. So, where a city was sued for an injury sustained in the destruction of property by a mob, in consequence of the failure of officers to

give adequate protection, the court, in holding that the action will not lie, say: "It is not the policy of the government to indemnify individuals for losses sustained either from the want of proper laws, or from the inadequate enforcement of laws." *Western College v. Cleveland*, 12 Ohio St. 375, 377. See also *Chicago v. Chicago League Base Ball Club*, 196 Ill. 54, 63 N. E. 695, 89 Am. St. Rep. 243; *Wallace v. Norman*, 9 Okla. 339, 60 Pac. 108, 48 L. R. A. 620; *Fluckiger v. Seattle*, 103 Wash. 330, 174 Pac. 456, L. R. A. 1918 F, 780; *Long v. Neenah*, 128 Wis. 40, 107 N. W. 10, 8 Ann. Cas. 463. But liability for such losses may be cast by statute on municipalities. *Chicago v. Manhattan Cement Co.*, 178 Ill. 372, 53 N. E. 68, 45 L. R. A. 848, 69 Am. St. 321. See also *Chicago v. Sturges*, 222 U. S. 313, 56 L. ed. 215, 23 Sup. Ct. Rep. 92, Ann. Cas. 1913 B, 1349, affirming 237 Ill. 46, 86 N. E. 683; *Wells, Fargo & Co. v. Jersey City*, 207 Fed. 871, affirmed 219 Fed. 699, 135 C. C. A. 371. *Dawson Soap Co. v. Chicago*, 234 Ill. 314, 84 N. E. 920, 14 Ann. Cas. 1131; *Pittsburg, etc., R. Co. v. Chicago*, 242 Ill. 178, 89 N. E. 1022, 134 Am. St. Rep. 316, 44 L. R. A. (n. s.) 358; *Iola v. Birnbaum*, 71 Kan. 600, 81 Pac. 198, 6 Ann. Cas. 267; *Cherryvale v. Hawman*, 80 Kan. 170, 101 Pac. 994, 133 Am. St. Rep. 195, 23 L. R. A. (n. s.) 645, 18 Ann. Cas. 149; *Blake-man v. Wichita*, 93 Kan. 444, 144 Pac. 816, L. R. A. 1915 C, 578, Ann. Cas. 1916 D, 188; *Easter v. El Dorado*, 104 Kan. 57, 177 Pac. 538, 13 A. L. R. 744; *Sanger v. Kansas City*, 111 Kan. 262, 206 Pac. 891, 23 A. L. R. 294; *Butte Miners' Union v. Butte*, 58 Mont. 391, 194 Pac. 149, 13 A. L. R. 746; *Adamson v. New York*, 188 N. Y. 255, 80 N. E. 937, 117 Am. St. Rep. 863, 10 L. R. A. (n. s.) 925, 11 Ann. Cas. 183, affirming 110 App. Div. 58, 96 N. Y. Supp. 907.

A city is not liable for the destruction of a house by fire set by sparks from an engine which was by its ordinances a nuisance subject to abatement. "In the exercise of such powers a city is not bound to act unless it chooses to act." *Davis v. Montgom-*

ery, 51 Ala. 139, 23 Am. Rep. 545. Nor for failure to enforce a fire limits ordinance whereby adjoining property is burned. *Hines v. Charlotte*, 72 Mich. 278, 40 N. W. 333. Nor for failure to prohibit manufacture of fireworks. *McDade v. Chester*, 117 Pa. St. 414, 12 Atl. 421. Nor is it liable for neglect to construct a proper system of drainage, in consequence of which plaintiff's store was overflowed in an extraordinary rain. *Carr v. Northern Liberties*, 35 Pa. St. 324; *Flagg v. Worcester*, 13 Gray, 601.

A city is not liable for the failure to provide a proper water supply for the extinguishment of fires: *Grant v. Erie*, 69 Pa. St. 420, 8 Am. Rep. 272; *Tainter v. Worster*, 123 Mass. 311, 25 Am. Rep. 90; *Wright v. Augusta*, 78 Ga. 241, *Black v. Columbia*, 19 S. C. 412; *Vanhorn v. Des Moines*, 63 Iowa, 447, 19 N. W. 293; *Mendel v. Wheeling*, 28 W. Va. 233; *Butterworth v. Henrietta*, 25 Tex. Civ. App. 467, 61 S. W. 975; *Allen, etc., Mfg. Co. v. Shreveport Waterworks Co.*, 113 La. 1091, 37 So. 980, 104 Am. St. Rep. 525, 68 L. R. A. 650, 2 Ann. Cas. 471; nor for the inefficiency of its firemen: *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368; *Patch v. Covington*, 17 B. Mon. 722; *Greenwood v. Louisville*, 13 Bush, 226, 26 Am. Rep. 263; *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Jewett v. New Haven*, 38 Conn. 368; *Torbush v. Norwich*, 38 Conn. 225, 9 Am. Rep. 395; *Howard v. San Francisco*, 51 Cal. 52; *Heller v. Sedalia*, 53 Mo. 159, 14 Am. Rep. 444; *McKenna v. St. Louis*, 6 Mo. App. 320; *Robinson v. Evansville*, 87 Ind. 334; nor for not preventing "coasting" in its streets, to the injury of individuals: *Shepherd v. Chelsea*, 4 Allen, 113; *Pierce v. New Bedford*, 129 Mass. 534; *Ray v. Manchester*, 46 N. H. 59; *Altwater v. Baltimore*, 31 Md. 462; *Hutchinson v. Concord*, 41 Vt. 271; *Calwell v. Boone*, 51 Iowa, 687, 2 N. W. 614, 33 Am. Rep. 154; *Schultz v. Milwaukee*, 49 Wis. 254, 5 N. W. 342, 35 Am. Rep. 779; *Burford v. Grand Rapids*, 53 Mich. 98, 18 N. W. 571; *Weller v. Burlington*, 60 Vt. 28, 12 Atl. 215;

*Lafayette v. Timberlake*, 88 Ind. 330; *Wilmington v. Van De Grift*, 1 Marvel, 5, 29 Atl. 1047, 25 L. R. A. 538, 65 Am. St. 256; *Dudley v. Flemingsburg*, 115 Ky. 5, 24 Ky. L. Rep. 1804, 72 S. W. 327, 103 Am. St. Rep. 253, 60 L. R. A. 575. But see *Taylor v. Cumberland*, 64 Md. 68, 20 Atl. 1027; nor for fitting a path for "coasting" in public grounds, where a collision occurs with a person passing it: *Steele v. Boston*, 128 Mass. 583; nor for not preventing the running at large of dogs when hydrophobia is epidemic: *Smith v. Selinsgrove*, 199 Pa. St. 615, 49 Atl. 213. See also *Addington v. Littleton*, 50 Colo. 623, 115 Pac. 896, 34 L. R. A. (N. S.) 1012, 24 Am. & Eng. Ann. Cas. 753; nor for failure to light the streets sufficiently: *Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407; *Miller v. St. Paul*, 38 Minn. 134, 36 N. W. 271; *Williams v. Washington*, 142 Ga. 281, 82 S. E. 656; *Greenboro v. Robinson*, 19 Ga. App. 199, 91 S. E. 244; *Palestine v. Siler*, 225 Ill. 630, 80 N. E. 345, 8 L. R. A. (N. S.) 205; *Spencer v. Mayfield*, 43 Ind. App. 134, 85 N. E. 23; *Blain v. Montezuma*, 150 Iowa, 141, 129 N. W. 808, 32 L. R. A. (N. S.) 542, Ann. Cas. 1912 D, 430; *Gee's Adm. v. Hopkinsville*, 154 Ky. 263, 157 S. W. 30; *Dudley v. Smithland*, 174 Ky. 248, 192 S. W. 21; *Hodgins v. Bay City*, 156 Mich. 687, 121 N. W. 274, 132 Am. St. Rep. 546; *Brady v. Randleman*, 159 N. C. 434, 74 S. E. 811; *Herndon v. Salt Lake City*, 34 Utah, 65, 95 Pac. 646. See *Randall v. Eastern R. Co.*, 106 Mass. 276, 8 Am. Rep. 327. Compare *Baltimore v. Beck*, 96 Md. 183, 53 Atl. 976; nor for granting to a railroad a right of way along one of its streets: *Davenport v. Stevenson*, 34 Iowa, 225; *Frith v. Dubuque*, 45 Iowa, 406; *Stevenson v. Lexington*, 69 Mo. 157; nor for failure to compel such railroad to maintain safety gates: *Kistner v. Indianapolis*, 100 Ind. 210; nor for failure to enact proper ordinances for keeping its sidewalks in repair, or to enforce them if enacted: *Cole v. Medina*, 27 Barb. 218. *Contra*, *Atlanta v. Hampton*, 139 Ga. 389, 77 S. E. 393; *Brown v. Chillicothe*, 122

tion;<sup>1</sup> or orders and constructs public works, from which incidental injury results to individuals;<sup>2</sup> or adopts unsuitable or insufficient

Iowa, 640, 98 N. W. 502; *Madisonville v. Pemberton's Admr.*, 25 Ky. L. Rep. 347, 75 S. W. 229; *Goodwyn v. Shreveport*, 134 La. 820, 64 So. 762; *McDevitt v. St. Paul*, 66 Minn. 14, 68 N. W. 178, 33 L. R. A. 601; *Gillard v. Chester*, 212 Pa. St. 338, 61 Atl. 929; nor for failure to prohibit bicycle riding upon sidewalks: *Jones v. Williamsburg*, 97 Va. 722, 34 S. E. 883, 47 L. R. A. 294; nor for failure to build footwalks adjoining a bridge: *Lehigh Co. v. Hoffort*, 116 Pa. St. 119, 9 Atl. 177; nor for allowing a shooting-gallery to be maintained. *Hubbell v. Viroqua*, 67 Wis. 343, 30 N. W. 847; nor for permitting cannon firing: *Wheeler v. Plymouth*, 116 Ind. 158, 18 N. E. 532; *Lincoln v. Boston*, 148 Mass. 578, 20 N. E. 329; *Robinson v. Greenville*, 42 Ohio St. 625; *O'Rourke v. Sioux Falls*, 4 S. D. 47, 54 N. W. 1044, 19 L. R. A. 789, 46 Am. St. 760; nor for the discharge of fireworks: *Ball v. Woodbine*, 61 Iowa, 83, 15 N. W. 846; *Bartlett v. Clarksburg*, 45 W. Va. 393, 31 S. E. 918, 43 L. R. A. 295, 72 Am. St. 817; *Aron v. Wausau*, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733; *Love v. Raleigh*, 116 N. C. 296, 21 S. E. 503, 28 L. R. A. 192; *Fifield v. Phoenix*, 4 Ariz. 283, 36 Pac. 916, 24 L. R. A. 430; *Kerr v. Brookline*, 208 Mass. 190, 94 N. E. 257, 34 L. R. A. (N. S.) 464; nor for damage done on adjoining property by its failure to remove a dangerous wall: *Kiley v. Kansas City*, 87 Mo. 103; *Anderson v. East*, 117 Ind. 126, 19 N. E. 726; *Cain v. Syracuse*, 95 N. Y. 83; otherwise for injury therefrom to a person on the street. *Duffy v. Dubuque*, 63 Iowa, 171, 18 N. W. 900.

But the city as owner of vacant lots is subject to same duties in regard thereto as a private owner. *Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. 114. And where the city permits cattle to roam the streets to such an extent that they amount to a nuisance, it may be liable for an injury to a person on the street, caused by a cow running at large. *Cochrane v. Frostburg*, 81 Md. 54,

31 Atl. 703, 27 L. R. A. 728, 48 Am. St. 479, and see note in L. R. A.

But city is not responsible for defective condition of a bathing beach, the duty to maintain which is thrust upon it by law. *McGraw v. Dist. of Columbia*, 3 App. D. C. 405, 25 L. R. A. 691. Where it lawfully acts as private contractor in furnishing water to steam-heating plant, it is liable for breach. *Watson v. Needham*, 161 Mass. 404, 37 N. E. 204, 24 L. R. A. 287.

<sup>1</sup>Such as an ordinance forbidding fireworks within a city: *Hill v. Charlotte*, 72 N. C. 55, 21 Am. Rep. 451; or forbidding cattle running at large: *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787.

A city is not liable for a loss by fire which might have been prevented if the city had not cut off the water from one of its hydrants. *Tainter v. Worcester*, 123 Mass. 311.

<sup>2</sup>*Brewster v. Davenport*, 51 Iowa, 427, 1 N. W. 737; *Wehn v. Commissioners*, 5 Neb. 494, 25 Am. Rep. 497 (case of a jail, complained of as offensive in the neighborhood); *Carroll v. St. Louis*, 4 Mo. App. 191; *Saxton v. St. Joseph*, 60 Mo. 153; *Wicks v. De Witt*, 54 Iowa, 130, 6 N. W. 176; *White v. Yazoo City*, 27 Miss. 357; *Vincennes v. Richards*, 23 Ind. 381; *Highway Com'rs v. Ely*, 54 Mich. 173, 19 N. W. 940; *Fort Worth v. Crawford*, 64 Tex. 202; *Gaylor v. Bridgeport*, 90 Conn. 235, 96 Atl. 936; *Bowden v. Jacksonville*, 52 Fla. 216, 42 So. 394; *Atlanta v. Williams*, 15 Ga. App. 654, 84 S. E. 139; *Indianapolis v. Williams*, 58 Ind. App. 447, 108 N. E. 387; *Shreveport v. McClure*, 132 La. 468, 61 So. 530; *Campbell Lumber Co. v. Levee Dist.*, 186 Mo. App. 371, 172 S. W. 64; *Linton Pharmacy v. McDonald*, 96 N. Y. Supp. 675, 48 Misc. Rep. 125; *Goodrich v. Otego*, 145 N. Y. Supp. 497, 160 App. Div. 349; *Casel v. New York*, 153 N. Y. Supp. 410, 167 App. Div. 831; *Wood v. Duke Land & Imp. Co.*, 165 N. C. 367, 81 S. E. 422; *Mangum v. Todd*, 42 Okla. 343, 141 Pac. 266; *Ettor v.*

plans for public bridges, buildings, sewers, or other public works;<sup>1</sup> or in any other manner, through the exercise or failure to exercise its political authority, causes incidental injury to individuals, an action will not lie for such injury. The reason is obvious. The maintenance of such an action would transfer to court and jury the discretion which the law vests in the municipality, but transfer them not to be exercised directly and finally, but indirectly and partially by

Tacoma, 77 Wash. 267, 137 Pac. 820; Thorpe v. Spokane, 78 Wash. 488, 139 Pac. 221.

There can be no recovery for an injury caused by blasting in the course of a public work, in the absence of negligence in the city's agent. Blumb v. Kansas City, 84 Mo. 112; Murphy v. Lowell, 128 Mass. 396. *Contra*, Joliet v. Harwood, 86 Ill. 110. Nor, except by force of statute, even in case of negligence. Howard v. Worcester, 153 Mass. 426, 27 N. E. 11, 12 L. R. A. 160.

Where a city has a right to erect an incinerator and to maintain it for the benefit of the public in the exercise of a governmental duty, it will not be held civilly liable to individuals for injuries resulting therefrom, when properly built and operated, upon the theory of a trespass, in absence of some legislative authority or a statute conferring such right of action. But the denial of a right to recover against a municipality for an alleged injury, upon the theory of its constituting a trespass, does not militate against the right of recovery for a taking or appropriating, in whole or in part, of property for a public use without due compensation. Dayton v. Asheville, 185 N. C. 12, 115 S. E. 827, 30 A. L. R. 1186.

Determination of city council that poles for electric light wires shall be erected in street cannot be questioned. Palmer v. Larchmont El. Co., 158 N. Y. 231, 52 N. E. 1092, 43 L. R. A. 672.

In Kentucky it has been held that a city may be liable for establishing a pesthouse near the residence of a person. Clayton v. Henderson, 103 Ky. 228, 44 S. W. 667, 44 L. R. A. 474.

<sup>1</sup> Mills v. Brooklyn, 32 N. Y. 489; Carr v. Northern Liberties, 35 Pa.

St. 324; Fair v. Philadelphia, 88 Pa. St. 309; Collins v. Philadelphia, 93 Pa. St. 272; Lynch v. New York, 76 N. Y. 60; Larkin v. Saginaw, 11 Mich. 88; Detroit v. Beckman, 34 Mich. 125; Lansing v. Toolan, 37 Mich. 152; Davis v. Jackson, 61 Mich. 530, 28 N. W. 526; Foster v. St. Louis, 4 Mo. App. 564; Denver v. Capelli, 4 Col. 25, 34 Am. Rep. 62; Allen v. Chippewa Falls, 52 Wis. 430, 9 N. W. 284; McClure v. Redwing, 28 Minn. 186, 9 N. W. 767; French v. Boston, 129 Mass. 592, 37 Am. Rep. 393; Johnston v. Dist. Columbia, 118 U. S. 19, 30 L. ed. 75, 6 Sup. Ct. Rep. 923; Hughes v. Auburn, 161 N. Y. 96, 55 N. E. 389, 46 L. R. A. 636; Hume v. Des Moines, 146 Iowa, 624, 125 N. W. 846, 29 L. R. A. (N. S.) 126, Ann. Cas. 1912 B, 904; Hart v. Neillsville, 125 Wis. 546, 104 N. W. 699, 1 L. R. A. (N. S.) 952, 4 Ann. Cas. 1085.

In Nebraska it is held that where a city in the erection of a public work exercises reasonable care and judgment, and adopts plans approved and recommended by engineers having all the knowledge that skill and experience in such work would naturally give them, it should not be held liable in damages on account of an alleged defect in the plan, unless the construction is so manifestly dangerous that all reasonable minds must agree that it was unsafe. Watters v. Omaha, 76 Neb. 855, 107 N. W. 1007, 110 N. W. 981, 14 Ann. Cas. 750.

A city is not liable if in rebuilding a walk an abutter follows the original plan. Urquhart v. Ogdensburg, 91 N. Y. 67. But if he deviates from it, the fact that the city suffers the walk to remain does not constitute an adoption of it. *Ibid.*, 97 N. Y. 238. In Kansas a city may be liable if the plan is manifestly unsafe. Gould v. To-



the retroactive effect of punitive verdicts upon special complaints. The probable consequence is well stated in a case in which action was brought against a city for neglect to construct a proper system of drainage. "Any street may be complained of as being too steep or too level; gutters as being too deep or too shallow; or as being pitched in a wrong direction; and there may be evidence that these things were carelessly resolved upon, and then a tribunal that is foreign to the municipal system will be allowed to intervene and

peka, 32 Kan. 485, 4 Pac. 822. In Indiana it is liable for negligence in plan, but not for mere errors of judgment. *Seymour v. Cummins*, 119 Ind. 148, 21 N. E. 549, 5 L. R. A. 126, and note; *Rice v. Evansville*, 108 Ind. 7, 9 N. E. 139; *Terre Haute v. Hudson*, 112 Ind. 542, 13 N. E. 686.

In *Hill v. Boston*, 122 Mass. 344, 23 Am. Rep. 332, a child attending one of the public schools in the third story of a school building fell over the railing to the staircase, and brought suit for the consequent injury, alleging that the railing was made dangerously low. The court held no such action maintainable, and asserted the "general doctrine that a private action cannot be maintained against a town or other quasi corporation for a neglect of corporate duty, unless such action is given by statute"; citing *White v. Phillipston*, 10 Met. 108; *Sawyer v. Northfield*, 7 Cush. 490; *Reed v. Belfast*, 20 Me. 246; *Eastman v. Meredith*, 36 N. H. 284; *Hyde v. Jamaica*, 27 Vt. 443; *Chidsey v. Canton*, 17 Conn. 475; *Taylor v. Peckham*, 8 R. I. 349, 5 Am. Rep. 578; *Bartlett v. Crozier*, 17 Johns. 439; *Freeholders of Sussex County v. Strader*, 18 N. J. L. 108; *Warbiglee v. Los Angeles*, 45 Cal. 36; *Highway Commissioners v. Martin*, 4 Mich. 557, and a great number of other cases. It is also said in the same case that, in Massachusetts, the same doctrine is applied to incorporated cities. See further *Hyde v. Jamaica*, 27 Vt. 443; *State v. Burlington*, 36 Vt. 521; *Chidsey v. Canton*, 17 Conn. 475; *Taylor v. Peckham*, 8 R. I. 349, 5 Am. Rep. 578.

If the water of a stream becomes polluted by the emptying into it of city sewers, so that a riparian pro-

prietor cannot use it in his business as he has been accustomed to do, or if the property of such a proprietor is otherwise injured by such sewers, he cannot recover against the city for the injury, so far as it is attributable to the plan of sewerage adopted by the city, but he can recover so far as it is attributable to the improper construction or unreasonable use of the sewers, or the negligence or other fault of the city in the care and management of them. *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592, citing *Emery v. Lowell*, 104 Mass. 13; *Child v. Boston*, 4 Allen, 41; *Valparaiso v. Hagen*, 153 Ind. 337, 54 N. E. 1062, 48 L. R. A. 707, 74 Am. St. Rep. 305; *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610; *Metz v. Asheville*, 150 N. C. 748, 64 S. E. 881, 22 L. R. A. (N. S.) 940; *Blizzard v. Danville*, 175 Pa. St. 479, 34 Atl. 846; *Owens v. Lancaster*, 182 Pa. St. 257, 37 Atl. 858. See also *Atlanta v. Warnock*, 91 Ga. 210, 18 S. E. 135, 23 L. R. A. 301, and note, 44 Am. St. 17; *Bulger v. Eden*, 82 Me. 352, 19 Atl. 829, 9 L. R. A. 205, and note. But a city may not empty a sewer into a mill pond without acquiring the right in some lawful way. *Vale Mills v. Nashua*, 63 N. H. 136.

In Kansas it has been held that in the construction of sewers emptying into a river, a city is not required to provide against phenomenal floods which are beyond reasonable anticipation, but is required to guard against floods such as have occasionally occurred, and which may be reasonably expected to occur again, and, failing to make such provision, it is liable for the consequences of its negligence. *Kansas City v. King*, 65 Kan. 64, 68 Pac. 1093.

control the town officers. And the end is not yet; for if a regulation be altered to suit the views of one jury, the alteration may give rise to another case, in which the new regulation will be likewise condemned. This theory is so vicious that it cannot possibly be admitted.”<sup>1</sup> The alternative is—and the only course consistent with principle—to leave the municipal corporation to judge finally in the exercise of such political power as has been confided to it.<sup>2</sup>

<sup>1</sup> *Carr v. Northern Liberties*, 35 Pa. St. 324, 329. See *Detroit v. Beckman*, 34 Mich. 125.

<sup>2</sup> *Louisville v. Hyatt*, 2 B. Mon. 177, 36 Am. Dec. 594.

Cities are under a political obligation to open such streets and build such market-houses as the convenience of the community requires; but they cannot be compelled to perform these duties, or be held responsible for non-performance. *Joliet v. Verley*, 35 Ill. 58. See, further, *Little Rock v. Willis*, 27 Ark. 572; *Duke v. Rome*, 20 Ga. 635; *Tate v. Railroad Co.*, 64 Mo. 149; *Bennett v. New Orleans*, 14 La. Ann. 120; *Commissioners v. Duckett*, 20 Md. 468; *Randall v. Eastern R. Corp.*, 106 Mass. 276; *Hughes v. Baltimore*, Taney, 243; *Weightman v. Washington*, 1 Black, 39, 17 L. ed. 52.

A city is not liable to an abutter for allowing a street to be used for market purposes. *Henkel v. Detroit*, 49 Mich. 249, 13 N. W. 611. But this doctrine does not deprive an individual of remedy when by reason of the negligent construction of a public work his property is injured, or when the necessary result of its construction is to flood or otherwise injure his property in a manner that would render a private individual liable. See *Van Pelt v. Davenport*, 40 Iowa, 308, 20 Am. Rep. 622, and note, p. 626; *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592; *Mayo v. Springfield*, 136 Mass. 10; *Weyman v. Jefferson*, 61 Mo. 55; *Broadwell v. Kansas City*, 75 Mo. 213; *Union v. Durkes*, 38 N. J. L. 21; *Hewison v. New Haven*, 37 Conn. 475, 9 Am. Rep. 342; *Hines v. Lockport*, 50 N. Y. 236; *Hardy v. Brooklyn*, 90 N. Y. 435; *Weightman v. Washington*, 1 Black, 39, 17 L. ed. 52; *Simmer v. St. Paul*, 23

*Minn.* 408; *Ross v. Clinton*, 46 Iowa, 606; *Inman v. Tripp*, 11 R. 1 520; *Damour v. Lyons City*, 44 Iowa, 276; *Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463; *Little Rock v. Willis*, 27 Ark. 572; *Princeton v. Gieske*, 93 Ind. 102; *Denver v. Rhodes*, 9 Col. 554, 13 Pac. 729; *Keating v. Cincinnati*, 38 Ohio St. 141; *Mayor, &c. Savannah v. Spears*, 66 Ga. 304; *Miles v. Worcester*, 154 Mass. 511, 28 N. E. 676, 13 L. R. A. 841, 26 Am. St. 264; *Selma v. Jones*, 202 Ala. 82, 79 So. 476, L. R. A. 1918 F, 1020; *Chicago Sanitary Dist. v. Ray*, 199 Ill. 63, 64 N. E. 1048, 93 Am. St. Rep. 102; *Taylor v. Baltimore*, 130 Md. 133, 99 Atl. 900, L. R. A. 1917 C, 1046; *Keene v. Huntington*, 79 W. Va. 713, 92 S. E. 119, L. R. A. 1917 F, 475.

A city is liable for negligence in repairing a sewer. *Fort Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743; *Kranz v. Mayor, &c. of Baltimore*, 64 Md. 491, 2 Atl. 908; *Stanchfield v. Newton*, 142 Mass. 110, 7 N. E. 703; and a State may be, if it has assumed to make one. *Ballou v. State*, 111 N. Y. 496, 18 N. E. 627.

If a city cuts a sewer in such a manner as to cause the collection of a large quantity of water which otherwise would not have flowed there, and to cast it upon the premises of an individual to his injury, this is a trespass for which the city is liable. *Ashley v. Port Huron*, 35 Mich. 296, citing many cases. See also *Bloomington v. Brokaw*, 77 Ill. 194; *Elgin v. Kimball*, 90 Ill. 356; *Dixon v. Baker*, 65 Ill. 518, 16 Am. Rep. 591; *Rowe v. Portsmouth*, 56 N. H. 291, 22 Am. Rep. 464; *Burton v. Chattanooga*, 7 Lea, 739; *Rhodes v. Cleveland*, 10 Ohio, 159, 36 Am. Dec. 82; *West Orange v. Field*, 37 N. J. Eq. 600; *Crawfords-*

And as the State is not responsible for the acts or neglects of public officers in respect to the duties imposed upon them for the public benefit, so one of these corporations is not liable to private suits for either the non-performance or the negligent performance of the public duties which it is required to assume, and does assume, for the general public, and from which the corporation itself receives neither profit nor special privilege.<sup>1</sup> And the same presumption

ville *v.* Bond, 96 Ind. 236; *Lehn v.* San Francisco, 66 Cal. 76, 4 Pac. 965; *Rychlicki v.* St. Louis, 98 Mo. 497, 11 S. W. 1001; *Blakely v.* Devine, 36 Minn. 53, 25 N. W. 342; *Seifert v.* Brooklyn, 101 N. Y. 136, 4 N. E. 321; *Albany v.* Sikes, 94 Ga. 30, 20 S. E. 257, 26 L. R. A. 653; *Shaw v.* Sebastopol, 159 Cal. 623, 115 Pac. 213; *Milledgeville v.* Sternbridge, 139 Ga. 692, 78 S. E. 35; *Atlanta v.* Holcomb, 20 Ga. App. 601, 93 S. E. 259; *Valparaiso v.* Spaeth, 166 Ind. 14, 76 N. E. 518; *Cromer v.* Logansport, 38 Ind. App. 661, 78 N. E. 1045; *Fitzgerald v.* Sharon, 143 Iowa, 730, 121 N. W. 523; *Hume v.* Des Moines, 146 Iowa, 624, 125 N. W. 846, 29 L. R. A. (N. S.) 126; *Daley v.* Watertown, 192 Mass. 116, 71 N. E. 143; *Whitten v.* Haverhill, 204 Mass. 95, 90 N. E. 409; *Diamond v.* Attleborough, 219 Mass. 587, 107 N. E. 445; *Weber v.* Minneapolis, 132 Minn. 170, 156 N. W. 287; *Vicksburg v.* Richardson, 90 Miss. 1, 42 So. 234; *Sandy v.* St. Joseph, 142 Mo. App. 330, 126 S. W. 989; *Naysmith v.* Auburn, 95 Neb. 582, 146 N. W. 971; *Dohrmann v.* Hudson County Board, etc., 84 N. J. L. 689, 87 Atl. 463; *Bloom v.* Orange, 91 N. J. L. 376, 103 Atl. 395; *Prime v.* Yonkers, 192 N. Y. 105, 84 N. E. 571; *Miles v.* Brooklyn, 90 N. Y. Supp. 702, 98 App. Div. 195; *Haley & Lang Co. v.* Huron, 36 S. D. 6, 153 N. W. 891; *Houston v.* Richardson, 42 Tex. Civ. App. 147, 94 S. W. 454; *McHenry v.* Parkersburg, 66 W. Va. 533, 66 S. E. 750; *Kunst v.* Grafton, 67 W. Va. 20, 67 S. E. 74, 26 L. R. A. (N. S.) 1201; *Lutz v.* Charleston, 76 W. Va. 657, 86 S. E. 561; *Knapp v.* Deer Creek, 162 Wis. 168, 155 N. W. 940.

As to the liability for increasing the flow of surface water on land by grad-

ing streets, compare the following cases where it was denied: *Bronson v.* Wallingford, 54 Conn. 513, 9 Atl. 393; *Stewart v.* Clinton, 79 Mo. 603; *Kehrer v.* Richmond, 81 Va. 745; *Meth. Ep. Ch. v.* Wyandotte, 31 Kan. 721, 3 Pac. 527; *Morris v.* Council Bluffs, 67 Iowa, 343, 25 N. W. 274; *Kennison v.* Beverly, 146 Mass. 467, 16 N. E. 278; *Heth v.* Fond du Lac, 63 Wis. 228, 23 N. W. 495; *Jordan v.* Benwood, 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. 859; *Miles v.* Brooklyn, 90 N. Y. Supp. 702, 98 App. Div. 195; *Harp v.* Baraboo, 101 Wis. 368, 77 N. W. 744; with the following cases where it was sustained: *Peters v.* Fergus Falls, 35 Minn. 549, 29 N. W. 586; *Gray v.* Knoxville, 85 Tenn. 99, 1 S. W. 622; *Gilluly v.* Madison, 63 Wis. 518, 24 N. W. 137; *Addy v.* Janesville, 70 Wis. 401, 35 N. W. 931; *Nevins v.* Peoria, 41 Ill. 502, 89 Am. Dec. 392; *Aurora v.* Gillett, 56 Ill. 132; *Aurora v.* Reed, 57 Ill. 29, 11 Am. Rep. 1; *Dixon v.* Baker, 65 Ill. 518, 16 Am. Rep. 591; *Bloomington v.* Brokaw, 77 Ill. 194; *Wilber v.* Fort Dodge, 120 Iowa, 555, 95 N. W. 186; *Hume v.* Des Moines, 146 Iowa, 624, 125 N. W. 846, 29 L. R. A. (N. S.) 126; *Beatrice v.* Leary, 45 Neb. 149, 63 N. W. 370, 50 Am. St. Rep. 546.

<sup>1</sup> *Eastman v.* Meredith, 36 N. H. 284; *Hill v.* Boston, 122 Mass. 344, 23 Am. Rep. 332; *Markey v.* Queens County, 154 N. Y. 675, 49 N. E. 71, 39 L. R. A. 46; *Moran v.* Pullman Palace Car Co., 134 Mo. 641, 36 S. W. 659, 33 L. R. A. 755, 56 Am. St. 543; *Snider v.* St. Paul, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151.

Nor does it change the rule that the duty is not specially imposed, but is assumed under a general law. *Wixon v.* Newport, 13 R. I. 454.

"The decisions draw a distinction between the acts of municipalities done in their corporate character, or business capacity, and those which they perform as functions of government, delegated by the state to its agencies as public instrumentalities; regarding the first, the municipality may be held liable for the acts of its representatives or employees, while as to the second, there is generally an immunity from liability, based on grounds of public policy." *Scibilia v. City of Philadelphia*, 279 Pa. St. 549, 124 Atl. 273, 32 A. L. R. 981.

A city is not liable for the negligent management of its hospitals: *Richmond v. Long*, 17 Gratt. 375; *Benton v. Trustees, &c.*, 140 Mass. 13, 1 N. E. 836; *Watson v. Atlanta*, 136 Ga. 370, 71 S. E. 664; *Tollefson v. Ottawa*, 228 Ill. 134, 81 N. E. 823; *Having v. Covington*, 25 Ky. L. Rep. 1617, 78 S. W. 431; *Twyman's Adm'r v. Frankfort*, 117 Ky. 518, 78 S. W. 446, 64 L. R. A. 572; or for the administration of impure vaccine virus under an ordinance compelling vaccination: *Wyatt v. Rome*, 105 Ga. 312, 31 S. E. 188, 42 L. R. A. 180, 70 Am. St. 41; or for an injury arising from defective machinery in an asylum which the State compelled it to maintain: *Hughes v. County of Monroe*, 147 N. Y. 49, 41 N. E. 407, 39 L. R. A. 33. See also *Freel v. School City of Crawfordsville*, 142 Ind. 27, 41 N. E. 312, 37 L. R. A. 301, and note thereto in L. R. A.; or for negligence in not maintaining proper poles in fire-signal system: *Pettingell v. Chelsea*, 161 Mass. 368, 37 N. E. 380, 24 L. R. A. 426; nor is it liable for injuries resulting to persons confined in jails and police stations from improper construction thereof or negligence in their management. *Evans v. Kankakee*, 231 Ill. 223, 83 N. E. 223; *Bowling Green v. Rogers*, 142 Ky. 558, 134 S. W. 921; *Braunstein v. Louisville*, 146 Ky. 777, 143 S. W. 372; *Mains v. Fort Fairfield*, 99 Me. 177, 59 Atl. 87; *Wilcox v. Rochester*, 190 N. Y. 137, 82 N. E. 1119; *Carty's Adm'r v. Winooski*, 78 Vt. 104, 62 Atl. 45, 2 L. R. A. (N. S.) 95; *Shaw v. Charleston*, 57 W. Va. 433, 50 S. E. 527. But in North

Carolina it has been held that a city is liable for injury to the health of a prisoner whom it confines in a damp, cold, filthy prison. *Shields v. Durham*, 118 N. C. 450, 24 S. E. 794, 36 L. R. A. 293, and note. Compare *Nichols v. Fountain*, 165 N. C. 166, 80 S. E. 1059, and *Hobbs v. Washington*, 168 N. C. 293, 84 S. E. 391.

A county is not liable for personal injuries sustained by reason of the imperfect construction of its courthouse. *Kincaid v. Hardin*, 53 Iowa, 430, 50 N. W. 589, 36 Am. Rep. 236; *Hollenbeck v. Winnebago Co.*, 95 Ill. 148, 35 Am. Rep. 151. See further, *Little v. Madison*, 49 Wis. 605, 6 N. W. 249, 35 Am. Rep. 793; *Dawson v. Aurelius*, 49 Mich. 479, 13 N. W. 824. And compare *post*, pp. 513-528, and notes.

A city is not liable for the torts of its police officers: *Cook v. Macon*, 54 Ga. 468; *M'Elroy v. Albany*, 65 Ga. 387, 38 Am. Rep. 791; *Grumbine v. Washington*, 2 McArthur, 578, 29 Am. Rep. 626; *Harman v. Lynchburg*, 33 Gratt. 37; *Buttrick v. Lowell*, 1 Allen, 172; *Elliott v. Philadelphia*, 75 Pa. St. 347; *Norristown v. Fitzpatrick*, 94 Pa. St. 121; *Caldwell v. Boone*, 51 Iowa, 687, 2 N. W. 614; *Attaway v. Cartersville*, 68 Ga. 740; *Worley v. Columbia*, 88 Mo. 106; *Hathaway v. Everett*, 205 Mass. 246, 91 N. E. 296, 137 Am. St. Rep. 436; *Lamont v. Stavannah*, 129 Minn. 321, 152 N. W. 720, L. R. A. 1915 E, 460; *Aldrich v. Youngstown*, 106 Ohio St. 342, 140 N. E. 164, 27 A. L. R. 1497; *Lawton v. Harkins*, 34 Okla. 545, 126 Pac. 727, 42 L. R. A. (N. S.) 69; or for their negligence: *Pollock's Adm'r v. Louisville*, 13 Bush, 221, 26 Am. Rep. 260, and note; *Little v. Madison*, 49 Wis. 605, 6 N. W. 249, 35 Am. Rep. 793; *Jolly v. Hawesville*, 89 Ky. 279, 12 S. W. 313; *Pasadena v. Railroad Commission*, 183 Cal. 526, 192 Pac. 25, 10 A. L. R. 1425; *Looney v. Sioux City*, 163 Iowa, 604, 145 N. W. 287, 51 L. R. A. (N. S.) 546; *Jones v. Sioux City*, 185 Iowa, 1178, 170 N. W. 445, 10 A. L. R. 474; *Franklin v. Seattle*, 112 Wash. 671, 192 Pac. 1015, 12 A. L. R. 247; *Long v. Neenah*, 128 Wis. 40, 107 N. W. 10, 8 Ann.

Cas. 463. But see *contra*, *Carrington v. St. Louis*, 89 Mo. 208, 1 S. W. 240; or for malfeasance or nonfeasance in relation to the maintenance or operation of its fire department; *Long v. Birmingham*, 161 Ala. 427, 49 So. 881, 18 Ann. Cas. 507; *Judson v. Winsted*, 80 Conn. 384, 68 Atl. 999, 15 L. R. A. (N. S.) 91; *Brown v. District of Columbia*, 29 App. D. C. 273, 25 L. R. A. (N. S.) 98; *Rogers v. Atlanta*, 143 Ga. 153, 84 S. E. 555; *Miller v. Macon*, 152 Ga. 648, 110 S. E. 873; *Wilcox v. Chicago*, 107 Ill. 334; *Aschoff v. Evansville*, 34 Ind. App. 25, 72 N. E. 279; *Jennie De Pauw Memorial M. E. Church v. New Albany Waterworks*, 193 Ind. 368, 140 N. E. 540; *Bradley v. Oskaloosa*, 193 Iowa, 1072, 188 N. W. 896; *Hazel v. Owensboro*, 30 Ky. L. Rep. 627, 99 S. W. 315, 9 L. R. A. (N. S.) 235; *Small v. Frankfort*, 203 Ky. 188, 261 S. W. 1111, 33 A. L. R. 692; *Burrill v. Augusta*, 78 Me. 118, 3 Atl. 177; *Brink v. Grand Rapids*, 144 Mich., 472, 108 N. W. 430; *Hodgins v. Bay City*, 156 Mich. 687, 121 N. W. 274, 132 Am. St. Rep. 546; *Grube v. St. Paul*, 34 Minn. 402, 26 N. W. 228; *Hillstrom v. St. Paul*, 134 Minn. 451, 159 N. W. 1076, L. R. A. 1917 B, 548; *Hattiesburg v. Geigor*, 118 Miss. 676, 79 So. 846; *Heller v. Sedalia*, 53 Mo. 159, 14 Am. Rep. 444; *Hawkins v. Springfield*, 194 Mo. App. 151, 186 S. W. 576; *Gillespie v. Lincoln*, 35 Neb. 34, 52 N. W. 811, 16 L. R. A. 349; *Smith v. Rochester*, 76 N. Y. 506; *Gaetjens v. New York*, 132 App. Div. 394, 116 N. Y. Supp. 759; *Peterson v. Wilmington*, 130 N. C. 76, 40 S. E. 853, 56 L. R. A. 959, 11 Am. Neg. Rep. 332; *Mack v. Charlotte City Waterworks*, 181 N. C. 383, 107 S. E. 244, 20 N. C. C. A. 823; *Aldrich v. Youngstown*, 106 Ohio St. 342, 140 N. E. 164, 27 A. L. R. 1497, overruling *Fowler v. Cleveland*, 100 Ohio St. 158, 126 N. E. 72, 9 A. L. R. 131; *Dodge v. Granger*, 17 R. I. 664, 24 Atl. 100, 15 L. R. A. 781; 33 Am. St. Rep. 901; *Blankenship v. Sherman*, 33 Tex. Civ. App. 507, 76 S. W. 805; *Brown v. Salt Lake City*, 33 Utah, 222, 93 Pac. 970, 14 L. R. A. (N. S.) 619, 126 Am. St. Rep. 828,

14 Ann. Cas. 1004; *Walsh v. Rutland*, 56 Vt. 228, 48 Am. Rep. 762; *Lynch v. North Yakima*, 37 Wash. 657, 80 Pac. 79, 12 L. R. A. (N. S.) 261; *Cunningham v. Seattle*, 40 Wash. 59, 82 Pac. 143, 4 L. R. A. (N. S.) 629, 19 Am. Neg. Rep. 55, on rehearing 42 Wash. 134, 84 Pac. 641, 4 L. R. A. (N. S.) 633, 7 Ann. Cas. 805; *Highway Trailer Co. v. Janesville Electric Co.*, 178 Wis. 340, 190 N. W. 110, 27 A. L. R. 1168. Compare *Bowden v. Kansas City*, 69 Kan. 587, 77 Pac. 573, 66 L. R. A. 181, 105 Am. St. Rep. 187, 1 Ann. Cas. 955, 16 Am. Neg. Rep. 339; *Davidson v. Hine*, 151 Mich. 294, 115 N. W. 246, 15 L. R. A. (N. S.) 575, 123 Am. St. Rep. 267, 14 Ann. Cas. 352, and *Wagner v. Portland*, 40 Oreg. 389, 60 Pac. 785, 67 Pac. 300. See *contra*, *Maxwell v. Miami*, 87 Fla. 107, 100 So. 147, 33 A. L. R. 682; or for the negligence of its bridge-tender: *Corning v. Saginaw*, 116 Mich. 74, 74 N. W. 307, 40 L. R. A. 526; or for the torts of other officers: *Hunt v. Boonville*, 65 Mo. 620, 27 Am. Rep. 299; *Wallace v. Menasha*, 48 Wis. 79, 4 N. W. 101, 33 Am. Rep. 804; *Trustees v. Schroeder*, 58 Ill. 353; *Cumberland v. Willison*, 50 Md. 138; *Cooney v. Hartland*, 95 Ill. 516; *Corsicana v. White*, 57 Tex. 382; *Gray v. Griffin*, 111 Ga. 361, 36 S. E. 792, 51 L. R. A. 131; or for their errors or neglects: *Wallace v. Menasha*, 48 Wis. 79, 4 N. W. 101, 33 Am. Rep. 804; *Collins v. Philadelphia*, 93 Pa. St. 272; *Hart v. Bridgeport*, 13 Blatch. 289; *McCarthy v. Boston*, 135 Mass. 197; *Tindley v. Salem*, 137 Mass. 171; *Summers v. Com's Daviess Co.*, 103 Ind. 262, 2 N. E. 725; *Abbett v. Com's Johnson Co.*, 114 Ind. 61, 16 N. E. 127; *Wakefield v. Newport*, 60 N. H. 374; *Condict v. Jersey City*, 46 N. J. L. 157; *Donnelly v. Tripp*, 12 R. I. 97; *Bd. of Com's Jasper Co. v. Allman*, 142 Ind. 573, 42 N. E. 206, 39 L. R. A. 58; *A'Hern v. Iowa St. Agr'l Society*, 91 Iowa, 97, 58 N. W. 1092, 24 L. R. A. 655; *Williamson v. Louisville Ind. School*, 95 Ky. 251, 24 S. W. 1065, 23 L. R. A. 200, and note, 44 Am. St. 243; *Whitfield v. Paris*, 84 Tex. 431, 19 S. W. 566, 15 L. R. A. 783, and note, 31 Am.

St. 69; *Brown v. Guyandotte*, 34 W. Va. 299, 12 S. E. 707, 11 L. R. A. 121; *Culver v. Streator*, 130 Ill. 238, 22 N. E. 810, 6 L. R. A. 270; but see *Sprague v. Tripp*, 13 R. I. 38; or for illegal action of officers under an illegal ordinance: *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1; *Hoggard v. Monroe*, 51 La. Ann. 683, 25 So. 349, 44 L. R. A. 477. But it is liable if in obedience to orders an officer acts under such ordinance: *Durkee v. Kenosha*, 59 Wis. 123, 17 N. W. 677; *Schussler v. Hennepin Co. Com'rs*, 67 Minn. 412, 70 N. W. 6, 64 Am. St. 424, 39 L. R. A. 75. And it may be liable if the negligent person is to be regarded as its servant, and not as a public officer: *Mulcairns v. Janesville*, 67 Wis. 24, 29 N. W. 565; *Waldron v. Haverhill*, 143 Mass. 582, 10 N. E. 481; *Perkins v. Lawrence*, 136 Mass. 305; *Semple v. Vicksburg*, 62 Miss. 63.

Upon the question of the liability of a municipality for injury resulting from the operation by one of its officers of a municipal automobile, the decisions are not in complete accord and cannot be wholly reconciled. In *Jones v. Sioux City*, 185 Iowa, 1178, 170 N. W. 445, 10 A. L. R. 474, it was held that a municipality is not relieved from liability for the negligence of the driver of an automobile hauling policemen to their beats; so in *Opocensky v. South Omaha*, 101 Neb. 336, 163 N. W. 325, L. R. A. 1917 E, 1170, the court held that a municipality was liable for the unlawful operation of a municipal automobile by a municipal officer while engaged in testing it. So in *Hewitt v. Seattle*, 62 Wash. 377, 113 Pac. 1084, 32 L. R. A. (N. S.) 632, where a person was injured by the negligent operation of a municipal automobile driven by the superintendent of streets in the performance of his duty, it was held that the municipality was liable; so in *Brown v. Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44, a municipality was held liable for an injury resulting from the unlawful operation of its automobile police patrol, and in *Johnston v. Chicago*, 258 Ill. 494, 101 N. E. 960, 45 L. R. A. (N. S.) 1167,

*Ann. Cas.* 1914 B, 339, 4 N. C. C. A. 40, it was held that a municipality was liable for the negligent operation of one of its automobiles by a municipal public library employee engaged in hauling books from the main library to substations; but in *Engel v. Milwaukee*, 158 Wis. 480, 149 N. W. 141, a municipality was held not to be liable for the negligent driving by its employee of an automobile in the service of the city's department of fire and police alarm system; and in *Stater v. Joplin*, 189 Mo. App. 383, 176 S. W. 241, where injury was caused by a municipal motor patrol wagon driven by a municipal employee, it was held that the municipality was not liable, and that this was so whether the injury resulted from the negligence of the driver or from defects in the vehicle.

In the management of the private property held by the corporation for its own profit or advantage, it is held to the same responsibility that private citizens are. *Moulton v. Scarborough*, 71 Me. 267, 36 Am. Rep. 308, and cases cited; *Rowland v. Kalamazoo Supts.*, 49 Mich. 553, 14 N. W. 494. But not where the acquisition and holding of such property is *ultra vires*. *Duncan v. Lynchburg (Va.)*, 34 S. E. 964, 48 L. R. A. 331.

A city is liable for negligent management of market buildings which it may erect, but is not compelled to: *Barron v. Detroit*, 94 Mich. 601, 54 N. W. 273, 19 L. R. A. 452, and note, 34 Am. St. 366.

In some jurisdictions it has been held that a city is liable for negligent management of its waterworks. *Esberg-Gunst Cigar Co. v. Portland*, 34 Ore. 282, 54 Pac. 664, 43 L. R. A. 435, 75 Am. St. 651; *Augusta v. Mackey*, 113 Ga. 64, 38 S. E. 339. But in New York it is held that a city is not liable for insufficiency of its water-works: *Springfield F. & M. Ins. Co. v. Keeseville*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. 667.

If a city lets a public building for hire, it is liable for negligence in managing it. *Worden v. New Bedford*, 131 Mass. 23. See also *Toledo v. Cone*, 41 Ohio St. 149, and note to 39

that legislative action has been devised and adopted on adequate information and under the influence of correct motives, will be applied to the discretionary action of municipal bodies, and of the State legislature, and will preclude, in the one case as in the other, all collateral attack.<sup>1</sup>

Among the implied powers of such an organization appears to be that of defending and indemnifying its officers where they have incurred liability in the *bona fide* discharge of their duty. It has been decided in a case where irregularities had occurred in the assessment of a tax, in consequence of which the tax was void, and the assessors had refunded to the persons taxed the moneys which had been collected and paid into the town, county, and State treasuries, that the town had authority to vote to raise a sum of money in order to refund to the assessors what had been so paid by them, and that such vote was a legal promise to pay, on which the assessors might maintain action against the town. "The general purpose of this vote," it was said, "was just and wise. The inhabitants, finding that three of their townsmen, who had been elected by themselves to an office, which they could not, without incurring a penalty, refuse to accept, had innocently and inadvertently committed an error which, in strictness of law, annulled their proceedings, and exposed them to a loss perhaps to the whole extent of their property, if all the inhabitants individually should avail themselves of their strict legal rights, — finding also that the treasury of the town had been supplied by the very money which these unfortunate individuals were obliged to refund from their own estates, and that, so far as the town tax went, the very persons who had rigorously exacted it from

L. R. A. 33, upon liabilities of counties in action for torts and negligence.

The same doctrine of immunity from private suit applies to public officers who are compelled to serve without compensation where their duties are quasi-judicial. *Daniels v. Hathaway*, 65 Vt. 247, 26 Atl. 970, 21 L. R. A. 377.

Mayor duly acting as court is not liable for maliciously issuing an erroneous order. *Scott v. Fishblate*, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696.

Statute made municipality liable for injuries done by "riotous or tumultuous assemblages of people." Held, not necessary that there should be any common intent, in those composing such assemblage, to injure in order that municipality be liable.

*Madisonville v. Bishop*, 113 Ky. 106, 67 S. W. 269, 57 L. R. A. 130. See also *Aron v. Wausau*, 98 Wis. 592, 74 N. W. 354, 40 L. R. A. 733; *Scanlon v. Wedger*, 156 Mass. 462, 31 N. E. 642, 16 L. R. A. 395.

<sup>1</sup> *Milhau v. Sharp*, 15 Barb. 193; *New York, &c. R. R. Co. v. New York*, 1 Hilton, 562; *Buell v. Ball*, 20 Iowa, 282; *Freeport v. Marks*, 59 Pa. St. 253; *Decatur v. Barteau*, 260 Ill. 612, 103 N. E. 601. Compare *State v. Cincinnati Gas Co.*, 18 Ohio St. 262. See cases *ante*, pp. 378-384. But in *Weston v. Syracuse*, 158 N. Y. 274, 53 N. E. 12, 43 L. R. A. 678, 70 Am. St. 472, it was held that a resolution accepting an imperfect sewer was void because secured by fraud and corruption.

the assessors, or who were about to do it, had themselves shared in due proportion the benefits and use of the money which had been paid into the treasury, in the shape of schools, highways, and various other objects which the necessities of a municipal institution call for, — concluded to reassess the tax, and to provide for its assessment in a manner which would have produced perfect justice to every individual of the corporation, and would have protected the assessors from the effects of their inadvertence in the assessment which was found to be invalid. The inhabitants of the town had a perfect right to make this reassessment, if they had a right to raise the money originally. The necessary supplies to the treasury of a town cannot be intercepted, because of an inequality in the mode of apportioning the sum upon the individuals. Debts must be incurred, duties must be performed, by every town; the safety of each individual depends upon the execution of the corporate duties and trusts. There is and must be an inherent power in every town to bring the money necessary for the purposes of its creation into the treasury; and if its course is obstructed by the ignorance or mistakes of its agents, they may proceed to enforce the end and object by correcting the means; and whether this be done by resorting to their original power of voting to raise money a second time for the same purposes, or by directing to reassess the sum before raised by vote, is immaterial; perhaps the latter mode is best, at least it is equally good.”<sup>1</sup>

It has also been held competent for a town to appropriate money to indemnify the school committee for expenses incurred in defend-

<sup>1</sup> Per *Parker*, Ch. J., in *Nelson v. Milford*, 7 Pick. 18, 23. See also *Baker v. Windham*, 13 Me. 74; *Fuller v. Groton*, 11 Gray, 340; *Board of Commissioners v. Lucas*, 93 U. S. 108, 23 L. ed. 822; *State v. Hamonton*, 38 N. J. L. 430, 20 Am. Rep. 404; *Miles v. Albany*, 59 Vt. 79, 7 Atl. 601. The duty, however, must have been one authorized by law, and the matter one in which the corporation had an interest. *Gregory v. Bridgeport*, 41 Conn. 76, 19 Am. Rep. 485.

In *Bristol v. Johnson*, 34 Mich. 123, it appeared that a township treasurer had been robbed of town moneys, but had accounted to the township therefor. An act of the legislature was then obtained for refunding this sum to him by tax. Held, not justified by the constitution of the State, which forbids the allowance of demands against the public by the legislature.

See *People v. Supervisor of Onondaga*, 16 Mich. 254.

No indemnity can be given an officer for a loss arising through his negligence. *Thorndike v. Camden*, 82 Me. 39, 19 Atl. 95, 7 L. R. A. 463.

Where local improvements within the power of the legislature to authorize are made under an act later adjudged unconstitutional, and the assessment made thereunder fails, the legislature may authorize a reassessment of the cost of the improvement. *Chester v. Black*, 132 Pa. St. 568, 19 Atl. 276, 6 L. R. A. 802, and note.

A municipal corporation, it is said, may offer rewards for the detection of offenders within its limits; but its promise to reward an officer for that which without such reward, it was his duty to do, is void. *Dillon Mun. Corp.* § 91, and cases cited. And see note, p. 459, *post*.



ing an action for an alleged libel contained in a report made by them in good faith, and in which action judgment had been rendered in their favor.<sup>1</sup> And although it should appear that the officer had exceeded his legal right and authority, yet, if he has acted in good faith in an attempt to perform his duty, the town has the right to adopt his act and to bind itself to indemnify him.<sup>2</sup> And perhaps the legislature may even have power to compel the town, in such a case, to reimburse its officers the expenses incurred by them in the honest but mistaken discharge of what they believed to be their duty, notwithstanding the town, by vote, has refused to do so.<sup>3</sup>

<sup>1</sup> *Fuller v. Groton*, 11 Gray, 340. See also *Hadsell v. Inhabitants of Hancock*, 3 Gray, 526; *Pike v. Middleton*, 12 N. H. 278.

<sup>2</sup> A surveyor of highways cut a drain for the purpose of raising a legal question as to the bounds of the highway, and the town appointed a committee to defend an action brought against the surveyor therefor, and voted to defray the expenses incurred by the committee. By the court: "It is the duty of a town to repair all highways within its bounds, at the expense of the inhabitants, so that the same may be safe and convenient for travelers; and we think it has the power, as incident to this duty, to indemnify the surveyor, or other agent, against any charge or liability he may incur in the *bona fide* discharge of this duty, although it may turn out on investigation that he mistook his legal rights and authority. The act by which the surveyor incurred a liability was the digging a ditch, as a drain for the security of the highway; and if it was done for the purpose of raising a legal question as to the bounds of the highway, as the defendants offered to prove at the trial, the town had, nevertheless, a right to adopt the act, for they were interested in the subject, being bound to keep the highway in repair. They had, therefore, a right to determine whether they would defend the surveyor or not; and having determined the question, and appointed the plaintiffs a committee to carry on the defense, they cannot now be allowed to deny their liability, after the committee have paid the charges incurred under the authority of the

town. The town had a right to act on the subject-matter which was within their jurisdiction; and their votes are binding and create a legal obligation, although they were under no previous obligation to indemnify the surveyor. That towns have an authority to defend and indemnify their agents who may incur a liability by an inadvertent error, or in the performance of their duties imposed on them by law, is fully maintained by the case of *Nelson v. Milford*, 7 Pick. 18." *Bancroft v. Lynnfield*, 18 Pick. 566, 568. And see *Briggs v. Whipple*, 6 Vt. 95; *Sherman v. Carr*, 8 R. I. 431.

A collector may be indemnified for public money stolen from him. *Fields v. Highland Co. Commissioners*, 36 Ohio St. 476. Compare *Bristol v. Johnson*, 34 Mich. 123.

<sup>3</sup> *Guilford v. Supervisors of Chenango*, 13 N. Y. 143. See this case commented upon by *Lyon, J.*, in *State v. Tappan*, 29 Wis. 664, 680. On the page last mentioned it is said: "We have seen no case, except in the courts of New York, which holds that such moral obligation gives the legislature power to compel payment." The case in New York is referred to as authority in *New Orleans v. Clark*, 95 U. S. 644, 24 L. ed. 521.

Where officers make themselves liable to penalties for refusal to perform duty, the corporation has no authority to indemnify them. *Halstead v. Mayor, &c. of New York*, 3 N. Y. 430; *Merrill v. Plainfield*, 45 N. H. 126. See *Frost v. Belmont*, 6 Allen, 152; *People v. Lawrence*, 6 Hill, 244; *Vincent v. Nantucket*, 12 Cush. 103.

*Construction of Municipal Powers.*

The powers conferred upon municipalities must be construed with reference to the object of their creation, namely, as agencies of the State in local government.<sup>1</sup> The State can create them for no other purpose, and it can confer powers of government to no other end, without at once coming in conflict with the constitutional maxim,

<sup>1</sup> "While the courts will give due weight to a legislative determination of what is a municipal purpose, yet where the purpose declared by statute to be such may in fact be not a municipal purpose, or where the purpose may be by the Constitution expressly or by implication excluded as a municipal purpose, or where the execution of the purpose may involve a violation of organic law, the courts will ultimately determine whether it is or is not a permissible municipal purpose, and in doing so will consider the pertinent facts that may be peculiar to the particular case as well as the controlling law in the premises." *Bradentown v. State* (Fla.), 102 So. 556, 36 A. L. R. 1297.

Under the police power cities and villages may enact reasonable ordinances to preserve health, suppress nuisances, prevent fires, regulate the use and storing of dangerous articles, and similar uses and purposes. *Cook County v. Chicago*, 311 Ill. 234, 142 N. E. 512, 31 A. L. R. 442.

The powers of municipal government must be exercised to conserve the interests of the inhabitants and taxpayers, and tax levies are legal only in so far as they are clearly authorized by law for proper public purposes. *Bradentown v. State* (Fla.), 102 So. 556, 36 A. L. R. 1297.

A somewhat peculiar question was involved in the case of *Jones v. Richmond*, 18 Gratt. 517. In anticipation of the evacuation of the city of Richmond by the Confederate authorities, and under the apprehension that scenes of disorder might follow which would be aggravated by the opportunity to obtain intoxicating liquors, the common council ordered the seizure and destruction of all such liquors within the city, and pledged the faith of the city to the payment of the

value. The Court of Appeals of Virginia afterwards decided that the city might be held liable on the pledge in an action of assumpsit. *Rives, J.*, says: "By its charter the council is specially empowered to 'pass all by-laws, rules, and regulations which they shall deem necessary for the peace, comfort, convenience, good order, good morals, health, or safety of said city, or of the people or property therein.' It is hard to conceive of larger terms for the grant of sovereign legislative powers to the specified end than those thus employed in the charter; and they must be taken by necessary and unavoidable intendment to comprise the powers of eminent domain within these limits of prescribed jurisdiction. There were two modes open to the council: first, to direct the destruction of these stores, leaving the question of the city's liability therefor to be afterwards litigated and determined; or secondly, assuming their liability, to contract for the values destroyed under their orders. Had they pursued the first mode, the corporation would have been liable in an action of trespass for the damages; but they thought proper to adopt the latter mode, make it a matter of contract, and approach their citizens, not as trespassers, but with the amicable proffer of a formal receipt and the plighted faith of the city for the payment. In this they seem to me to be well justified." Judge Dillon doubts the soundness of this decision. *Dillon, Mun. Corp.*, § 371, note. The case seems to us analogous in principle to that of the destruction of buildings to stop the progress of a fire. In each case private property is destroyed to anticipate and prevent an impending public calamity. *Jones v. Richmond* is overruled in *Wallace v. Richmond*, 94 Va. 204, 26 S. E. 586,

that legislative power cannot be delegated, or with other maxims designed to confine all the agencies of government to the exercise of their proper functions. And wherever the municipality shall attempt to exercise powers not within the proper province of local self-government, whether the right to do so be claimed under express legislative grant, or by implication from the charter, the act must be considered as altogether *ultra vires*, and therefore void.

A reference to a few of the adjudged cases will perhaps best illustrate this principle. The common council of the city of Buffalo undertook to provide an entertainment and ball for its citizens and certain expected guests on the 4th of July, and for that purpose entered into contract with a hotel-keeper to provide the entertainment at his house, at the expense of the city. The entertainment was furnished and in part paid for, and suit was brought to recover the balance due. The city had authority under its charter to raise and expend moneys for various specified purposes, and also "to defray the contingent and other expenses of the city." But providing an entertainment for its citizens is no part of municipal self-government, and it has never been considered, where the common law has prevailed, that the power to do so pertained to the government in any of its departments. The contract was therefore held void, as not within the province of the city government.<sup>1</sup>

36 L. R. A. 554. See *post*, pp. 1114-1117, 1296-1298.

Village may offer reward for arrest and conviction of incendiaries. *People v. Holly*, 119 Mich. 637, 78 N. W. 665, 44 L. R. A. 677, 75 Am. St. 435.

<sup>1</sup> *Hodges v. Buffalo*, 2 Denio, 110. See also the case of *New London v. Brainard*, 22 Conn. 552, which follows and approves this case. The cases differ in this only: that in the first, suit was brought to enforce the illegal contract, while in the second the city was enjoined from paying over moneys which it had appropriated for the purposes of the celebration. The cases of *Tash v. Adams*, 10 Cush. 252; *Hood v. Lynn*, 1 Allen, 103, and *Austin v. Coggeshall*, 12 R. I. 329, 34 Am. Rep. 648, are to the same effect.

In *Stegmaier v. Goeringer*, 218 Pa. St. 499, 67 Atl. 782, 11 Ann. Cas. 973, in which it was held that the general welfare clause in the Pennsylvania statute relating to cities of the third class was broad enough to confer the express power to make an appropri-

tion for the commemoration of events of great public interest, the court said: "The custom of commemorating important historical, military, and civil events is as old as mankind, and at common law the right of municipalities to make appropriations out of the public funds for the proper observance of such occasions was recognized for centuries. There is no reason why a municipality, unless restricted by statute, should not be permitted to make reasonable appropriations in order to fitly commemorate public events in which all the citizens thereof are, or should be, interested. . . . It must not be understood, however, that because in a proper case, and for a proper purpose, a municipality has the power to make such an appropriation it can do so without any limitations or restrictions. The general rule that a public corporation cannot make a contract to provide an entertainment for its citizens or guests is freely conceded; also that it is not within the power of cities of the

The supervisors of the city of New York refused to perform a duty imposed upon them by law, and were prosecuted severally

third class to make appropriations for expenses incurred in providing refreshments, entertainments and dinners for delegates to a convention; or for entertaining guests at a supper or ball; or, indeed, for the purpose of extending hospitality or furnishing social pleasures either to citizens or invited guests. While these limitations have been very properly imposed upon municipalities, it does not follow that they do not have the power to make an appropriation to fittingly decorate and otherwise ornament the streets and public buildings, and to provide suitable conveniences for the accommodation of the public in the enjoyment of the ceremonies incident to the occasion."

A town, it has been held, cannot lawfully be assessed to pay a reward offered by a vote of the town for the apprehension and conviction of a person supposed to have committed murder therein. *Gale v. South Berwick*, 51 Me. 174. See also *Hawk v. Marion County*, 48 Iowa, 472; *Hanger v. Des Moines*, 52 Iowa, 193, 2 N. W. 1105, 35 Am. Rep. 266; *Board of Commissioners v. Bradford*, 72 Ind. 455, 37 Am. Rep. 174; *Patton v. Stephens*, 14 Bush, 324; *Felker v. Elk County*, 70 Kan. 96, 78 Pac. 167, 3 Ann. Cas. 156; *Luchini v. Police Jury*, 126 La. 972, 53 So. 68, 21 Ann. Cas. 59. *Contra*, *Borough of York v. Forscht*, 23 Pa. St. 391; and see, *People v. Holly*, 119 Mich. 637, 78 N. W. 665, 44 L. R. A. 677, 75 Am. St. Rep. 435.

In Louisiana it has been held that a police jury, having the power to prohibit the sale of intoxicants in a parish, has power to offer rewards for evidence of violations of its ordinances, and that the fact that the prosecutions for these violations are carried on in the name of the State does not affect its power to offer the rewards. *Luchini v. Police Jury*, 126 La. 972, 53 So. 68, 21 Ann. Cas. 59.

As to the power of a municipality to bind itself by the offer of a reward, see further, *Crawshaw v. Roxbury*, 7 Gray, 374; *Lee v. Flemingsburg*, 7

*Dana*, 28; *Loveland v. Detroit*, 41 Mich. 367, 1 N. W. 952; *Janvrin v. Exeter*, 48 N. H. 83; *Murphy v. Jacksonville*, 18 Fla. 318.

An officer cannot claim an offered reward for merely doing his duty. *Pool v. Boston*, 5 Cush. 219. See *Stamp v. Cass County*, 47 Mich. 330, 11 N. W. 183.

Under its general authority to raise money for "necessary town charges", a town is not authorized to raise and expend moneys to send lobbyists to the legislature. *Frankfort v. Winterport*, 54 Me. 250; *Mead v. Acton*, 139 Mass. 341, 1 N. E. 413. Nor, under like authority, to furnish a uniform for a volunteer military company. *Clafin v. Hopkinton*, 4 Gray, 502.

Under power to raise money for celebration of holidays and "other public purposes", it may raise it for public concerts. *Hubbard v. Taunton*, 140 Mass. 467, 5 N. E. 157.

County cannot lease rooms of court-house to be used for private purposes. *State v. Hart*, 144 Ind. 107, 43 N. E. 7, 33 L. R. A. 118; upon lease of public buildings for private purposes, see note to this case in L. R. A.

Where a municipal corporation enters into a contract *ultra vires*, no implied contract arises to compensate the contractor for anything he may have done under it, notwithstanding the corporation may have reaped a benefit therefrom. *McSpedon v. New York*, 7 Bosw. 601; *McDonald v. Mayor*, 68 N. Y. 23; *Zottman v. San Francisco*, 20 Cal. 96; *Niles Water Works v. Mayor*, 59 Mich. 311, 26 N. W. 525; *Swanson v. Ottumwa*, 131 Iowa, 540, 106 N. W. 9, 5 L. R. A. (N. S.) 860, 9 Ann. Cas. 1117; *Minneapolis, etc., Electric Traction Co. v. Minneapolis*, 124 Minn. 351, 145 N. W. 609, 50 L. R. A. (N. S.) 143. Compare *East St. Louis v. East St. Louis, etc., Co.*, 19 Ill. App. 44; *Montgomery v. Montgomery Water Works*, 79 Ala. 233.

and judgment recovered for the penalty which the law imposed for such refusal. The board of supervisors then assumed, on behalf of the city and county, the payment of these judgments, together with the costs of defending the suits, and caused drafts to be drawn upon the treasurer of the city for these amounts. It was held that these drafts upon the public treasury to indemnify officers for disregard of duty were altogether unwarranted and void, and that it made no difference that the officers had acted conscientiously in refusing to perform their duty, and in the honest belief that the law imposing the duty was unconstitutional. The city had no interest in the suits against the supervisors, and appropriating the public funds to satisfy the judgments and costs was not within either the express or implied powers conferred upon the board.<sup>1</sup> It was in fact appropriating the public money for private purposes, and a tax levied therefor must consequently be invalid, on general principles controlling the right of taxation, which will be considered in another place. [But it has been held that in the absence of prohibitive charter provisions, a municipality has the power to reimburse a police officer for expenses and attorney's fees incurred in the defense of an action for false imprisonment; it appearing that the officer was acting in good faith in the exercise of his official duties.<sup>2</sup>] In an Iowa case it is said: "No instance occurs to us in which it would be competent for [a municipal corporation] to loan its credit or make its accommodation paper for the benefit of citizens, to enable them to execute private enterprises;"<sup>3</sup> and where it cannot loan its credit to private undertakings, it is equally without power to appropriate the moneys in its treasury for such purposes, or by the conduct of its officers to subject itself to implied obligations.<sup>4</sup> [In a Florida

<sup>1</sup> *Halstead v. Mayor, &c. of New York*, 3 N. Y. 430. See a similar case in *People v. Lawrence*, 6 Hill, 244. See also *Carroll v. St. Louis*, 12 Mo. 444; *Vincent v. Nantucket*, 12 Cush. 103; *Parsons v. Goshen*, 11 Pick. 396; *Merrill v. Plainfield*, 45 N. H. 126.

<sup>2</sup> *Moorhead v. Murphy*, 94 Minn. 123, 102 N. W. 219, 110 Am. St. Rep. 345, 68 L. R. A. 400, 3 Ann. Cas. 434. See also *Cullen v. Carthage*, 103 Ind. 196, 2 N. E. 571, 53 Am. Rep. 504; *Bancroft v. Lynnfield*, 18 Pick. 566, 29 Am. Dec. 623; *Fuller v. Groton*, 11 Gray, 340; *Pike v. Middleton*, 12 N. H. 278; *Bradley v. Hammonton*, 38 N. J. L. 430, 20 Am. Rep. 404; *Sherman v. Carr*, 8 R. I. 431.

<sup>3</sup> *Clark v. Des Moines*, 19 Iowa, 199,

224; *Carter v. Dubuque*, 35 Iowa, 416. See *Tyson v. School Directors*, 51 Pa. St. 9; *Freeland v. Hastings*, 10 Allen, 570; *Thompson v. Pittston*, 59 Me. 545; *Kelly v. Marshall*, 69 Pa. St. 319; *Allen v. Jay*, 60 Me. 124, Am. Law Reg., Aug., 1873 with note by Judge Redfield, 11 Am. Rep. 185.

<sup>4</sup> "In determining whether the subject-matter is within the legitimate authority of the town, one of the tests is to ascertain whether the expenses were incurred in relation to a subject specially placed by law in other hands. . . . It is a decisive test against the validity of all grants of money by towns for objects liable to that objection, but it does not settle questions arising upon expenditures for objects

case it was held that in view of the rule that the authority of municipalities to act, and particularly to levy a tax, must be made clearly to appear, and that doubts, if any, as to the power sought to be exercised, must be resolved against the municipality, it was not evident that the power to issue bonds to acquire land for an enlarged golf course in a city was included in the charter and general statutory powers of the city to purchase property for public parks and playgrounds and for any other municipal purpose the city council might deem proper, and to issue bonds for any purpose stated, and for any municipal purpose authorized by the charter and general law; the issuing of bonds to construct a golf course being more in the nature of a corporate than of a governmental function.<sup>1</sup>

The powers conferred upon the municipal governments must also be construed as confined in their exercise to the territorial limits embraced within the municipality;<sup>2</sup> and the fact that these powers are conferred in general terms will not warrant their exercise except within those limits. A general power "to purchase, hold, and convey estate, real and personal, for the public use" of the corporation, will not authorize a purchase outside the corporate limits for that purpose.<sup>3</sup> Without some special provision they cannot, as of course,

not specially provided for. In such cases the question still will recur, whether the expenditure was within the jurisdiction of the town. It may be safely assumed that, if the subject of the expenditure be in furtherance of some duty enjoined by statute, or in exoneration of the citizens of the town from a liability to a common burden, a contract made in reference to it will be valid and binding upon the town." *Allen v. Taunton*, 19 Pick. 485, 487. See *Tucker v. Virginia City*, 4 Nev. 20.

It is no objection to the validity of an act which authorizes an expenditure for a town-hall that rooms to be rented for stores are contained in it. *White v. Stamford*, 37 Conn. 578.

<sup>1</sup> *Bradentown v. State* (Fla.), 102 So. 556, 36 A. L. R. 1297. In a head-note in this case, prepared by the court, it is stated that "while the legislature might authorize municipalities, within appropriate limitations for the protection of taxpayers, to purchase and maintain golf courses to be impartially conducted in the interest of the local public, thereby declaring it to be a municipal purpose, the courts should not, by deducing

such authority from general powers conferred upon municipalities, anticipate express legislation conferring upon municipalities the specific power to establish and maintain golf courses." Compare *Capen v. Portland*, 112 Oreg. 14, 228 Pac. 105, 35 A. L. R. 589.

<sup>2</sup> *State v. Eason*, 114 N. C. 787, 19 S. E. 88, 41 Am. St. 811, 23 L. R. A. 520, and note upon boundary of municipality upon navigable stream.

"The general rule is that a municipal corporation cannot acquire real estate beyond its territorial limits, or lawfully perform any act beyond such limits, unless the power to do so is expressly given by law." *Langley v. Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133.

In Wisconsin it is held that the general rule that the authority of a municipal corporation does not extend beyond its corporate boundaries does not apply to its mere business functions, but does to its governmental authority. *Schneider v. Menasha*, 118 Wis. 298, 95 N. W. 94.

<sup>3</sup> *Riley v. Rochester*, 9 N. Y. 64.

It is competent for a municipal corporation to purchase land outside

possess any control or rights over lands lying outside;<sup>1</sup> and the taxes they levy of their own authority and the moneys they expend, must be for local purposes only.<sup>2</sup>

But the question is a very different one how far the legislature of the State may authorize the corporation to extend its action to objects outside the city limits, and to engage in enterprises of a public nature which may be expected to benefit the citizens of the municipality in common with the people of the State at large, and also in some special and peculiar manner, but which nevertheless are not under the control of the corporation, and are so far aside from the ordinary purposes of local governments that assistance by the municipality in such enterprises would not be warranted under any general grant of power for municipal government. For a few years past the sessions of the legislative bodies of the several States have been prolific in legislation which has resulted in flooding the country with municipal securities issued in aid of works of public improvement, to be owned, controlled, and operated by private parties, or by corporations created for the purpose; the works themselves being designed for the convenience of the people of the State at large, but being nevertheless supposed to be specially beneficial

to supply itself with water. *Newman v. Ashe*, 9 Bax. 380. Or to provide drainage. *Langley v. Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; *Coldwater v. Tucker*, 36 Mich. 474, 24 Am. Rep. 601. See *Rochester v. Rush*, 80 N. Y. 302; *Houghton v. Huron Copper M. Co.*, 57 Mich. 547, 24 N. W. 820.

<sup>1</sup> Per *Kent*, Chancellor, *Denton v. Jackson*, 2 Johns. Ch. 320. And see *Bullock v. Curry*, 2 Met. (Ky.) 171; *Weaver v. Cherry*, 8 Ohio St. 564; *North Hempstead v. Hempstead*, Hopk. 288; *Concord v. Boscawen*, 17 N. H. 465; *Coldwater v. Tucker*, 36 Mich. 474.

In Virginia it is held that, in the absence of express authority, a municipal corporation has no power to operate a stone quarry outside of its corporate limits, though the stone is to be used for the repair of streets which it is required to keep in order. *Donable's Adm'r v. Harrisonburg*, 104 Va. 533, 52 S. E. 174, 2 L. R. A. (N. S.) 910. But in Wisconsin it is held that a city having express authority to grade and pave streets and to purchase and hold real estate necessary

or convenient for its use, has, by implication therefrom, authority to purchase a stone quarry without its corporate limits for the purpose of obtaining therefrom raw material from which to manufacture crushed rock. *Schneider v. Menasha*, 118 Wis. 298, 95 N. W. 94.

A city may be authorized to take land outside for a park. *Matter of Application of Mayor*, 99 N. Y. 569. See also *Quitmann v. Jelks & McLeod*, 139 Ga. 238, 77 S. E. 76. But neither the legislature of the home State nor that of a sister State can authorize the city to construct and control a highway in the sister State. *Becker v. La Crosse*, 99 Wis. 414, 75 N. W. 84, 40 L. R. A. 829, 67 Am. St. 874.

<sup>2</sup> In *Parsons v. Goshen*, 11 Pick. 396, the action of a town appropriating money in aid of the construction of a county road was held void and no protection to the officers who had expended it. See also *Concord v. Boscawen*, 17 N. H. 465.

A town cannot lay a tax for the benefit of a cemetery which it does not control. *Luques v. Dresden*, 77 Me. 186.

to certain localities because running near or through them, and therefore justifying, it is supposed, the imposition of a special burden by taxation upon such localities to aid in their construction.<sup>1</sup> We have elsewhere<sup>2</sup> referred to cases in which it has been held that the legislature may constitutionally authorize cities, townships, and counties to subscribe to the stock of railroad companies, or to loan them their credit, and to tax their citizens to pay these subscriptions, or the bonds or other securities issued as loans, where a peculiar benefit to the municipality was anticipated from the improvement. The rulings in these cases, if sound, must rest upon the same right which allows such municipalities to impose burdens upon their citizens to construct local streets or roads, and they can only be defended on the ground that "the object to be accomplished is so obviously connected with the [municipality] and its interests as to conduce obviously and in a special manner to their prosperity and advancement."<sup>3</sup> But there are authorities which dispute their

<sup>1</sup> In *Merrick v. Inhabitants of Amherst*, 12 Allen, 500, it was held competent for the legislature to authorize a town to raise money by taxation for a State agricultural college, to be located therein. The case, however, we think, stands on different reasons from those where aid has been voted by municipalities to public improvements. See it explained in *Jenkins v. Andover*, 103 Mass. 94. And see similar cases referred to, *post*, p. 486, n. 3.

<sup>2</sup> *Ante*, pp. 236-239.

<sup>3</sup> *Talbot v. Dent*, 9 B. Monr. 526. See *Hasbrouck v. Milwaukee*, 13 Wis. 37.

It seems not inappropriate to remark in this place that the three authors who have treated so ably of municipal constitutional law (Mr. Sedgewick, *Stat. & Const. Law*, 464), of railway law (Judge Redfield), and of municipal corporations (Judge Dillon), have all united in condemning this legislation as unsound and unwarranted by the principles of constitutional law. See the views of the two writers last named in note to the case of *People v. Township Board of Salem*, 9 Am. Law Reg. 487. And Judge Dillon well remarks in his *Treatise on Municipal Corporations* (§ 104) that, "regarded in the light of its effects, there is little hesitation in affirming

that this invention to aid private enterprises has proved itself baneful in the last degree."

If we trace the beginning of this legislation, we shall find it originating at a time when there had been little occasion to consider with care the limitations to the functions of municipal government, because as yet those functions had been employed with general caution and prudence, and no disposition had been manifested to stretch their powers to make them embrace matters not usually recognized as properly and legitimately falling within them, or to make use of the municipal machinery to further private ends. Nor did the earliest decisions attract much attention, for they referred to matters somewhat local, and the spirit of speculation was not as yet rife. When the construction of railways and canals was first entered upon by an expenditure of public funds to any considerable extent, the States themselves took them in charge, and for a time appropriated large sums and incurred immense debts in enterprises, some of which were of high importance and others of little value, the cost and management of which threatened them at length with financial disaster, bankruptcy, and possible repudiation. No long experience was required to demonstrate



that railways and canals could not be profitably, prudently, or safely managed by the shifting administrations of State government; and many of the States not only made provision for disposing of their interest in works of public improvement, but, in view of a bitter experience of the evils already developed in undertaking to construct and control them, they amended their constitutions so as to prohibit the State, when again the fever of speculation should prevail, from engaging anew in such undertakings.

All experience shows, however, that men are abundant who do not scruple to evade a constitutional provision which they find opposed to their desires, if they can possibly assign a plausible reason for doing so; and in the case of the provisions before referred to, it was not long before persons began to question their phraseology very closely, not that they might arrive at the actual purpose, — which indeed was obvious enough, — but to discover whether that purpose might not be defeated without a violation of the express terms. The purpose clearly was to remand all such undertakings to private enterprise, and to protect the citizens of the State from being taxed to aid them; but while the State was forbidden to engage in such works, it was unfortunately not expressly declared that the several members of the State, in their corporate capacity, were also forbidden to do so. The conclusion sought and reached was that the agencies of the State were at liberty to do what was forbidden to the State itself, and the burden of debt which the State might not directly impose upon its citizens, it might indirectly place upon their shoulders by the aid of municipal action.

The legislation adopted under this construction some of the courts felt compelled to sustain, upon the accepted principle of constitutional law that no legislative authority is forbidden to the legislature unless forbidden in terms; and the voting of municipal aid to railroads became almost a matter of course wherever a plausible scheme could be presented

by interested parties to invite it. In some localities, it is true, vigorous protest was made; but as the handling of a large amount of public money was usually expected to make the fortune of the projectors, whether the enterprise proved successful or not, means either fair or unfair were generally found to overcome all opposition. Towns sometimes voted large sums to railroads on the ground of local benefit where the actual and inevitable result was local injury, and the projectors of one scheme succeeded in obtaining and negotiating the bonds of one municipality to the amount of a quarter of a million dollars, which are now being enforced, though the work they were to aid was never seriously begun. A very large percentage of all the aid voted was paid to "work up the aid", sacrificed in discounts to purchasers of bonds, expended in worthless undertakings, or otherwise lost to the taxpayers; and the cases might almost be said to be exceptional in which municipalities, when afterwards they were called upon to meet their obligations, could do so with a feeling of having received the expected consideration. Some State and territorial governors did noble work in endeavoring to stay this reckless legislative and municipal action, and some of the States at length rendered such action impossible by constitutional provisions so plain and positive that the most ingenious mind was unable to misunderstand or pervert them.

When the United States entered upon a scheme of internal improvement, the Cumberland road was the first important project for which its revenues were demanded. The promises of this enterprise were of continental magnificence and importance, but they ended, after heavy national expenditures, in a road no more national than a thousand others which the road-masters in the several States have constructed with the local taxes; and it was finally abandoned to the States as a common highway. When next a great national scheme was broached, the aid of the general government was demanded by way of subsidies to private corporations, who

presented schemes of works of great public convenience and utility, which were to open up the new Territories to improvement and settlement sooner than the business of the country would be likely to induce unaided private capital to do it, and which consequently appealed to the imagination rather than to facts to demonstrate their importance, and afforded abundant opportunity for sharp operators to call to their assistance the national sentiment, then peculiarly strong and active by reason of the attempt recently made to overthrow the government, in favor of projects whose national importance in many cases the imagination alone could discover. The general result was the giving away of immense bodies of land, and in some cases the granting of pecuniary aid, with a recklessness and often with an appearance of corruption that at length startled the people, and aroused a public spirit before which the active spirits in Congress who had promoted these grants, and sometimes even demanded them in the name of the poor settler in the wilderness who was unable to get his crops to market, were compelled to give way. The scandalous frauds connected with the Pacific Railway, which disgraced the nation in the face of the world, and the great and disastrous financial panic of 1873, were legitimate results of such subsidies; but the pioneer in the wilderness had long before discovered that land grants were not always sought or taken with a view to an immediate appropriation to the roads for the construction of which they were nominally made, but that the result in many cases was that large tracts were thereby kept out of the market and from taxation, which otherwise would have been purchased and occupied by settlers who would have lessened his taxes by contributing their share to the public burdens. The grants, therefore, in such cases, instead of being at once devoted to improvements for the benefit of settlers, were in fact kept in a state of nature by the speculators who had secured them, until the improvements of settlers in their vicinity

could make the grantees wealthy by the increase in value which such improvements gave to the land near them. In saying this the admission is freely made that in many cases the grants were promptly and honestly appropriated in accordance with their nominal purpose; but the general verdict now is that the system was necessarily corruptive and tended to invite fraud, and that some persons of influence managed to accumulate great wealth by grants indirectly secured to themselves under the unfounded pretense of a desire to aid and encourage the pioneers in the wilderness.

Some States also have recently in their corporate capacity again engaged in issuing bonds to subsidize private corporations, with the natural result of serious State scandals, State insolvency, public discontent, and in some cases, it would seem, almost inevitable repudiation. Their governments, amid the disorders of the times, have fallen into the hands of strangers and novices, and the hobby of public improvement has been ridden furiously under the spur of individual greed.

It has often been well remarked that the abuse of a power furnishes no argument against its existence; but a system so open to abuses may well challenge attention to its foundations. And when those foundations are examined, it is not easy to find for them any sound support in the municipal constitutional law of this country. The same reasons which justify subsidies to the business of common carriers by railway will support taxation in aid of any private business whatsoever.

It is sometimes loosely said that railway companies are public corporations, but the law does not so regard them. It is the settled doctrine of the law that, like banks, mining companies, and manufacturing companies, they are mere private corporations, supposed to be organized for the benefit of the individual corporators, and subject to no other public supervision or control than any other private association for business purposes to which corporate powers have been

granted. *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Bonaparte v. Camden & Amboy R. R. Co.*, Baldw. 216; *Eustis v. Parker*, 1 N. H. 273; *Ohio &c. R. R. Co. v. Ridge*, 5 Blackf. 78; *Cox v. Louisville, &c. R. R. Co.*, 48 Ind. 178, 189; *Roanoke, &c. R. R. Co. v. Davis*, 2 Dev. & Bat. 451; *Dearborn v. Boston, C. & M. R. R. Co.*, 4 Fost. 179; *Trustees, &c. v. Auburn, &c. R. R. Co.*, 3 Hill, 567; *Tinsman v. Belvidere, &c. R. R. Co.*, 26 N. J. L. 148; *Thorpe v. Rutland, &c. R. R. Co.*, 27 Vt. 140; *Alabama R. R. Co. v. Kidd*, 29 Ala. 221; *Turnpike Co. v. Wallace*, 8 Watts, 316; *Seymour v. Turnpike Co.*, 10 Ohio, 477; *Ten Eyck v. D. & R. Canal*, 3 Harr. 200; *Atlantic, &c. Telegraph Co. v. Chicago, &c. R. R. Co.*, 6 Biss. 158; *A. & A. on Corp.* §§ 30-36; *Redf. on Railw. c. 3, § 1*; *Pierce on Railroads*, 19, 20.

Taxation to subsidize them cannot therefore be justified on the ground of any public character they possess, any more than to subsidize banks or mining companies. It is truly said that it has long been the settled doctrine that the right of eminent domain may be employed in their behalf, and it has sometimes been insisted with much earnestness that wherever the State may aid an enterprise under the right of eminent domain, it may assist it by taxation also. But the right of taxation and the right of eminent domain are by no means co-extensive, and do not rest wholly upon like reasons. The former compels the citizen to contribute his proportion of the public burden; the latter compels him to part with nothing for which he is not to receive pecuniary compensation. The tax in the one case is an exaction, the appropriation in the other is only a forced sale. To take money for private purposes under pretense of taxation is, as has been often said, but robbery and plunder; to appropriate under the right of eminent domain for a private corporation robs no one, because the corporation pays for what is taken, and in some cases, important to the welfare and prosperity of the community, and where a public convenience is to be provided, — as in the

case of a grist mill, — it has long been held competent to exercise the one power, while the other was conceded to be inadmissible. Few persons would attempt to justify a tax in aid of a mill-owner, on the ground that laws appropriating lands for his benefit, but at his expense, have been supported. The truth is, the right to tax in favor of private corporations of any description must rest upon the broad ground that the power of the legislature, subject only to the express restrictions of the constitution, is supreme, and that, in the language of some of the cases, "if there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy, and not of natural justice, and the determination of the legislature is conclusive." (*Post*, p. 1030.) But nothing is better settled on authority than that this strong language, though entirely true when it refers to the making provision for those things which it falls within the province of government to provide for its citizens, or to the payment for services performed for the State, or the satisfaction of legal, equitable, or moral obligations resting upon it, is wholly inadmissible when the purpose is to impose a burden upon one man for the benefit of another. Many such cases might be suggested in which there would not only be a "possibility", but even a strong probability, that a small burden imposed upon the public to set an individual up in business, or to build him a house, or otherwise make him comfortable, would be promotive of the public welfare; but in law the purpose of any such burden is deemed private, and the incidental benefit to the public is not recognized as an admissible basis of taxation.

In *Allen v. Inhabitants of Jay*, 60 Me. 124, 11 Am. Rep. 185, it became necessary to reaffirm a doctrine, often declared by the courts, that however great was the power to tax, it was exceeded, and the legislature was attempting the exercise of a power not legislative in its character, when it undertook to impose a burden on the public for a private purpose. And it was

soundness, and it cannot be denied that this species of legislation has been exceedingly mischievous in its results, that it has created a

also held that the raising of money by tax in order to loan the same to private parties to enable them to erect mills and manufactories in such town, was raising it for a private purpose, and therefore illegal. *Appleton*, Ch. J., most truly remarks in that case, that "all security of private rights, all protection of private property, is at an end, when one is compelled to raise money to loan at the will of others for their own use and benefit, when the power is given to a majority to lend or give away the property of an unwilling minority." And yet how plain it is that the benefit of the local public might possibly have been promoted by the proposed erections. See, to the same effect, *Loan Association v. Topeka*, 20 Wall. 655, 22 L. ed. 455, where the whole subject is carefully considered and presented with clearness and force, in an opinion by Mr. Justice *Miller*; also *Commercial Bank v. Iola*, 2 Dill. C. C. 355; 9 Kan. 689; *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Cole v. La Grange*, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416, and cases cited; *Mather v. Ottawa*, 114 Ill. 659, 3 N. E. 216.

These cases are not singular: they are representative cases; and they are cited only because they are among the most recent expressions of judicial opinion on the subject. With them may be placed *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39, in which the Supreme Court of Massachusetts, after the great fire of 1872 in Boston, denied the power of the Commonwealth to permit taxation in order to loan the moneys out to the person who had suffered by the fire. Like decisions are found in *State v. Osawkee*, 14 Kan. 418, and *Feldman v. City Council*, 23 S. C. 57.

These decisions of eminent tribunals indicate a limit to legislative power in the matter of taxation, and hold, what has been decided very many times before, that it is not necessary the constitution should forbid expressly the

taxing for private purposes, since it is implied in the very idea of taxation that the purpose must be public, and a taking for any other purpose is unlawful confiscation. *Cooley on Taxation*, 67 *et seq.*

One difference there undoubtedly is between the case of a railroad corporation and a manufacturing corporation; that there are precedents in favor of taxing for the one and not for the other. But if the precedents are a departure from sound principle, then, as in every other case where principle is departed from, evils were to have been expected. A catalogue of these would include the squandering of the public domain; the enrichment of schemers whose policy it has been, first, to obtain all they can by fair promises, and then avoid as far and as long as possible the fulfillment of the promises; the corruption of legislation; the loss of State credit; great public debts recklessly contracted for moneys often recklessly expended; public discontent because the enterprises fostered from the public treasury and on the pretense of public benefit are not believed to be managed in the public interest; and, finally, great financial panic, collapse, and disaster. At such a cost has the strong expression of dissent which all the while has accompanied these precedents been disregarded and set aside.

Where legislature is prohibited from making a gift to any private person or corporation, it cannot release a debt due to State from such person or corporation: *Matter of Stanford*, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788. An appropriation for "relief" of a street contractor is void. *Conlin v. San Francisco*, 99 Cal. 17, 33 Pac. 753, 21 L. R. A. 474, 37 Am. St. 17; so one for benefit of sufferers from flood: *Patty v. Golgan*, 97 Cal. 251, 31 Pac. 1133, 18 L. R. A. 744; and one for relief of employee of State injured through negligence of his superior officer: *Bourn v. Hart*, 93 Cal. 321, 28 Pac. 951, 15 L. R. A. 431, 27 Am. St. 203.

great burden of public debt, for which in a large number of cases the anticipated benefit was never received, and that, as is likely to be the case where municipal governments take part in projects foreign to the purposes of their creation, it has furnished unusual facilities for fraud and public plunder, and led almost inevitably, at last, to discontent; sometimes even to disorder and violence. In some of the recent revisions of State constitutions, the legislature has been expressly prohibited from permitting the municipalities to levy taxes or incur debts in aid of works of public improvement, or to become stockholders in private corporations.<sup>1</sup>

<sup>1</sup> The following States have such provisions in their constitutions: Colorado, Connecticut, Illinois, Mississippi, Missouri, and New Hampshire.

Many of the State constitutions expressly forbid State aid to private corporations of any sort, and it is probable that their provisions are broad enough in some cases to prohibit aid by the municipalities also.

Upon what is an indebtedness within constitutional and statutory restrictions upon indebtedness of municipal corporations, see *Beard v. Hopkinsville*, 95 Ky. 239, 24 S. W. 872, 44 Am. St. 222, 23 L. R. A. 402, and note; *South Bend v. Reynolds*, 155 Ind. 70, 57 N. E. 706, 49 L. R. A. 795; *La Porte v. Gamewell F. A. T. Co.*, 146 Ind. 466, 45 N. E. 588, 58 Am. St. 359, 35 L. R. A. 686; *Brashear v. Madison*, 142 Ind. 685, 36 N. E. 252, 42 N. E. 349, 33 L. R. A. 474; *Lamar W. & E. L. Co. v. Lamar*, 128 Mo. 188, 31 S. W. 756, 32 L. R. A. 157; *McBean v. Fresno*, 112 Cal. 159, 44 Pac. 358, 53 Am. St. 191, 31 L. R. A. 794; *Kelley v. Minneapolis*, 63 Minn. 125, 65 N. W. 115; *Hodges v. Crowley*, 186 Ill. 305, 57 N. E. 889.

Where the constitution denies to municipalities the power to incur debts for any except necessary expenses unless specially authorized by the legislature and by popular vote, a debt for the purchase of an electric lighting plant for public purposes is within the restriction. *Mayo v. Washington*, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163.

The prohibition mentioned in the text above does not extend to construction of public improvements which shall be the property of the

municipality. *Sun P. & P. Assn. v. New York*, 152 N. Y. 257, 46 N. E. 499, 37 L. R. A. 788. But it prevents a city from becoming part owner. *Ampt v. Cincinnati*, 56 Ohio, 47, 46 N. E. 69, 35 L. R. A. 737, and note.

Prohibition of aid to any corporation applies only to private corporations. Does not prevent gift to United States. *Lancey v. King Co.*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817.

Where the constitution forbids the loan of the public credit for private benefit a statute authorizing the issue of bonds to pay for a local improvement, the cost thereof to be recovered by the levy of annual installments upon the property benefited, is void. *Martin v. Tyler*, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838.

By becoming a member of a mutual insurance company a municipality does not become the owner of any stock or bonds of the company in violation of a constitutional provision prohibiting any municipality from owning any stock or bonds of any association or corporation; and by giving premium notes for the payment of assessments to meet losses incurred by such an insurance company, the municipality does not loan its credit to the company in violation of a constitutional prohibition against doing so. *French v. Millville*, 66 N. J. L. 392, 49 Atl. 465.

For a contract between a municipality and a transportation company which was held not to violate a constitutional provision prohibiting any city from giving any money or property or loaning its money or credit to

Assuming that any such subscriptions or securities may be authorized, the first requisite to their validity would seem, then, to be a special legislative authority to make or issue them; an authority which does not reside in the general words in which the powers of local self-government are usually conferred,<sup>1</sup> and one also which

or in aid of any individual, association or corporation, see *Admiral Realty Co. v. New York*, 206 N. Y. 110, 99 N. E. 241.

A constitutional prohibition against making a donation directly to a railroad precludes a municipality from making such a donation indirectly by compensating citizens who have already paid over money to the corporation. *Adel v. Woodall*, 122 Ga. 535, 50 S. E. 481.

Upon the general subject of municipal bonds, when they may be issued, for what purposes, etc., see notes to 37 L. ed. U. S. 145, and 34 L. ed. U. S. 344.

<sup>1</sup> *Bullock v. Curry*, 2 Met. (Ky.) 171.

A general power to borrow money or incur indebtedness to aid in the construction of "any road or bridge" must be understood to have reference only to the roads or bridges within the municipality. *Stokes v. Scott County*, 10 Iowa, 166; *State v. Wapello County*, 13 Iowa, 388; *Lafayette v. Cox*, 5 Ind. 38.

Power to submit to village voters raising money for extraordinary purposes does not cover the submission of railroad aid. *Perrin v. New London*, 67 Wis. 416, 30 N. W. 623. There are decisions in the Supreme Court of the United States which appear to be to the contrary. The city charter of Muscatine conferred in detail the usual powers, and then authorized the city "to borrow money for any object in its discretion", after a vote of the city in favor of the loan. In *Meyer v. Muscatine*, 1 Wall. 384, 17 L. ed. 564, the court seem to have construed this clause as authorizing a loan for *any object whatever*; though such phrases are understood usually to be confined in their scope to the specific objects before enumerated; or at least to those embraced within the ordinary functions of municipal governments. See *Lafayette v. Cox*, 5

Ind. 38. The case in 1 Wallace was followed in *Rogers v. Burlington*, 3 Wall. 654, 18 L. ed. 79, four justices dissenting. See also *Mitchell v. Burlington*, 4 Wall. 270, 18 L. ed. 350. But in *Brenham v. German American Bank*, 144 U. S. 173, 549, 36 L. ed. 390, 399, 12 Sup. Ct. Rep. 559, 975, it was held that power conferred upon a municipality to borrow money "for general purposes" on the credit of the municipality, only gave power to borrow money for ordinary governmental purposes, such as are generally carried out with revenues derived from taxation, and *Rogers v. Burlington*, *supra*, and *Mitchell v. Burlington*, *supra*, were expressly overruled.

It has been held that a municipal corporation having power to borrow money may make its obligations payable wherever it shall agree. *Meyer v. Muscatine*, 1 Wall. 384, 17 L. ed. 564; *Lynde v. County*, 16 Wall. 6, 21 L. ed. 272. But some cases hold that such obligations can only be made payable at the corporation treasury, unless there is express legislative authority to make them payable elsewhere. *People v. Tazewell County*, 22 Ill. 147; *Pekin v. Reynolds*, 31 Ill. 529.

If the power to issue bonds is given, power to tax to meet them is impliedly given, unless a clear intent to the contrary is shown. *Quincy v. Jackson*, 113 U. S. 332, 28 L. ed. 1001, 5 Sup. Ct. Rep. 544; *Scotland Co. Court v. United States*, 140 U. S. 41, 35 L. ed. 351, 11 Sup. Ct. Rep. 697; *United States v. Saunders*, 124 Fed. 124, 59 C. C. A. 394; *Rose v. McKie*, 145 Fed. 584, 76 C. C. A. 274; *State v. Bristol*, 109 Tenn. 315, 70 S. W. 1031; *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917 A, 1244. See also *Minden-Edison Light & Power Co. v. Minden*, 94 Neb. 161, 142 N. W. 673. But power to borrow money on the credit of the city does not of itself

must be carefully followed by the municipality in all essential particulars, or the subscription or security will be void.<sup>1</sup> And while mere irregularities<sup>2</sup> of action, not going to the essentials of the power, would not prevent parties who had acted in reliance upon the securities enforcing them, yet as the doings of these corporations are matters of public record, and they have no general power to

include power to issue negotiable bonds therefor. *Brenham v. German American Bank*, 144 U. S. 173, 549, 36 L. ed. 390, 12 Sup. Ct. Rep. 559, 975; *Merrill v. Monticello*, 138 U. S. 673, 34 L. ed. 1069, 11 Sup. Ct. Rep. 441; *Folsom v. School Directors*, 91 Ill. 402; *Heins v. Lincoln*, 102 Iowa, 69, 71 N. W. 189. In some States, however, the contrary rule prevails. *Schmutz v. Little Rock Special School Dist.*, 78 Ark. 118, 95 S. W. 438; *Buch's Ex'r v. Fluvanna County*, 86 Va. 452, 10 S. E. 532.

<sup>1</sup> See *Harding v. Rockford, &c. R. R. Co.*, 65 Ill. 90; *Dunnovan v. Green*, 57 Ill. 63; *Springfield, &c. R. R. Co. v. Cold Spring*, 72 Ill. 603; *People v. County Board of Cass*, 77 Ill. 438; *Cairo, &c. R. R. Co. v. Sparta*, 77 Ill. 505; *George v. Oxford*, 16 Kan. 72; *Hamlin v. Meadville*, 6 Neb. 227; *McClure v. Oxford*, 94 U. S. 429, 24 L. ed. 129; *Bates Co. v. Winters*, 97 U. S. 83, 24 L. ed. 933; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Bissell v. Spring Valley*, 110 U. S. 162, 28 L. ed. 105, 3 Sup. Ct. Rep. 555; *Keith County v. Citizens' Savings & Loan Ass'n*, 116 Fed. 13, 53 C. C. A. 525; *Aurora v. Hayden*, 23 Colo. App. 1, 126 Pac. 1109; *Hartzler v. Goodland*, 97 Kan. 129, 154 Pac. 265; *Brownfield v. Kearney* 94 Neb. 419, 143 N. W. 475; *Burwell v. Lillington*, 171 N. C. 94, 87 S. E. 970; *McAndrew v. Dunmore Borough*, 254 Pa. St. 101, 91 Atl. 237; *Simpson v. Nacogdoches*, (Tex. Civ. App.) 152 S. W. 858; *State v. Clausen*, 87 Wash. 111, 151 Pac. 251.

Bonds cannot run a longer time than the legislature has given permission for. *Barnum v. Okolona*, 148 U. S. 393, 37 L. ed. 495, 13 Sup. Ct. Rep. 638. Strict compliance with all conditions necessary. *Lytle v. Lansing*, 147 U. S. 59, 37 L. ed. 78, 13 Sup.

Ct. Rep. 254; *Stewart v. Lansing*, 104 U. S. 505, 26 L. ed. 866; *People v. Van Valkenburg*, 63 Barb. 105; *Case v. Sullivan*, 222 Ill. 56, 78 N. E. 37. But power to issue interest-bearing bonds carries with it power to issue negotiable coupons for the interest. *Board of Ed. v. De Kay*, 148 U. S. 591, 37 L. ed. 573, 13 Sup. Ct. Rep. 706.

Where the statute requires that the bonds shall recite the purposes for which they are issued, it is not sufficient to recite that they are issued by virtue of a specified ordinance in which is contained a statement of the purpose for which the bonds are to be issued. Bonds containing no further or more specific recital of purpose are void in the hands of every holder. *Barnett v. Denison*, 145 U. S. 135, 36 L. ed. 652, 12 Sup. Ct. Rep. 819.

Where question submitted to popular vote was on bonds bearing interest payable annually, making interest payable semi-annually invalidates the bonds. *Skinner v. Santa Rosa*, 107 Cal. 469, 40 Pac. 742, 29 L. R. A. 512.

Where statute prescribes that they shall be payable "in gold coin or lawful money of the United States", making them payable in gold coin invalidates them. *Ibid.*, and see note hereto in L. R. A. Place of payment of coupons cannot be varied. *Middleton v. St. Augustine*, 42 Fla. 287, 29 So. 421.

<sup>2</sup> Like error in copying a single word in the title of a statute, or a misrecital of the name of the obligor corporation. *Board of Ed. v. De Kay*, 148 U. S. 591, 37 L. ed. 573, 13 Sup. Ct. Rep. 706. And any improper or fraudulent action taken by the municipality in regard to the proceeds of the bonds after their issue cannot invalidate them. *Cairo v. Zane*, 149 U. S. 122, 37 L. ed. 673, 13 Sup. Ct. Rep. 803.

issue negotiable securities,<sup>1</sup> any one who becomes holder of such securities, even though they be negotiable in form, will take them with constructive notice of any want of power in the corporation to issue them, and cannot enforce them when their issue was unauthorized.<sup>2</sup>

<sup>1</sup> *Thomson v. Lee County*, 3 Wall. 327, 18 L. ed. 177; *Police Jury v. Britton*, 15 Wall. 566, 21 L. ed. 251; *Wells v. Supervisors*, 102 U. S. 625, 26 L. ed. 122; *Claiborne Co. v. Brooks*, 111 U. S. 400, 28 L. ed. 47, 4 Sup. Ct. Rep. 489; *Carter Co. v. Sinton*, 120 U. S. 517, 30 L. ed. 701, 7 Sup. Ct. Rep. 650; *Starin v. Genoa*, 23 N. Y. 439; *People v. Supervisors*, 11 Cal. 170; *Dively v. Cedar Falls*, 21 Iowa, 565; *Smith v. Cheshire*, 13 Gray, 318; *People v. Gray*, 23 Cal. 125; *Bradbury v. Idaho Falls*, 32 Idaho, 28, 177 Pac. 388; *Reed v. Cedar Rapids*, 136 Iowa, 191, 113 N. W. 773; *Schieffelin v. Hylan*, 124 N. Y. Supp. 506. See *Thomas v. Richmond*, 12 Wall. 349, 20 L. ed. 453; *Katzenberger v. Aberdeen*, 121 U. S. 172, 30 L. ed. 911, 7 Sup. Ct. Rep. 947; *Emery v. Mariaville*, 56 Me. 315; *Sherrard v. Lafayette Co.*, 3 Dill. 236.

The power to tax in aid of railroads does not necessarily give power to issue negotiable bonds. *Concord v. Robinson*, 121 U. S. 165, 30 L. ed. 885, 7 Sup. Ct. Rep. 937; *Kelly v. Milan*, 127 U. S. 139, 32 L. ed. 77, 8 Sup. Ct. Rep. 1101. Compare *Savannah v. Kelly*, 108 U. S. 184, 27 L. ed. 696, 2 Sup. Ct. Rep. 468; *Richmond v. McGirr*, 78 Ind. 192.

<sup>2</sup> There is considerable confusion in the cases on this subject. If the corporation has no authority to issue negotiable paper, or if the officers who assume to do so have no power under the charter for that purpose, there can be no doubt that the defense of want of power may be made by the corporation in any suit brought on the securities. *Smith v. Cheshire*, 13 Gray, 318; *Gould v. Sterling*, 23 N. Y. 456; *Andover v. Grafton*, 7 N. H. 298; *Clark v. Des Moines*, 19 Iowa, 199; *M'Pherson v. Foster*, 43 Iowa, 48; *Bissell v. Kankakee*, 64 Ill. 249; *Big Grove v. Wells*, 65 Ill. 263; *Wade v. La Moille*, 112 Ill. 79; *Elmwood v. Marey*, 92 U. S. 289, 23 L. ed. 710; *Concord v.*

*Portsmouth Savings Bank*, 92 U. S. 625, 23 L. ed. 628; *St. Joseph v. Rogers*, 16 Wall. 644, 21 L. ed. 328; *Pendleton Co. v. Amy*, 13 Wall. 297, 20 L. ed. 579; *Marsh v. Fulton Co.*, 10 Wall. 676, 19 L. ed. 1040; *East Oakland v. Skinner*, 94 U. S. 255, 24 L. ed. 125; *South Ottawa v. Perkins*, 94 U. S. 260, 24 L. ed. 154; *McClure v. Oxford*, 94 U. S. 429, 24 L. ed. 129; *Swanson v. Ottumwa*, 131 Iowa, 540, 106 N. W. 9, 5 L. R. A. (N. S.) 860, 9 Ann. Cas. 1117; *Schmitz v. Zeh*, 91 Minn. 290, 97 N. W. 1049, 1 Ann. Cas. 322. And in any case, if the holder has received the securities with notice of any valid defense, he takes them subject thereto. *Lytle v. Lansing*, 147 U. S. 59, 37 L. ed. 78, 13 Sup. Ct. Rep. 254; *Stewart v. Lansing*, 104 U. S. 505, 26 L. ed. 866; *St. Lawrence Tp. v. Furman*, 171 Fed. 400, 96 C. C. A. 356, 17 Ann. Cas. 1244.

If the issue is without authority, the doctrine of protection to a purchaser in good faith has no application. *Merchants' Bank v. Bergen Co.*, 115 U. S. 384, 29 L. ed. 430, 6 Sup. Ct. Rep. 88.

Where a legislative enactment purports to confer upon a municipality authority to issue bonds, and such authority is in conflict with express or implied provisions of the Constitution, the enactment confers no authority, and bonds issued thereunder are void in the hands of *bona fide* holders, and the municipality is not estopped to deny the validity of the bonds. *State ex rel. Nuveen v. Greer*, 88 Fla. 249, 102 So. 739, 37 A. L. R. 1298. But where the corporation has power to issue negotiable paper in some cases, and its officers have assumed to do so in cases not within the charter, whether a *bona fide* holder would be chargeable with notice of the want of authority in the particular case, or on the other hand, would be entitled to rely on the securities themselves as sufficient evidence that they were properly is-



sued when nothing appeared on their face to apprise him of the contrary, is a question still open to some dispute.

Where the amount of indebtedness is limited by the State Constitution and the bonds contain a recital that the total amount of the issue does not exceed the limit, and the bonds do not show on their face the amount of the issue, it has been held that the municipality will be estopped by the recital as against a *bona fide* purchaser. *Chaffee Co. v. Potter*, 142 U. S. 355, 35 L. ed. 1040, 12 Sup. Ct. Rep. 216; *Board of Commissioners v. E. H. Rollins & Sons*, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. 390. Compare *Dixon Co. v. Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Lake Co. v. Graham*, 130 U. S. 674, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654; *Sutliff v. Board of County Commissioners*, 147 U. S. 230, 37 L. ed. 145, 13 Sup. Ct. Rep. 318; *St. Lawrence Tp. v. Furman*, 171 Fed. 400, 96 C. C. A. 356, 17 Ann. Cas. 1244; *Schnell v. Rock Island*, 232 Ill. 89, 83 N. E. 462, 14 L. R. A. (N. S.) 874; *Eddy Valve Co. v. Crown Point*, 166 Ind. 613, 76 N. E. 536, 3 L. R. A. (N. S.) 684.

In *South Bend v. Reynolds*, 155 Ind. 70, 57 N. E. 706, 49 L. R. A. 795, it was held that where the debt arises under a continuing contract of lease and the annual installments, together with all other running expenses, are within the current revenues of the city, such debt does not pass the prescribed limit of indebtedness, no matter how great the aggregate during the life of the contract.

For other cases upon limitation of indebtedness, see *Kiehle v. South Bend*, 44 U. S. App. 687, 36 L. R. A. 228; *Rauch v. Chapman*, 16 Wash. 568, 48 Pac. 253, 36 L. R. A. 407, 58 Am. St. 52; *Grand Island & N. W. R. Co. v. Baker*, 6 Wyo. 369, 45 Pac. 494, 34 L. R. A. 835, 71 Am. St. 926; *Saleno v. Neosho*, 127 Mo. 627, 30 S. W. 190, 27 L. R. A. 769, 48 Am. St. 653; *Brooke v. Philadelphia*, 162 Pa. 123, 29 Atl. 387, 24 L. R. A. 781; *Beard v. Hopkinsville*, 95 Ky. 239, 24 S. W. 872, 44 Am. St. 222, 23 L. R. A. 402, and note; *Crowder v. Sullivan*, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; *Quill v.*

*Indianapolis*, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681.

In *Stoney v. American Life Insurance Co.*, 11 Paige, 635, it was held that a negotiable security of a corporation which upon its face appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder thereof without notice, although such security was in fact issued for a purpose, and at a place not authorized by the charter of the company, and in violation of the laws of the State where it was actually issued.

In *Gelpcke v. Dubuque*, 1 Wall. 175, 203, 17 L. ed. 520, 524, the law is stated as follows: "When a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such holder than any other commercial paper." See also *Aspinwall v. Daviess Co.*, 22 How. 364, 16 L. ed. 296; *Bissell v. Jeffersonville*, 24 How. 287, 16 L. ed. 664; *Lexington v. Butler*, 14 Wall. 282, 20 L. ed. 809; *Moran v. Commissioners of Miami Co.*, 2 Black, 722, 17 L. ed. 342; *De Voss v. Richmond*, 18 Gratt. 338; *San Antonio v. Lane*, 32 Tex. 405; *State v. Commissioners*, 37 Ohio St. 526.

In *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125, 129, it is said: "A citizen who deals directly with a corporation, or who takes its negotiable paper, is presumed to know the extent of its corporate power. But when the paper is, upon its face, in all respects such as the corporation has authority to issue, and its only defect consists in some extrinsic fact, — such as the purpose or object for which it was issued, — to hold that the person taking the paper must inquire as to such extraneous fact, of the existence of which he is in no way apprised, would obviously conflict with the whole policy of the law in regard to negotiable paper." In *Madison & Indianapolis Railroad Co. v. The Norwich Savings Society*,

24 Ind. 457, this doctrine is approved; and a distinction made, in the earlier case of *Smead v. Indianapolis, &c. Railroad Co.*, 11 Ind. 104, between paper executed *ultra vires* and that executed within the power of the corporation, but, by an abuse of the power in that particular instance, was repudiated.

In *St. Joseph v. Rogers*, 16 Wall. 644, 21 L. ed. 328, it was decided that where power is conferred to issue bonds, but only in a particular manner, or subject to certain regulations, conditions, or qualifications, and the bonds are actually issued with recitals showing compliance with the law, the proof that any of the recitals are incorrect will not constitute a defense to a suit on the bonds, "if it appears that it was the sole province of the municipal officers who executed the bonds to decide whether or not there had been an antecedent compliance with the regulation, condition, or qualification which it is alleged was not fulfilled." And see *Moran v. Commissioners of Miami Co.*, 2 Black, 722, 17 L. ed. 342; *Pendleton Co. v. Amy*, 13 Wall. 297, 20 L. ed. 579; *Chute v. Winegar*, 15 Wall. 355, 21 L. ed. 170; *Coloma v. Eaves*, 92 U. S. 484, 23 L. ed. 579; *Venice v. Murdoch*, 92 U. S. 494, 23 L. ed. 583; *Marcy v. Oswego*, 92 U. S. 637, 23 L. ed. 748; *Humboldt v. Long*, 92 U. S. 642, 23 L. ed. 752; *Douglas Co. v. Bolles*, 94 U. S. 104, 24 L. ed. 46; *Johnson Co. v. January*, 94 U. S. 202, 24 L. ed. 343; *Scotland Co. v. Thomas*, 94 U. S. 682, 24 L. ed. 219; *Wilson v. Salamanca*, 99 U. S. 499, 25 L. ed. 330; *Menasha v. Hazard*, 102 U. S. 81, 26 L. ed. 85; *Lincoln v. Iron Co.*, 103 U. S. 412, 26 L. ed. 518; *Bonham v. Needles*, 103 U. S. 648, 26 L. ed. 451; *Cairo v. Zane*, 149 U. S. 122, 37 L. ed. 673, 13 Sup. Ct. Rep. 803; *Stanly County v. Coler*, 190 U. S. 437, 47 L. ed. 1126, 23 Sup. Ct. Rep. 811; *Hitchcock v. Platt*, 201 U. S. 646, 50 L. ed. 903, 26 Sup. Ct. Rep. 761; *Aurora v. Gates*, 208 Fed. 101, 125 C. C. A. 329, L. R. A. 1915 A, 910; *Chinak v. Burnside*, 150 Ga. 556, 104 S. E. 435; *Greene v. Rienzi*, 87 Miss. 463, 40 So. 17, 112 Am. St. Rep. 449; *Weil v. Newbern*, 126 Tenn. 223, 148 S. W.

680, L. R. A. 1915 A, 1009, Ann. Cas. 1913 E, 25.

That neither irregularities in issuing bonds nor fraud in obtaining them will be a defense in the hands of *bona fide* holders, see foregoing cases, and also *Maxcy v. Williamson Co.*, 72 Ill. 207; *Nicolay v. St. Clair*, 3 Dillon, 163; *East Lincoln v. Davenport*, 94 U. S. 801, 24 L. ed. 322; *Copper v. Mayor, &c.*, 44 N. J. L. 634; *Aberdeen v. Sykes*, 59 Miss. 236; *Lynchburg v. Slaughter*, 75 Va. 57; *Givens v. Hillsborough County*, 46 Fla. 502, 35 So. 88, 110 Am. St. Rep. 104. But when one in whose hands the bonds are invalid puts them in course of trade so that they get into the hands of a *bona fide* holder and are enforced against the obligor, he is liable to such obligor for the tort. *Winona & St. P. R. Co. v. Plainview*, 143 U. S. 371, 36 L. ed. 191, 12 Sup. Ct. Rep. 530.

Where recitals in county bonds plainly import that the bonds are issued for courthouse or jail purposes by order of the county commissioners' court, in conformity with specified acts of the legislature, the county is estopped to assert, as against a *bona fide* holder, that the bonds are not within the limit authorized by the legislature, or are not issued for the purposes contemplated by the statutes. *Presidio County v. Noel-Young Bond, etc., Co.*, 212 U. S. 58, 53 L. ed. 402, 29 Sup. Ct. Rep. 237.

See, further, that there may be an estoppel by the recitals in favor of a *bona fide* holder: *Ottawa v. Nat. Bank*, 105 U. S. 342, 26 L. ed. 1127; *Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424, 2 Sup. Ct. Rep. 704; *Sherman Co. v. Simons*, 109 U. S. 735, 27 L. ed. 735, 3 Sup. Ct. Rep. 502; *New Providence v. Halsey*, 117 U. S. 336, 29 L. ed. 904, 6 Sup. Ct. Rep. 764; *Oregon v. Jennings*, 119 U. S. 74, 30 L. ed. 323, 7 Sup. Ct. Rep. 124; *State v. Montgomery*, 74 Ala. 226; *Shurtleff v. Wiscasset*, 74 Me. 130; *Gunnison Co. Com'rs v. Rollins & Sons*, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. Rep. 390; *Harper Co. Com'rs v. Rose*, 140 U. S. 71, 35 L. ed. 344, 11 Sup. Ct. Rep. 710; *Chaffee Co. Com'rs v. Potter*, 142 U. S. 355, 35 L. ed. 1040, 12 Sup.

Ct. Rep. 216; *Huron v. 2d Ward Sav. Bk.*, 57 U. S. App. 593, 86 Fed. Rep. 272, 30 C. C. A. 38, 49 L. R. A. 534; *Flagg v. School District No. 70*, 4 N. D. 30, 58 N. W. 499, 25 L. R. A. 363; *Hutchinson & S. R. Co. v. Fox*, 48 Kan. 70, 28 Pac. 1078, 15 L. R. A. 401; *Waite v. Santa Cruz*, 184 U. S. 302, 46 L. ed. 552, 22 Sup. Ct. Rep. 327; *School Dist. No. 11 v. Chapman*, 205 U. S. 545, 51 L. ed. 923, 27 Sup. Ct. Rep. 792; *Henderson County v. Travelers' Ins. Co.*, 128 Fed. 817, 63 C. C. A. 467; *Platt v. Hitchcock County*, 139 Fed. 929, 71 C. C. A. 649; *Aurora v. Gates*, 208 Fed. 101, 125 C. C. A. 329, L. R. A. 1915 A, 910; *Newbern v. National Bank*, 234 Fed. 209, 148 C. C. A. 111, L. R. A. 1917 B, 1019; *Baxter v. Dickinson*, 136 Cal. 185, 68 Pac. 601; *Cripple Creek v. Adams*, 36 Colo. 320, 85 Pac. 184; *White v. Chalfield*, 116 Minn. 371, 133 N. W. 962; *Weil v. Newbern*, 126 Tenn. 223, 148 S. W. 680, L. R. A. 1915 A, 1009, Ann. Cas. 1913 E, 25. But see *Evans v. McFarland*, 186 Mo. 703, 85 S. W. 873; *Montpelier Bank & Trust Co. v. School Dist. No. 5*, 115 Wis. 622, 92 N. W. 439.

Such estoppel only applies to matters of procedure which the corporate officers had authority to determine and certify. It cannot supply the lack of statutory authority: *Northern Bank v. Porter Township*, 110 U. S. 608, 28 L. ed. 258, 4 Sup. Ct. Rep. 254; *Dixon Co. v. Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *School District v. Stone*, 106 U. S. 183, 27 L. ed. 90, 1 Sup. Ct. Rep. 84; *Parkersburg v. Brown*, 106 U. S. 487, 27 L. ed. 238, 1 Sup. Ct. Rep. 442; *Hayes v. Holly Springs*, 114 U. S. 120, 29 L. ed. 81, 5 Sup. Ct. Rep. 785; *Hedges v. Dixon County*, 150 U. S. 182, 37 L. ed. 1044, 14 Sup. Ct. Rep. 71; *Sutliff v. Bd. of Co. Com.*, 147 U. S. 230, 37 L. ed. 145, 13 Sup. Ct. Rep. 318; *Cass County v. Wilbarger County*, 25 Tex. Civ. App. 52, 60 S. W. 988; *Wilkes County v. Coler*, 190 U. S. 107, 47 L. ed. 971, 23 Sup. Ct. Rep. 738; *Hamilton County v. Montpelier Sav. Bank*, 208 U. S. 617, 52 L. ed. 647, 28 Sup. Ct. Rep. 569; *Aurora v. Gates*, 208 Fed. 101, 125 C. C. A. 329, L. R. A. 1915 A, 910;

*State v. School Dist. No. 50*, 18 N. D. 616, 120 N. W. 555, 138 Am. St. Rep. 787; *Weil v. Newbern*, 126 Tenn. 223, 148 S. W. 680, L. R. A. 1915 A, 1009, Ann. Cas. 1913 E, 25; nor avoid the effect of actual knowledge of invalidity. *Ottawa v. Carey*, 108 U. S. 110, 27 L. ed. 669, 2 Sup. Ct. Rep. 361. Nor can receipt of proceeds of issue of invalid bonds estop the city from pleading lack of authority to issue the same. *Merrill v. Monticello*, 138 U. S. 673, 34 L. ed. 1069, 11 Sup. Ct. Rep. 441.

Where a municipal corporation, not wholly lacking in power to do so, issues bonds and puts them in circulation, and their validity is sanctioned and vouched for by the payment of interest for a number of years, the taxpayers are estopped from questioning the validity of the bonds. *Schmitz v. Zeh*, 91 Minn. 290, 97 N. W. 1049, 1 Ann. Cas. 322.

Where unauthorized issue was made in aid of railway company, and bonds were sold by such company and proceeds used in erection of railway structures within the limits of the town, an action for "money had and received" will not lie against the town to recover the money paid for the bonds. *Travelers' Ins. Co. v. Johnson City*, 99 Fed. Rep. 663, 49 L. R. A. 123.

Where unauthorized bonds were issued for railway stock the purchaser of bonds from the railway company for practically full value was, after failure in an attempt to enforce the bonds against the town issuing them, subrogated to the town's right to the stock. *Illinois G. T. R. Co. v. Wade*, 140 U. S. 65, 35 L. ed. 342, 11 Sup. Ct. Rep. 709.

A holder cannot recover if the bonds show on their face their issue under a void act: *Cole v. La Grange*, 113 U. S. 1, 28 L. ed. 896, 5 Sup. Ct. Rep. 416; or show non-compliance with an enabling act: *Gilson v. Dayton*, 123 U. S. 59, 31 L. ed. 74, 8 Sup. Ct. Rep. 66; *Barnum v. Okolona*, 148 U. S. 393, 37 L. ed. 495, 13 Sup. Ct. Rep. 638; or if, when they contain no recitals, their invalidity could be learned from the records. *Merchants' Bank v.*

Bergen Co., 115 U. S. 384, 29 L. ed. 430, 6 Sup. Ct. Rep. 88; Daviess Co. v. Dickinson, 117 U. S. 657, 29 L. ed. 1026, 6 Sup. Ct. Rep. 897; Sutliff v. Bd. of Co. Com., 147 U. S. 230, 37 L. ed. 145, 13 Sup. Ct. Rep. 318; Doon Township v. Cummins, 142 U. S. 366, 35 L. ed. 1044, 12 Sup. Ct. Rep. 220; Nat. Life Ins. Co. v. Mead, 13 S. D. 37, 82 N. W. 78, 48 L. R. A. 785, 79 Am. St. 876.

In *Halstead v. Mayor, &c. of New York*, 5 Barb. 218, action was brought upon warrants drawn by the corporation of New York upon its treasurer, not in the course of its proper and legitimate business. It was held that the corporation under its charter had no general power to issue negotiable paper, though, not being prohibited by law, it might do so for any debt contracted in the course of its proper legitimate business. But it was also held that any negotiable securities not issued by the defendants in their proper and legitimate business, were void in the hands of the plaintiff, although received by him without actual notice of their consideration. This decision was affirmed in 3 N. Y. 430.

In *Gould v. Town of Stirling*, 23 N. Y. 456, it was held that where a town had issued negotiable bonds, which could only be issued when the written assent of two-thirds of the resident persons taxed in the town had been obtained and filed in the county clerk's office, the bonds issued without such assent were invalid, and that the purchaser of them could not rely upon the recital in the bonds that such assent had been obtained, but must ascertain for himself at his peril. Say the court: "One who takes a negotiable promissory note or bill of exchange, purporting to be made by an agent, is bound to inquire as to the power of the agent. Where the agent is appointed and the power conferred, but the right to exercise the power has been made to depend upon the existence of facts of which the agent may naturally be supposed to be in an especial manner cognizant, the *bona fide* holder is protected; because he is presumed to have taken the paper upon the faith of the representation of the

agent as to those facts. The mere fact of executing the note or bill amounts of itself, in such a case, to a representation by the agent to every person who may take the paper that the requisite facts exist. But the holder has no such protection in regard to the existence of the power itself. In that respect the subsequent *bona fide* holder is in no better situation than the payee, except in so far as the latter would appear of necessity to have had cognizance of facts which the other cannot [must?] be presumed to have known." And the case is distinguished from that of the *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125, where the extrinsic fact affecting the authority related to the state of accounts between the bank and one of its customers, which could only be known to the teller and other officers of the bank. See also *Brady v. Mayor, &c. of New York*, 2 Bosw. 173; *Hopple v. Brown Township*, 13 Ohio St. 311; *Veeder v. Lima*, 19 Wis. 280.

The subject is reviewed in *Clark v. Des Moines*, 19 Iowa, 199. The action was brought upon city warrants, negotiable in form, and of which the plaintiff claimed to be *bona fide* assignee, without notice of any defects. The city offered to show that the warrants were issued without any authority from the city council and without any vote of the council authorizing the same. It was held that the evidence should have been admitted, and that it would constitute a complete defense. See further, *Head v. Providence, &c. Co.*, 2 Cranch, 127, 2 L. ed. 229; *Royal British Bank v. Turquand*, 6 El. & Bl. 327; *Knox County v. Aspinwall*, 21 How. 539, 16 L. ed. 208; *Bissell v. Jeffersonville*, 24 How. 287, 16 L. ed. 664; *Sanborn v. Deerfield*, 2 N. H. 251; *Alleghany City v. McClurkan*, 14 Pa. St. 81; *Morris Canal & Banking Co. v. Fisher*, 9 N. J. Eq. 667; *Clapp v. Cedar Co.*, 5 Iowa, 15; *Commissioners, &c. v. Cox*, 6 Ind. 403; *Madison & Indianapolis R. R. Co. v. Norwich Savings Society*, 24 Ind. 457; *Bird v. Daggett*, 97 Mass., 494.

It is of course impossible to recon-

cile these cases. In *Cagwin v. Hancock*, 84 N. Y. 532, 5 Am. & Eng. R. R. Cas. 150, on a review of the New York authorities it is declared to be the law of that State that there can never be a *bona fide* holder of town bonds, within the meaning of the law applicable to negotiable paper, as such bonds are always issued under special statutory authority, and are only valid when the statute is complied with. To the same effect are *Craig v. Andes*, 93 N. Y. 405, and *Lyons v. Chamberlain*, 89 N. Y. 578. See *Fish v. Kenosha*, 26 Wis. 23.

That the powers of the agents of municipal corporations are matters of record, and the corporation not liable for an unauthorized act, see further *Baltimore v. Eschbach*, 18 Md. 276; *Johnson v. Common Council*, 16 Ind. 227. That bonds voted to one railroad company and issued to another are void, see *Big Grove v. Wells*, 65 Ill. 263.

Those who deal with a corporation must take notice of the restrictions in its charter, or in the general law, regarding the making of contracts. *Brady v. Mayor, &c. of New York*, 2 Bosw. 173, 20 N. Y. 312; *Swift v. Williamsburg*, 24 Barb. 427; *Zabriske v. Cleveland, &c. R. R. Co.*, 23 How. 381; *Hull v. Marshall County*, 12 Iowa, 142; *Clark v. Des Moines*, 19 Iowa, 199; *McPherson v. Foster*, 43 Iowa, 48; *Marsh v. Supervisors of Fulton Co.*, 10 Wall. 676, 19 L. ed. 1040. If they are not valid, no subsequent ratification by the corporation can make them so. *Leavenworth v. Rankin*, 2 Kan. 357.

Where the recitals in bonds neither expressly nor by necessary implication import a compliance with conditions precedent, it is open to the municipality to show that the conditions had not been performed when the bonds were issued, and have never since been performed. *Citizens' Sav. & Loan Assn. v. Perry County*, 156 U. S. 692, 39 L. ed. 585, 15 Sup. Ct. Rep. 547. But in *Chiniquy v. People*, 78 Ill. 570, it was held that if bonds are voted upon a condition, and issued before the condition is complied with, this, as to *bona fide* holders, is a waiver

of the condition. Compare *Supervisors of Jackson v. Brush*, 77 Ill. 59.

In some States, after paper has been put afloat under laws which the courts of the State have sustained, it is very justly held that the validity and obligation of such paper will not be suffered to be impaired by subsequent action of the courts overruling the former conclusions. See *Gelpcke v. Dubuque*, 1 Wall. 175, 17 L. ed. 520; *Steines v. Franklin County*, 48 Mo. 167; *Osage, &c. R. R. Co. v. Morgan County*, 53 Mo. 156; *Smith v. Clark Co.*, 54 Mo. 58; *State v. Sutterfield*, 54 Mo. 391; *Columbia Co. v. King*, 13 Fla. 421; *Same v. Davidson*, 13 Fla. 482; *McCullough v. Com. of Va.*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; *Wilkes County v. Coler*, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458.

Where bonds are issued by a *de facto* municipal corporation, which receives the full consideration therefor, it cannot set up as a defense to an action by a *bona fide* holder for interest on the bonds the fact that it was never legally incorporated. *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 46 L. ed. 773, 22 Sup. Ct. Rep. 531.

Bonds issued by a *de facto* municipal corporation are valid and, after it has been dissolved for the defect in its organization, they may be enforced against the municipalities into which the territory of the *de facto* corporation has been distributed. *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003, 80 Am. St. 17, 49 L. R. A. 483.

Where a municipality is authorized by statute to issue bonds for refunding "binding, subsisting, legal obligations of such" municipality, and in accordance therewith it issues a series of bonds, each of which refers to the statute and recites that "this bond is issued for the purpose of funding and retiring certain binding, subsisting, legal obligations of said county which remain outstanding and unpaid", &c., without describing such outstanding obligations more particularly, and the said bonds comply with all statutory requirements of form, execution, reg-

In some of the cases involving the validity of the subscriptions made or bonds issued by municipal corporations in aid of internal improvements, there has been occasion to consider clauses in the State constitutions designed to limit the power of the legislature to incur indebtedness on behalf of the State, and which clauses, it has been urged, were equally imperative in restraining indebtedness on behalf of the several political divisions of the State. The Constitution of Kentucky prohibited any act of the legislature authorizing any debt to be contracted on behalf of the Commonwealth, except for certain specified purposes, unless provision should be made in such act for an annual tax sufficient to pay such debt within thirty years; and the act was not to have effect unless approved by the people. It was contended that this provision was not to apply to the Commonwealth as a mere ideal abstraction, unconnected with her citizens and her soil, but to the Commonwealth as composed of her people, and their territorial organizations of towns, cities, and counties, which make up the State, and that it embraced in principle every legislative act which authorized a debt to be contracted by any of the local organizations of which the Commonwealth was composed. The courts of that State held otherwise. "The clause in question," they say, "applies in terms to a debt contracted on behalf of the Commonwealth as a distinct corporate body; and the distinction between a debt on behalf of the Commonwealth, and a debt or debts on behalf of one county, or of any number of counties, is too broad and palpable to admit of the supposition that the latter

istration, &c., they are valid in the hands of a *bona fide* holder for value before maturity, even though some of the purported obligations retired by their issue were in fact invalid. *Graves v. Saline Co.*, 161 U. S. 359, 40 L. ed. 732, 16 Sup. Ct. Rep. 526. See, to like effect, *Evansville v. Dennett*, 161 U. S. 434, 40 L. ed. 760, 16 Sup. Ct. Rep. 613; *Andes v. Ely*, 158 U. S. 312, 39 L. ed. 996, 15 Sup. Ct. Rep. 954. See also *Waite v. Santa Cruz*, 184 U. S. 302, 46 L. ed. 552, 22 Sup. Ct. Rep. 327; *Independent School Dist. v. Rew*, 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364; *Fairfield v. Rural Independent School Dist.* 116 Fed. 838, 54 C. C. A. 342; *Bradford v. Cameron*, 145 Fed. 21, 76 C. C. A. 21; *Tyler v. Tyler Building & Loan Assn.*, 99 Tex. 6, 86 S. W. 750.

Bonds issued for purpose of refunding an existing indebtedness cannot

be considered as increasing the indebtedness of the municipality. *Nat. Life Ins. Co. v. Mead*, 13 S. D. 37, 82 N. W. 78, 48 L. R. A. 785, 79 Am. St. 876; *contra*, *Doon Tp. v. Cummins*, 142 U. S. 366, 35 L. ed. 1044, 12 Sup. Ct. Rep. 220, in case issue is not in exchange for outstanding evidence of indebtedness.

Irregularities in the conduct of the election held to secure a popular authorization of a proposed bond issue are a sufficient ground for enjoining the issue. *Murphy v. San Luis Obispo*, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444. See an interesting case upon municipal bonds in *Knox County v. Ninth Nat. Bk.*, 147 U. S. 91, 37 L. ed. 93, 13 Sup. Ct. Rep. 267, where it became necessary to determine under which of two legislative authorizations the bonds were actually issued.

class of debts was intended to be embraced by terms specifically designating the former only."<sup>1</sup> The same view has been taken by the courts of Iowa, Wisconsin, Illinois, and Kansas, of the provisions in the constitutions of those States restricting the power of the legislature to contract debts on behalf of the State in aid of internal improvements;<sup>2</sup> but the decisions of the first-named State have since been doubted,<sup>3</sup> and those in Illinois, it would seem, overruled.<sup>4</sup> In Michigan it has been held that they were inapplicable to a constitution adopted with a clear purpose to preclude taxation for such enterprises.<sup>5</sup>

Another class of legislation, which has recently demanded the attention of the courts, has been little less troublesome, from the new, varied, and peculiar questions involved, than that in relation

<sup>1</sup> *Slack v. Railroad Co.*, 13 B. Monr. 1.

<sup>2</sup> *Dubuque County v. Railroad Co.*, 4 *Greene (Iowa)*, 1; *Clapp v. Cedar County*, 5 *Iowa*, 15; *Clark v. Janesville*, 10 *Wis.* 136; *Bushnell v. Beloit*, 10 *Wis.* 195; *Prettyman v. Supervisors*, 19 *Ill.* 406; *Robertson v. Rockford*, 21 *Ill.* 451; *Johnson v. Stark County*, 24 *Ill.* 75; *Perkins v. Lewis*, 24 *Ill.* 208; *Butler v. Dunham*, 27 *Ill.* 474; *Leavenworth Co. v. Miller*, 7 *Kan.* 479.

<sup>3</sup> *State v. Wapello County*, 13 *Iowa*, 388. And see *People v. Supervisor, &c.*, 16 *Mich.* 254.

<sup>4</sup> In *People v. Mayor, &c. of Chicago*, 51 *Ill.* 17, 35, it is held expressly that the provision of the State constitution prohibiting the State from creating a debt exceeding fifty thousand dollars without the consent of the people manifested at a general election, would preclude the State from creating a like debt against a municipal corporation, except upon the like conditions. And it was pertinently said: "The protection of the whole implies necessarily the protection of all its organized parts, and the whole cannot be secure while all or any of its parts are exposed to danger. What is the real value of this provision of the constitution if the legislature, inhibited from incurring a debt beyond fifty thousand dollars on behalf of the State, may force a debt tenfold or one hundred-fold greater—for there is no limit to the power—upon all the cities of the State? We can perceive

none." We do not see how this can be reconciled with the earlier Illinois cases, and it is so manifestly right, it is hoped the learned court will never make the attempt.

<sup>5</sup> The following extract from the opinion in *Bay City v. State Treasurer*, 23 *Mich.* 499, 504, is upon this point: "Our State had once before had a bitter experience of the evils of the government connecting itself with works of internal improvement. In a time of inflation and imagined prosperity, the State had contracted a large debt for the construction of a system of railroads, and the people were oppressed with heavy taxation in consequence. Moreover, for a portion of this debt they had not received what they bargained for, and they did not recognize their legal or moral obligation to pay for it. The good name and fame of the State suffered in consequence. The result of it all was that a settled conviction fastened itself upon the minds of our people, that works of internal improvement should be private enterprises; that it was not within the proper province of government to connect itself with their construction or management, and that an imperative State policy demanded that no more burden should be imposed upon the people by State authority, for any such purpose. Under this conviction they incorporated in the constitution of 1850, under the significant title of 'Finance and Taxation', several provisions expressly

prohibiting the State from being a party to, or interested in, any work of internal improvement, or engaged in carrying on any such work, except in the expenditure of grants made to it; and also from subscribing to, or being interested in, the stock of any company, association, or corporation, or loaning its credit in aid of any person, association, or corporation. Art. XIV. §§ 9, 8, and 7.

"All these provisions were incorporated by the people in the constitution, as precautions against injudicious action by themselves, if in another time of inflation and excitement they should be tempted to incur the like burdensome taxation in order to accomplish public improvements in cases where they were not content to wait the result of private enterprise. The people meant to erect such effectual barriers that if the temptation should return, the means of inflicting the like injury upon the credit, reputation, and prosperity of the State should not be within the reach of the authorities. They believed these clauses of the constitution accomplished this purpose perfectly, and none of its provisions had more influence in recommending that instrument to the hearty good-will of the people.

"In process of time, however, a majority in the legislature were found willing, against the solemn warning of the executive, to resort again to the power of taxation in aid of internal improvement. It was discovered that though 'the State' was expressly inhibited from giving such aid in any form, except in the disposition of grants made to it, the subdivisions of which the State was composed were not under the like ban. Decisions in other States were found which were supposed to sanction the doctrine that, under such circumstances, the State might do indirectly through its subdivisions what directly it was forbidden to do. Thus a way was opened by which the whole purpose of the constitutional provisions quoted might be defeated. The State could not aid a private corporation with its credit, but it might require each of its townships, cities, and villages to do so.

The State could not load down its people with taxes for the construction of a public improvement, but it might compel the municipal authorities, which were its mere creatures, and which held their whole authority and their whole life at its will, to enforce such taxes, one by one, until the whole people were bent to the burden.

"Now, whatever might be the just and proper construction of similar provisions in the constitutions of States whose history has not been the same with our own, the majority of this court thought when the previous case was before us, and they still think, that these provisions in our constitution do preclude the State from loaning the public credit to private corporations, and from imposing taxation upon its citizens or any portion thereof in aid of the construction of railroads. So the people supposed when the constitution was adopted. Constitutions do not change with the varying tides of public opinion and desire; the will of the people therein recorded is the same inflexible law until changed by their own deliberative action; and it cannot be permissible to the courts that, in order to aid evasions and circumventions, they shall subject these instruments, which in the main only undertake to lay down broad general principles, to a literal and technical construction, as if they were great public enemies standing in the way of progress, and the duty of every good citizen was to get around their provisions whenever practicable, and give them a damaging thrust whenever convenient. They must construe them as the people did in their adoption, if the means of arriving at that construction are within their power. In these cases we thought we could arrive at it from the public history of the times."

The State cannot provide indirectly for payment for work of internal improvement by authorizing a township to raise money for it by taxation. *Anderson v. Hill*, 54 Mich. 477, 20 N. W. 549. And see *Oren v. Pingree*, 120 Mich. 550, 79 N. W. 814, 46 L. R. A. 407, where an act attempting to authorize the creation of a public board



to municipal subscriptions in aid of internal improvements. As the power to declare war and to conduct warlike operations rests in the national government, and that government is vested with unlimited control of all the resources of the country for those purposes, the duty of national defense, and, consequently, the duty to defend all the citizens as well as all the property of all the municipal organizations in the several States, rests upon the national authorities. This much is conceded, though in a qualified degree, also, and subordinate to the national government, a like duty rests doubtless upon the State governments, which may employ the means and services of their citizens for the purpose. But it is no part of the duty of a township, city, or county, as such, to raise men or money for warlike operations, nor have they any authority, without express legislative sanction, to impose upon their people any burden by way of taxation for any such purpose.<sup>1</sup> Nevertheless, when a war arises which taxes all the energies of the nation, which makes it necessary to put into the field a large proportion of all the able-bodied men of the country, and which renders imperative a resort to all available means for filling the ranks of the army, recruiting the navy, and replenishing the national treasury, the question becomes a momentous one, whether the local organizations — those which are managed most immediately by the people themselves — may not be made important auxiliaries to the national and State governments in accomplishing the great object in which all alike are interested so vitally; and if they are capable of rendering important assistance, whether there is any constitutional principle which would be violated by making use of these organizations in a case where failure on the part of the central authority would precipitate general dismay and ruin. Indeed, as the general government, with a view to convenience, econ-

for the purpose of acquiring and operating the street railways of Detroit was held void.

Where the State cannot engage in the erection of works of internal improvement, a statute providing for the erection of a State grain elevator and warehouse is void. *Rippe v. Becker*, 56 Minn. 100, 57 N. W. 331, 22 L. R. A. 857.

<sup>1</sup> *Stetson v. Kempton*, 13 Mass. 272; *Gove v. Epping*, 41 N. H. 539; *Crowell v. Hopkinton*, 45 N. H. 9; *Baldwin v. North Branford*, 32 Conn. 47; *Webster v. Harwinton*, 32 Conn. 131. See also *Clafin v. Hopkinton*, 4 Gray, 502; *Cover v. Baytown*, 12 Minn. 124;

*Fiske v. Hazzard*, 7 R. I. 438; *Alley v. Edgecomb*, 53 Me. 446; *People v. Supervisors of Columbia*, 43 N. Y. 130; *Walschlager v. Liberty*, 23 Wis. 362; *Burrill v. Boston*, 2 Cliff. 590.

But the service rendered by the organized troops of the State in aid of the civil authorities of a county in enforcing law and order in the county at the request of the county authorities is for a county purpose, and payment therefor by the county does not violate the organic provision for "a uniform and equal rate of taxation." *Rushton v. State ex rel. Collins*, 75 Fla. 422, 78 So. 345.

omy, and promptness of action, will be very likely to adopt, for any purposes of conscription, the existing municipal divisions of the States, and its demand for men to recruit its armies will assume a form seeming to impose on the people whose municipal organization embraces the territory covered by the demand, the duty of meeting it, the question we have stated may appear to be one rather of form than of substance, inasmuch as it would be difficult to assign reasons why a duty resting upon the citizens of a municipality may not be considered as resting upon the corporation itself of which they are the constituents, and if so, why it may not be assumed by the municipality itself, and then be discharged in like manner as any other municipal burden, if the legislature shall grant permission for that purpose.

One difficulty that suggests itself in adopting any such doctrine is, that, by the existing law of the land, able-bodied men between certain specified ages are alone liable to be summoned to the performance of military duty; and if the obligation is assumed by the municipal organizations of the State, and discharged by the payment of money or the procurement of substitutes, the taxation required for this purpose can be claimed, with some show of reason, to be taxation of the whole community for the particular benefit of that class upon whom by the statutes the obligation rests. When the public funds are used for the purpose, it will be insisted that they are appropriated to discharge the liabilities of private individuals. Those who are already past the legal age of service, and who have stood their chance of being called into the field, or perhaps have actually rendered the required service, will be able to urge with considerable force that the State can no longer honorably and justly require them to contribute to the public defense, but ought to insist that those within the legal ages should perform their legal duty; and if any upon whom that duty rests shall actually have enrolled themselves in the army with a view to discharge it, such persons may claim, with even greater reason, that every consideration of equality and justice demands that the property they leave behind them shall not be taxed to relieve others from a duty equally imperative.

Much may be said on both sides of this subject, but the judicial decisions are clear, that the people of any municipal corporation or political division of a State have such a general interest in relieving that portion of their fellow-citizens who are liable to the performance of military duty, as will support taxation or render valid indebtedness contracted for the purpose of supplying their places, or of filling any call of the national authorities for men, with volun-

teers who shall be willing to enter the ranks for such pecuniary inducements as may be offered them. The duty of national defense, it is held, rests upon every person under the protection of the government who is able to contribute to it, and not solely upon those who are within the legal ages. The statute which has prescribed those ages has for its basis the presumption that those between the limits fixed are best able to discharge the burden of military service to the public benefit, but others are not absolved from being summoned to the duty, if at any time the public exigency should seem to demand it. Exemption from military duty is a privilege rather than a right, and, like other statutory privileges, may be recalled at any time when reasons of public policy or necessity seem to demand the recall.<sup>1</sup> Moreover, there is no valid reason, in the nature of things, why those who are incapable of performing military service, by reason of age, physical infirmity, or other cause, should not contribute, in proportion to their ability, to the public defense by such means as are within their power; and it may well happen that taxation, for the purpose of recruiting the armies of the nation, will distribute the burden more equally and justly among all the citizens than any other mode which could be devised. Whether it will be just and proper to allow it in any instance must rest with the legislature to determine; but it is unquestionably competent, with legislative permission, for towns, cities, and counties to raise money by loans or by taxation to pay bounty moneys to those who shall volunteer to fill any call made upon such towns, cities, or counties to supply men for the national armies.<sup>2</sup>

<sup>1</sup> See *post*, p. 793, and cases cited in note.

<sup>2</sup> "The power to create a public debt, and liquidate it by taxation, is too clear for dispute. The question is, therefore, narrowed to a single point: Is the purpose in this instance a public one? Does it concern the common welfare and interest of the municipality? Let us see. Civil war was raging, and Congress provided in the second section of the act of 24th February, 1864, that the quota of troops of each ward of a city, town, township, precinct, &c., should be as nearly as possible in proportion to the number of men resident therein liable to render military service. Section three provided that all volunteers who may enlist after a draft shall be ordered, shall be deducted from the number ordered to be drafted in such ward,

town, &c. Volunteers are therefore by law to be accepted in relief of the municipality from a compulsory service to be determined by lot or chance. Does this relief involve the public welfare or interest? The answer rises spontaneously in the breast of every one in a community liable to the military burden. It is given, not by the voice of him alone who owes the service but swells into a chorus from his whole family, relatives, and friends. Military service is the highest duty and burden the citizen is called to obey or to bear. It involves life, limb, and health, and is therefore a greater 'burden' than the taxation of property. The loss or the injury is not confined to the individual himself, but extends to all the relations he sustains. It embraces those bound to him in the ties of consanguinity,

Relief of the community from an impending or possible draft is not, however, the sole consideration which will support taxation by the municipal corporations of the State to raise money for the purpose of paying bounties to soldiers. Gratitude to those who have entered the military service, whether as volunteers or drafted men, or as substitutes for others who were drafted or were liable to be, is a consideration which the State may well recognize, and it may compensate the service either by the payment of bounty moneys directly to such persons, or by provision for the support of those dependent upon them while they shall be absent from their homes. Whether we regard such persons as public benefactors, who, having taken upon themselves the most severe and dangerous duty a citizen is ever called upon to perform, have thereby entitled themselves to public reward as an incentive to fidelity and courage, or as persons who, having engaged in the public service for a compensation inadequate to the toil, privation, and danger incurred, are deserving of the bounty as a further recognition on the part of the community of the worth of their services, there seems in either case to be no sufficient reason to question the right of the legislature to authorize the municipal divisions of the State to raise moneys in any of the

friendship, and interest; to the community which must furnish support to his family, if he cannot, and which loses in him a member whose labor, industry, and property contribute to its wealth and its resources; who assists to bear its burdens, and whose knowledge, skill, and public spirit contribute to the general good. Clearly the loss of that part of the population upon whom the greatest number depend, and who contribute most to the public welfare by their industry, skill, and property, and good conduct, is a common loss, and therefore a general injury. These are alike subject to the draft. The blind and relentless lot respects no age, condition, or rank in life. It is, therefore, clearly the interest of the community that those should serve who are willing, whose loss will sever the fewest ties and produce the least injury.

"The bounty is not a private transaction in which the individual alone is benefited. It benefits the public by inducing and enabling those to go who feel they can best be spared. It is not voluntary in those who pay it. The

community is subject to the draft, and it is paid to relieve it from a burden of war. It is not a mere gift or reward, but a consideration for services. It is therefore not a confiscation of one man's property for another's use, but it is a contribution from the public treasury for a general good. In short, it is simply taxation to relieve the municipality from the stern demands of war, and avert a public injury in the loss of those who contribute most to the public welfare." *Speer v. School Directors of Blairsville*, 50 Pa. St. 150, 159. See also *Waldo v. Portland*, 33 Conn. 363; *Bartholomew v. Harwinton*, 33 Conn. 408; *Fowler v. Danvers*, 8 Allen, 80; *Lowell v. Oliver*, 8 Allen, 247; *Washington County v. Berwick*, 56 Pa. St. 466; *Trustees of Cass v. Dillon*, 16 Ohio St. 38; *State v. Wilkesville*, 20 Ohio St. 288. Also *Opinions of Justices*, 52 Me. 505, in which the view is expressed that towns cannot, under the power to raise money for "necessary town charges", raise and pay commutation moneys to relieve persons drafted into the military service of the United States.

usual modes, for the purpose of paying bounties to them or their families, in recognition of such services.<sup>1</sup> And if a municipal corporation shall have voted moneys for such purpose without legislative authority, it is competent for the legislature afterwards to legalize their action if it shall so choose.<sup>2</sup>

The cases to which we have referred in the notes assume that, if the purpose is one for which the State might properly levy a tax upon its citizens at large, the legislature would also have power to apportion and impose the duty, or confer the power of assuming it, upon the towns and other municipal or political divisions. And the rule laid down is one which opens a broad field to legislative discretion, allowing as it does the raising and appropriation of moneys, whenever, in the somewhat extravagant words of one of the cases, there is "the least possibility that it will be promotive in any degree of the public welfare."<sup>3</sup> The same rule, substantially, has been recognized by the Court of Appeals of New York. "The legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the State. It can thus recog-

<sup>1</sup> The act under which the Pennsylvania case, cited in the preceding note, was decided, authorized the borough to contract a debt for the payment of three hundred dollars to each non-commissioned officer and private who might thereafter volunteer and enter the service of the United States, and be credited upon the quota of the borough under an impending draft. The whole purpose, therefore, was to relieve the community from the threatened conscription. But in the case of *Brodhead v. Milwaukee*, 19 Wis. 624, 652, it was held constitutional, not only to provide for the future by such municipal taxation, but also to raise moneys to pay bounties to volunteers previously enlisted, and even to those who should thereafter procure substitutes for themselves, and have them credited on the municipal quota.

<sup>2</sup> *Booth v. Town of Woodbury*, 32 Conn. 118; *Bartholomew v. Harwinton*, 33 Conn. 408; *Crowell v. Hopkinton*, 45 N. H. 9; *Shackford v. Newington*, 46 N. H. 415; *Lowell v. Oliver*, 8 Allen, 247; *Ahl v. Gleim*, 52 Pa. St. 432; *Weister v. Hade*, 52 Pa. St. 474; *Coffman v. Keightley*, 24

Ind. 509; *Board of Commissioners v. Bearss*, 25 Ind. 110; *Comer v. Fulsom*, 13 Minn. 219; *State v. Demorest*, 32 N. J. L. 528; *Taylor v. Thompson*, 42 Ill. 9; *Barbour v. Camden*, 51 Me. 608; *Hart v. Holden*, 55 Me. 572; *Burnham v. Chelsea*, 43 Vt. 69; *Butler v. Poultney*, 42 Vt. 481.

In *State v. Jackson*, 33 N. J. L. 450, a statute authorizing a town to raise money by tax to relieve its inhabitants from the burden of a draft under a law of Congress, was held void as tending to defeat the purpose of such law. The decision was made by a bare majority of a bench of eleven judges. Compare *O'Hara v. Carpenter*, 23 Mich. 410, in which a contract of insurance against a military draft was held void on grounds of public policy.

<sup>3</sup> *Booth v. Woodbury*, 32 Conn. 118, 128, per *Butler*, J.

"To make a tax law unconstitutional on this ground, it must be apparent at first blush that the community taxed can have no possible interest in the purpose to which their money is to be applied." *Sharpless v. Mayor, &c.*, 21 Pa. St. 147, 174, following *Cheaney v. Hooser*, 9 B. Monr. 330.

nize claims founded in equity and justice in the largest sense of these terms, or in gratitude or charity. Independently of express constitutional restrictions, it can make appropriations of money whenever the public well-being requires or will be promoted by it, and it is the judge of what is for the public good. It can, moreover, under the power to levy taxes, apportion the public burdens among all the taxpaying citizens of the State, or among those of a particular section or political division.”<sup>1</sup> And where citizens have voluntarily advanced moneys for the purpose of paying bounties to recruits who fill the quota of a municipal corporation, on an understanding, based upon informal corporate action, that the moneys should be refunded when a law should be passed permitting it, a subsequent act of the legislature authorizing taxation for this purpose is valid.<sup>2</sup>

However broad are the terms employed in describing the legislative power over taxation in these cases, it is believed that no one of them has gone so far as to sanction taxation or the appropriation of the public revenue in order to refund to individuals moneys which they may have paid to relieve themselves from an impending draft, or may have voluntarily contributed to any public purpose, from motives purely personal to themselves, without any reason to rely upon the credit of the State, or of any municipal corporation, for reimbursement, and where the circumstances are not such as fairly to challenge the public gratitude. Taxation in such a case, where no obligation, honorary or otherwise, rests upon the public, would be nothing else than a naked case of appropriating the property of the taxpayer for private purposes, and that, too, without reference to anticipated public benefits.<sup>3</sup>

<sup>1</sup> *Guilford v. Supervisors of Chenango*, 13 N. Y. 143, 149. See *New Orleans v. Clark*, 95 U. S. 644, 24 L. ed. 521.

The payment by a city of a recognized moral obligation assumed by it for services rendered at its request is within the legislative power to authorize, and does not constitute a donation or appropriation of the public funds. *Morris & E. R. Co. v. Mayor, etc., of Newark*, 76 N. J. L. 555, 70 Atl. 194.

<sup>2</sup> *Weister v. Hade*, 52 Pa. St. 474. And see *People v. Sullivan*, 43 Ill. 412; *Johnson v. Campbell*, 49 Ill. 316. Compare *Susquehanna Depot v. Barry*, 61 Pa. St. 317.

<sup>3</sup> *Tyson v. School Directors, &c.*, 51 Pa. St. 9. A meeting of persons liable

to draft under the law of the United States was called, and an association formed, called the Halifax Bounty Association, which levied an assessment of thirty dollars on each person liable to military duty in the township, and solicited contributions from others. Afterwards, an act was passed by the legislature, with a preamble reciting that certain citizens of Halifax township, associated as the Halifax Bounty Association, for freeing the said township from the late drafts, advanced moneys, which were expended in paying bounties to volunteers to fill the quota of the township. The act then authorized and required the school directors to borrow such sums of money as would fully reimburse the said Halifax Bounty Asso-

ciation for moneys advanced to free said township from the draft, and then further authorized the school directors to levy and collect a tax to repay the sums borrowed. The court say: "We are bound to regard the statute as an authority to reimburse what was intended by the Association as advances made to the township with the intent or understanding to be reimbursed or returned to those contributing. This was the light in which the learned judge below regarded the terms used; and unless this appears in support of the present levy by the school directors, they are acting without authority. But the learned judge, if I properly comprehend his meaning, did not give sufficient importance to these terms, and hence, I apprehend, he fell into error. He does not seem to have considered it material whether the Association paid its money voluntarily in aid of its own members, or expressly to aid the township in saving its people from a draft, with the understanding that it was advanced in the character of a loan if the legislature chose to direct its repayment, and the school directors chose to act upon the authority conferred. This we cannot agree to. Such an enactment would not be legislation at all. It would be in the nature of judicial action, it is true; but, wanting the justice of notice to parties to be affected by the hearing, trial, and all that gives sanction and force to regular judicial proceedings, it would much more resemble an imperial rescript than constitutional legislation: first, in declaring an obligation where none was created or previously existed; and next, in decreeing payment by directing the money or property of the people to be sequestered to make the payment. The legislature can exercise no such despotic functions; and as it is not apparent in the act that they attempted to do so, we are not to presume they did. They evidently intended the *advancements* to be reimbursed to be only such as were made on the faith that they were to be returned." See also *Crowell v. Hopkinton*, 45 N. H. 9; *Miller v. Grandy*, 13 Mich. 540; *Pease v.*

*Chicago*, 21 Ill. 500; *Ferguson v. Landram*, 5 Bush, 230; *Esty v. Westminster*, 97 Mass. 324; *Cole v. Bedford*, 97 Mass. 326; *Usher v. Colchester*, 33 Conn. 567; *Perkins v. Milford*, 59 Me. 315; *Thompson v. Pittston*, 59 Me. 315; *Kelly v. Marshall*, 69 Pa. St. 319.

The legislature cannot ratify the action of a town in agreeing to repay those who paid money to avoid the draft. *Bowles v. Landaff*, 59 N. H. 164.

In *Freeland v. Hastings*, 10 Allen, 570, it was held that the legislature could not empower towns to raise money by taxation for the purpose of refunding what had been paid by individuals for substitutes in military service.

In *Mead v. Acton*, 139 Mass. 341, 1 N. E. 413, it was held that an act passed in 1882 was void, which permitted taxation to pay bounties to those who re-enlisted in 1864, as being for a private purpose.

In *Cass v. Dillon*, 16 Ohio St. 38, it was held that taxes to refund bounties previously and voluntarily paid might be authorized. See also *State v. Harris*, 17 Ohio St. 608.

In a New York case it was held that an act authorizing a county to raise by taxation money to pay to men drafted and serving in Union armies in Civil War, or to their heirs, specified sums of money was void, as authorizing a devotion of public moneys to private purposes. *Bush v. Bd. of Supervisors of Orange Co.*, 159 N. Y. 212, 53 N. E. 1121, 45 L. R. A. 556, 70 Am. St. 538.

The Supreme Court of Wisconsin, in a well-reasoned case of *State v. Tappan*, 29 Wis. 664, deny the power of the State to *compel* a municipal corporation to pay bounties where it has not voted to do so.

In *Wheelock v. Lowell*, 196 Mass. 220, 81 N. E. 977, Chief Justice *Rugg*, in delivering the opinion of the court, said: "Municipalities are the creatures of the legislature, with powers as to the raising and expending of money strictly limited to the public purposes for which they are created. They have no power to expend money,

But it has been held by the Supreme Court of Massachusetts that towns might be authorized by the legislature to raise moneys by taxation for the purpose of refunding sums contributed by individuals to a common fund, in order to fill the quota of such towns under a call of the President, notwithstanding such moneys might have been contributed without promise or expectation of reimbursement. The court were of opinion that such contributions might well be considered as advancements to a public object, and, being such, the legislature might properly recognize the obligation and permit the towns to provide for its discharge.<sup>1</sup>

On a preceding page we have spoken in strong terms of the complete control which is possessed by the legislative authority of the State over the municipal corporations. There are nevertheless some limits to its power in this regard, as there are in various other directions limits to the legislative power of the State. Some of these are expressly defined; others spring from the usages, customs, and maxims of our people; they are a part of its history, a part of the system of local self-government, in view of the continuance and perpetuity of which all our constitutions are framed, and of the right to which the people can never be deprived except through express renunciation on their part. One undoubted right of the people is to choose, directly or indirectly, under the forms and restrictions prescribed by the legislature for reasons of general State policy, the officers of local administration, and the board that is to make the local laws. This is a right which of late has sometimes been encroached upon under various plausible pretenses, but almost

which can only come into their treasuries through taxation, for any other than purely public uses. In its last analysis any other principle is a taking of private property, through the medium of a public official, for a private use, which is contrary to fundamental conceptions of good government." See also *McManus v. Petoskey*, 164 Mich. 390, 129 N. W. 681; *Holley v. Mt. Vernon*, 126 N. Y. Supp. 460, 141 App. Div. 823; *Naylor v. McColloch*, 54 Oreg. 305, 103 Pac. 68.

In delivering the opinion of the court in *Wolcott v. Mayor, etc.*, of Wilmington, 11 Del. Ch. 1, 15, 95 Atl. 303, Chancellor *Curtis* says: "The legislative power over municipal corporations is large and ordinarily its determination of what is a public purpose for taxation, or the appropriation of money, is uncontrollable by the courts.

But where the legislature clearly devotes public funds to an object in no sense public, the judiciary may, and should, declare its action invalid."

The question of the right to pension school teachers was before the court in *Hibbard v. State*, 65 Ohio, 574, 64 N. E. 109, and the right denied as involving the taking of private property without due process of law and because the particular act was not uniform in its operation. See also *Mahon v. Board of Education*, 171 N. Y. 263, 63 N. E. 1107, 89 Am. St. Rep. 810. But see *Hughes v. Traeger*, 246 Ill. 612, 106 N. E. 431; *Hammitt v. Gaynor*, 144 N. Y. Supp. 123.

<sup>1</sup>*Freeland v. Hastings*, 10 Allen, 570, 585. And see *Hilbish v. Catherman*, 64 Pa. St. 154, and compare *Tyson v. School Directors*, 51 Pa. St. 9.



always with the result which reasonable men should have anticipated from the experiment of a body at a distance attempting to govern a local community of whose affairs or needs they could know but little, except as they should derive information from sources likely to have interested reasons for misleading.<sup>1</sup> Another is the

<sup>1</sup> On this subject reference is made to what is said by *Campbell*, Ch. J., in *People v. Hurlbut*, 24 Mich. 44, 87 *et seq.*; also p. 97. See s. c. 9 Am. Rep. 103.

In the absence of a grant in the constitution authorizing the appointment of municipal officers by the legislature or the governor, such power is denied by implication arising from the history and traditions which time out of mind have conferred local self-government on municipalities. *Ex parte Lewis*, 45 Tex. Co. Rep. 1, 73 S. W. 811, 108 Am. St. Rep. 929. But see *Brown v. Galveston*, 97 Tex. 1, 75 S. W. 488.

Much has been said concerning the necessity of legislative interference in some cases where bad men were coming into power through universal suffrage in cities, but the recent experience of the country shows that this has oftener been said to pave the way for bad men to obtain office or grants of unusual powers from the legislature than with any purpose to effect local reforms. And the great municipal scandals and frauds that have prevailed, like those which were so notorious in New York City, have been made possible and then nursed and fostered by illegitimate interference at the seat of State government. Some officers, usually of local appointment, are undoubtedly to be regarded as State officers whose choice may be confided to a State authority without any invasion of local rights; such as militia officers, officers of police, and those who have charge of the execution of the criminal laws; but those who are to administer the corporate funds and have the control of the corporate property, those who make the local laws and those who execute them, cannot rightfully be chosen by the central authority. *Dillon*, Mun. Corp. § 33. See *People v. Com. Council of Detroit*, 28 Mich. 228.

The legislature cannot appoint a board to have charge of the public works, streets, and fire department of a city. *State v. Denny*, 118 Ind. 382, 21 N. E. 252, 274, 4 L. R. A. 79; *Evansville v. State*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93.

A statute creating boards of park commissioners in cities of the first class, authorizing their appointment by the governor, and empowering them to raise by taxation the money necessary for carrying out their work, violates the theory of local self-government which, in Montana, is established as a fundamental principle of government. *State ex rel. Gerry v. Edwards*, 42 Mont. 135, 111 Pac. 734, 32 L. R. A. (N. S.) 1078, Ann. Cas. 1912 A, 1063.

An act establishing a bureau of public safety for a municipality, the members to be appointed by the governor, and conferring upon it the entire control and management of the police and fire departments, was held to be, as to the fire department, an unconstitutional interference with the municipality's right to local self-government. *Davidson v. Hine*, 151 Mich. 294, 115 N. W. 246, 123 Am. St. Rep. 267, 15 L. R. A. (N. S.) 575, 14 Ann. Cas. 352. See also *Lexington v. Thompson*, 113 Ky. 540, 68 S. W. 477, 101 Am. St. Rep. 361, 57 L. R. A. 775. But see *State v. Broatch*, 68 Neb. 687, 94 N. W. 1016, 110 Am. St. Rep. 477.

A city board may not control the police of neighboring townships which are not represented on it. *Metr. Police Board v. Wayne County Auditors*, 68 Mich. 576, 36 N. W. 743. But the State may provide for the appointment of police officials in a city. *Com. v. Plaisted*, 148 Mass. 374, 19 N. E. 224, 12 Am. St. 566, 2 L. R. A. 142; *State v. Seavey*, 22 Neb. 454, 35 N. W. 228; *Newport v. Horton*, 22 R. I. 196, 47 Atl. 312, 50 L. R. A. 330; *Americus v. Perry*, 114

right of the local community to determine what pecuniary burdens it shall take upon its shoulders.<sup>1</sup> But here from the very nature of the case there must be some limitations. The municipalities do not exist wholly for the benefit of their corporators, but as a part of the machinery of State government, and they cannot be permitted to decline a performance of their duties or a discharge of their obligations as such.<sup>2</sup> They cannot abolish local government;

Ga. 871, 40 S. E. 1004, 57 L. R. A. 230; *Arnett v. State*, 168 Ind. 180, 80 N. E. 153, 8 L. R. A. (N. S.) 1192; *Lexington v. Thompson*, 113 Ky. 540, 68 S. W. 477, 101 Am. St. Rep. 361, 57 L. R. A. 775; *Davidson v. Hine*, 151 Mich. 294, 115 N. W. 246, 123 Am. St. Rep. 267, 15 L. R. A. (N. S.) 575, 14 Ann. Cas. 352; *State v. Jost*, 265 Mo. 51, 175 S. W. 591, Ann. Cas. 1917 D, 1102; *State v. Broatch*, 68 Neb. 687, 94 N. W. 1016, 110 Am. St. Rep. 477; *Horton v. Newport*, 27 R. I. 283, 61 Atl. 759, 1 L. R. A. (N. S.) 512, 8 Ann. Cas. 1097. Not so in Wisconsin. *O'Connor v. Fond du Lac*, 109 Wis. 253, 85 N. W. 327. See *State v. Hunter*, 38 Kan. 578, 17 Pac. 177. And it may empower a board of water commissioners, created by itself, to bond a city. *David v. Portland Water Com.*, 14 Oreg. 98, 12 Pac. 174.

In Ohio it is held no infraction of the right of local self-government to allow the governor to appoint a board of public affairs for cities. *State v. Smith*, 44 Ohio St. 348, 7 N. E. 447, 12 N. E. 829.

In *Com. v. Plaisted*, *supra*, the court say, "We cannot declare an act of the legislature invalid because it abridges the exercise of the privilege of local self-government in a particular in regard to which such privilege is not guaranteed by any provision of the Constitution."

A West Virginia statute amending the charter of a city by changing the plan of its government from the ordinary form, administered by a mayor and councilmen, to a government by five commissioners, and authorizing the governor to appoint the first commissioners, to hold office for a period of two years, and providing for the election of their successors by the

voters of the city, at the first election provided for in the statute, was held to be valid and not to violate the spirit of the Constitution. *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917 A, 1244.

In Texas a municipal charter was so amended as to do away with the city council and create a board of five commissioners, two to be elected and three to be appointed by the governor, one of whom he was to designate as president. Vacancies on the board were to be filled by appointment by the governor. The charter was held to be valid. *Brown v. Galveston*, 97 Tex. 1, 75 S. W. 488.

The right of local self-government is not involved where a public duty is laid upon a municipality, the proper discharge of which will benefit the State at large or an indefinite portion of it. The municipality may be compelled to submit to a tax levied upon it by the legislature for the support of a local board of health, created by the legislature. *Davock v. Moore*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783.

<sup>1</sup> Where the Constitution prohibits the levy by the legislature of any tax upon a municipality for municipal purposes, the municipality cannot be required to purchase, when it shall determine to own a water plant, only from a private water company to which it has granted a franchise. *Helena Cons. Water Co. v. Steele*, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412.

<sup>2</sup> A county may be compelled to establish and maintain a high school. *State v. Freeman*, 61 Kan. 90, 58 Pac. 959, 47 L. R. A. 67. And a city, a park. *Knowlton v. Williams*, 174 Mass. 476, 55 N. E. 77, 47 L. R. A. 314.

they cannot refuse to provide the conveniences for its administration; they cannot decline to raise the necessary taxes for the purpose; they cannot repudiate pecuniary obligations that justly rest upon them as a local government. Over these matters the legislature of the State must have control, or confusion would inevitably be introduced into the whole system. But beyond this it is not often legitimate for the State to go except in moulding and shaping the local powers, and perhaps permitting the local authorities to do certain things for the benefit of their citizens which under the general grants of power would be inadmissible.<sup>1</sup>

On this general subject we shall venture to lay down the following propositions as the result of the authorities:—

1. That the legislature has undoubted power to compel the municipal bodies to perform their functions as local governments under their charters, and to recognize, meet, and discharge the duties and obligations properly resting upon them as such, whether they be legal, or merely equitable or moral; and for this purpose it may require them to exercise the power of taxation whenever and wherever it may be deemed necessary or expedient.<sup>2</sup>

<sup>1</sup> This subject is discussed with some fullness in Cooley on Taxation, ch. xxi.

<sup>2</sup> In support of this, we refer to the very strong case of *Guilford v. Supervisors of Chenango*, 18 Barb. 615, s. c. 13 N. Y. 143, where a town was compelled by the legislative authority of the State to reimburse its officers the expenses incurred by them in the honest but mistaken endeavor to discharge what they believed to be their duty; approved in *New Orleans v. Clark*, 95 U. S. 644, 24 L. ed. 521; also to *Sinton v. Ashbury*, 41 Cal. 525, 530, in which it is said by *Crocket, J.*, that "it is established by an overwhelming weight of authority, and I believe is conceded on all sides, that the legislature has the constitutional power to direct and control the affairs and property of a municipal corporation for municipal purposes, provided it does not impair the obligation of a contract, and by appropriate legislation may so control its affairs as ultimately to compel it, out of the funds in its treasury, or by taxation to be imposed for that purpose, to pay a demand when properly established, which in good conscience it ought to

pay, even though there be no legal liability to pay it" (citing *Blanding v. Burr*, 13 Cal. 343; *Beals v. Amador Co.*, 35 Cal. 624; *People v. Supervisors of San Francisco*, 11 Cal. 206; *Sharp v. Contra Costa Co.*, 34 Cal. 284; *People v. McCreery*, 34 Cal. 432; *People v. Alameda*, 26 Cal. 641, and holding that a city might be compelled to pay the claim of persons who had acted as commissioners in the extension of certain of its streets); also to *Borough of Dunmore's Appeal*, 52 Pa. St. 374, in which the legislature assumed the right of apportioning the indebtedness of a town among the boroughs carved out of it; supported by *Layton v. New Orleans*, 12 La. Ann. 515; *People v. Alameda*, 26 Cal. 641; and *Burns v. Clarion County*, 62 Pa. St. 422; also to *People v. Flagg*, 46 N. Y. 401, in which the legislative power to direct the construction of a public road, and to compel the creation of a town debt for the purpose, was fully sustained; to *People v. Power*, 25 Ill. 187; *Waterville v. County Commissioners*, 59 Me. 80; and to numerous other cases cited, *ante*, p. 395, note, and which we will not occupy space by repeating here.

In *Joslin Mfg. Co. v. Providence*, 262 U. S. 668, 67 L. ed. 1167, 43 Sup. Ct. Rep. 684, Justice *Sutherland*, who delivered the opinion of the court, said: "It is contended that the statute imposes a burden upon the taxpayers of the city of Providence by authorizing an expenditure, which in part is for the benefit of other municipalities or of companies outside the city, that are either not required to contribute to such expenditure or whose contributions do not constitute just compensation. The basis of this complaint, in so far as it relates to other municipalities and districts is that they are given the right to take water upon payment of fair wholesale rates therefor, and that these rates need bear no relation to the additional cost incident to the contingency of their coming in. That the taxpayers of one municipality may not be taxed arbitrarily for the benefit of another may be assumed; but that is not the case here presented. The communities to be supplied are those within the drainage area of the waters authorized to be taken. These waters are under the primary control of the State and in allowing the city of Providence to appropriate them, it was entirely just and proper for the legislature to safeguard the necessities of other communities who might be dependent thereon, and to that end to impose upon the city of Providence such reasonable conditions as might be necessary and appropriate. Municipalities are political subdivisions of the State, and are subject to the will of the legislature (*Trenton v. New Jersey*, 262 U. S. 182, 67 L. ed. 937, 43 Sup. Ct. Rep. 534); and may be compelled not only to recognize their legal obligations but to discharge obligations of an equitable and moral nature as well (*Guthrie National Bank v. Guthrie*, 173 U. S. 528, 43 L. ed. 796, 19 Sup. Ct. Rep. 513). The requirement here in question is one well within the rule. Specifically, it is objected that the act does not require these other communities to bear a proportionate part of the cost of acquisition, construction and maintenance. The special facts which led the legislature

to direct payment at wholesale rates, instead of upon the basis of sharing in the cost of the enterprise, or of some other, we need not consider. It may have been, as suggested, that there were inherent difficulties in the way of making such an apportionment. But it is enough to say that the method selected is one within the scope of legislative discretion and not obnoxious to the Federal Constitution. See *County of Mobile v. Kimball*, 102 U. S. 691, 703-704, 26 L. ed. 238; *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; *Davidson v. New Orleans*, 96 U. S. 97, 106, 24 L. ed. 616. The legislature is not precluded from putting a burden upon one municipality because it may result in an incidental benefit to another. *County of Mobile v. Kimball*, *supra*, 102 U. S. at pages 703, 704, 26 L. ed. 238. Moreover, we cannot assume that the fair wholesale rates to be paid by these outside communities will be less than just compensation for what they get."

The legislature may impose upon a municipal corporation liability for injury to person or property from riots or mobs, irrespective of its power to have prevented the violence or of negligence in the use of its power. *Chicago v. Sturges*, 222 U. S. 313, 56 L. ed. 215, 32 Sup. Ct. Rep. 92, Ann. Cas. 1913 B, 1349; *Dawson Soap Co. v. Chicago*, 234 Ill. 314, 84 N. E. 920, 14 Ann. Cas. 1131; *Iola v. Birnbaum*, 71 Kan. 600, 81 Pac. 198, 6 Ann. Cas. 267; *Butte Miners' Union v. Butte*, 58 Mont. 391, 194 Pac. 149, 13 A. L. R. 746.

A workmen's compensation act which compels municipal corporations to compensate all workmen accidentally injured while in the employ of the corporation, is valid. *Wood v. Detroit*, 188 Mich. 547, 155 N. W. 592, L. R. A. 1916 C, 388; *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489.

Although an act authorizing towns to repair and grade highways made no provision as to damages that might result to property owners from the undertaking, an act providing for the recovery of such damages from a

2. That in some cases, in view of the twofold character of such bodies, as being on the one hand agencies of State government, and on the other, corporations endowed with capacities and permitted to hold property and enjoy peculiar privileges for the benefit of their corporators exclusively, the legislature may permit the incurring of expense, the contracting of obligations, and the levy of taxes

town is not invalid. *In re Borup*, 182 N. Y. 222, 74 N. E. 838, 108 Am. St. Rep. 796.

The legislature may validate an unauthorized issue of bonds, thereby taking away an inequitable defense against a holder of them in good faith, and enabling him to enforce them. *Read v. Plattsmouth*, 107 U. S. 568, 27 L. ed. 414, 2 Sup. Ct. Rep. 208. So far as an act creates a liability which did not exist, it is void; so far as it provides a means for enforcing a pre-existing liability, it is valid. *Supervisors of Sadsbury v. Dennis*, 96 Pa. St. 400. The legislature cannot impose taxation to pay what a county does not owe: *Board of Supervisors v. Cowan*, 60 Miss. 876; nor to bestow a gratuity; otherwise if there is an equitable obligation to pay. *Fuller v. Morrison Co.*, 36 Minn. 309, 30 N. W. 824. See *State v. Foley*, 30 Minn. 350, 15 N. W. 375; *Caldwell Co. v. Harbert*, 68 Tex. 321, 4 S. W. 607.

Where the Constitution provides that no county shall give any money or property in aid of any individual, association, or corporation, the legislature cannot authorize the retrial of a demand against a county where judgment upon the first trial was for the county. *Re Greene*, 166 N. Y. 485, 60 N. E. 183.

In *Creighton v. San Francisco*, 42 Cal. 446, it is said that the power of the legislature to appropriate the money of municipal corporations in payment of equitable claims to individuals, not enforceable in the courts, depends on the legislative conscience, and the judiciary will not interfere unless in exceptional cases. But the Constitution of California now prohibits such action on the part of the legislature. *Conlin v. San Francisco Bd. of Supervisors*, 99 Cal. 17, 33

Pac. 753, 21 L. R. A. 474, 37 Am. St. 17. See also other cases to same subject, note 3, p. 464, and note 1 on p. 469, *ante*.

Unquestionably the legislature may decide what taxes shall be levied for proper purposes of local government. *Youngblood v. Sexton*, 32 Mich. 406. And a territorial legislature may compel the payment of debts incurred for public purposes by the inhabitants of a town before the organization of territorial and municipal governments. *Guthrie National Bank v. Guthrie*, 173 U. S. 528, 43 L. ed. 796, 19 Sup. Ct. Rep. 513; *Guthrie v. Oklahoma*, 1 Okla. 188, 31 Pac. 190, 21 L. R. A. 841. See also *Cooper v. Springer*, 65 N. J. L. 594, 48 Atl. 605.

That penalties recoverable at suit of party injured may be laid upon counties in which lynchings occur, see *Bd. of Com'rs of Champaign Co. v. Church*, 62 Ohio St. 318, 57 N. E. 50, 48 L. R. A. 738.

The Legislature may compel a city to acquire or construct and to pay for bridges and ferries within their limits or contiguous to them, but it cannot compel a county to pay the debts of a city within it. *Simon v. Northup*, 27 Oreg. 487, 40 Pac. 560, 30 L. R. A. 171.

The legislature cannot fix by statute the price which a city must pay for materials or property that it may need, or the compensation that it must pay for labor or other services that it may be obliged to employ, when such regulations increase the cost beyond that which it would be obliged to pay in the ordinary course of business. *Street v. Varney Electrical Supply Co.*, 160 Ind. 338, 66 N. E. 895, 98 Am. St. Rep. 325, 61 L. R. A. 155; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814.

which are unusual, and which would not be admissible under the powers usually conferred. Instances of the kind may be mentioned in the offer of military bounties, and the payment of a disproportionate share of a State burden in consideration of peculiar local benefits which are to spring from it.<sup>1</sup> [Where, however, a State constitution prohibits municipal corporations from levying taxes except for their necessary expenses, unless by a vote of the majority of the electors, the legislature cannot authorize a municipal corporation, without a vote of the people, to levy a tax for a purpose other than its necessary expenses.<sup>2</sup>]

<sup>1</sup> The subject of military bounties has been sufficiently referred to already. As to the right to permit a municipal corporation to burden itself with a local tax for a State object, we refer to *Merrick v. Amherst*, 12 Allen, 500; *Marks v. Trustees of Purdue University*, 37 Ind. 155; *Hasbrouck v. Milwaukee*, 13 Wis. 37. The first was a case in which, in consideration of the local benefits expected from the location of the State agricultural college in a certain town, the town was permitted to levy a large local tax in addition to its proportion of the State burden, for the erection of the necessary buildings. The second case was of a similar nature. The third was the case of permission to levy a city tax to improve the city harbor, — a work usually done by the general government. See also *Sinclair v. Lincoln*, 101 Neb. 163, 162 N. W. 488, L. R. A. 1917 E, 842.

There are cases which go further than these, and hold that the legislature may *compel* a municipal corporation to do what it may thus permit. Thus, in *Kirby v. Shaw*, 19 Pa. St. 258, it appeared that by an act of April 3, 1848, the commissioners of Bradford County were required to add \$500 annually, until 1857, to the usual county rates and levies of the borough of Towanda in said county, for the purpose of defraying the expenses of the courthouse and jail, then in process of erection in that borough. The act was held constitutional on the principle of assessment of benefits.

In *Gordon v. Cornes*, 47 N. Y. 608, a law was sustained which "authorized

and required" the village of Brockport to levy a tax for the erection of a State normal school building at that place. It is to be said of this case, however, that there was to be in the building a grammar-school free to all the children of proper acquirements in the village; so that the village was to receive a peculiar and direct benefit from it, besides those which would be merely incidental to the location of the normal school in the place. But for this circumstance it would be distinctly in conflict with *State v. Haben*, 22 Wis. 660, where it was held incompetent for the legislature to appropriate the school moneys of a city to the purchase of a site for a State normal school; and also with other cases cited in the next note. It must be conceded, however, that there are other cases which support it. And see, as supporting the last case, *Livingston County v. Weider*, 64 Ill. 427; *Burr v. Carbondale*, 76 Ill. 455; *Livingston County v. Darlington*, 101 U. S. 407, 25 L. ed. 1015.

<sup>2</sup> *Ketchie v. Hedrick*, 186 N. C. 392, 119 S. E. 767, 31 A. L. R. 491.

As to what are necessary expenses within the meaning of such a constitutional provision, see *Fawcett v. Mt. Airy*, 134 N. C. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. Rep. 825; *Jones v. Madison County*, 137 N. C. 579, 599, 50 S. E. 291, 298; *Collie v. Franklin County*, 145 N. C. 171, 59 S. E. 44; *Keith v. Lockhart*, 171 N. C. 455, 88 S. E. 642, Ann. Cas. 1918 D, 916; *Ketchie v. Hedrick*, 186 N. C. 392, 119 S. E. 767, 31 A. L. R. 491.

3. But it is believed the legislature has no power, against the will of a municipal corporation, to compel it to contract debts for local purposes in which the State has no concern, or to assume obligations not within the ordinary functions of municipal government. Such matters are to be disposed of in view of the interests of the corporators exclusively, and they have the same right to determine them for themselves which the associates in private corporations have to determine for themselves the questions which arise for their corporate action. The State in such cases may remove restrictions and permit action, but it cannot compel it.<sup>1</sup>

<sup>1</sup> A city cannot be compelled to erect buildings for a county; but it may be permitted to do it if it so elects. *Callam v. Saginaw*, 50 Mich. 7, 14 N. W. 677.

There are undoubtedly some cases which go to the extent of holding that municipal corporations and organizations are so completely under the legislative control, that whatever the legislature may *permit* them to do, it may *compel* them to do, whether the corporators are willing or not. A leading case is *Thomas v. Leland*, 24 Wend. 65. In that case it appeared that certain citizens of Utica had given their bond to the people of the State of New York, conditioned for the payment into the canal fund of the sum of \$38,615, the estimated difference between the cost of connecting the Chenango Canal with the Erie at Utica, instead of at Whitesborough, as the canal commissioners had contemplated; and it was held within the constitutional powers of the legislature to require this sum to be assessed upon the taxable property of the city of Utica, supposed to be benefited by the canal connection. The court treat the case as "the ordinary one of local taxation to make or improve a public highway", and dismiss it with few words. If it could be considered as merely a case of the apportionment between a number of municipalities of the expense of a public highway running through them, it would have the support of *Waterville v. County Commissioners*, 59 Me. 80; *Commonwealth v. Newburyport*, 103 Mass. 129; and also what is said in *Bay City v. State Treasurer*, 23 Mich. 499, where it is

admitted that over the matter of the construction of such a highway, as well as the apportionment of expense, the State authority must necessarily be complete. It has been considered in subsequent New York cases as a case of apportionment merely. See *People v. Brooklyn*, 4 N. Y. 419; *Howell v. Buffalo*, 37 N. Y. 267. The cases of *Kirby v. Shaw*, 19 Pa. St. 258, and *Gordon v. Cornes*, 47 N. Y. 608, referred to in the preceding note, it will be perceived, were also treated as cases merely of apportionment. How that can be called a case of apportionment, however, which singles out a particular town, and taxes it for benefits to be expected from a highway running across the State, without doing the same by any other town in the State, it is not easy to perceive.

In *Commissioners of Revenue v. The State*, 45 Ala. 399, it appeared that the legislature had created a local board consisting of the president of the county commissioners of revenue of Mobile County, the mayor of Mobile, the president of the Bank of Mobile, the president of the Mobile Chamber of Commerce, and one citizen of Mobile, appointed by the governor, as a board for the improvement of the river, harbor, and bay of Mobile, and required the commissioners of revenue of Mobile County to issue to them for that purpose county bonds to the amount of \$1,000,000, and to levy a tax to pay them. Here was an appointment by the State of local officers to make at the expense of the locality an improvement which it has been customary for the general government

to take in charge as one of national concern; but the Supreme Court of the State sustained the act, going farther, as we think, in doing so, than has been gone in any other case.

In *Hasbrouck v. Milwaukee*, 13 Wis. 37, approved and defended in an able opinion in *Mills v. Charleton*, 29 Wis. 400, the power of the legislature to compel the city of Milwaukee to issue bonds or levy a tax for the improvement of its harbor was distinctly denied, though it was conceded that permission might be given, which the city could lawfully act upon. Compare also *Knapp v. Grant*, 27 Wis. 147; *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622; *Atkins v. Randolph*, 31 Vt. 226.

In *People v. Batchellor*, 53 N. Y. 128, the Court of Appeals, through an able and lucid opinion by *Grover, J.*, denied the validity of a mandatory statute compelling a town to take stock in a railroad corporation, and to issue its bonds in exchange therefor. The authority to permit the town to do this was not discussed, but, taking that as admitted, it is declared that municipal corporations, in the making or refusing to make arrangements of the nature of that attempted to be forced upon the town in question, were entitled to the same freedom of action precisely which individual citizens might claim. This opinion reviews the prior decisions in the same State, and finds nothing conflicting with the views expressed.

In *Asbury v. Albemarle*, 162 N. C. 247, 78 S. E. 146, 44 L. R. A. (N. S.) 1189, it was held that an act which provides that before constructing its water plant a municipality shall acquire by purchase or condemnation a system maintained in its corporate limits by a private corporation was an unconstitutional interference by the legislature.

In *People v. Mayor, &c. of Chicago*, 51 Ill. 17, 2 Am. Rep. 278, it was denied, in an opinion of great force and ability, delivered by Chief Justice *Breese*, that the State could empower a board of park commissioners of State appointment to contract a debt for the city of Chicago, for the purposes of a

public park for that city, and without the consent of its citizens. The learned judge says (p. 31): "While it is conceded that municipal corporations, which exist only for public purposes, are subject at all times to the control of the legislature creating them, and have in their franchises no vested rights, and whose powers and privileges the creating power may alter, modify, or abolish at pleasure, as they are but parts of the machinery employed to carry on the affairs of the State, over which and their rights and effects the State may exercise a general superintendence and control (*Richland County v. Lawrence County*, 12 Ill. 8; *Trustees of Schools v. Tatman*, 13 Ill. 30), we are not of the opinion that that power, such as it is, can be so used as to compel any one of our many cities to issue its bonds against its will, to erect a park, or for any other improvement to force it to create a debt of millions; in effect, to compel every property owner in the city to give his bond to pay a debt thus forced upon the city. It will hardly be contended that the legislature can compel a holder of property in Chicago to execute his individual bond as security for the payment of a debt so ordered to be contracted. A city is made up of individuals owning the property within its limits, the lots and blocks which compose it, and the structures which adorn them. What would be the universal judgment, should the legislature, *sua sponte*, project magnificent and costly structures within one of our cities, — triumphal arches, splendid columns, and perpetual fountains, — and require in the act creating them that every owner of property within the city limits should give his individual obligation for his proportion of the cost, and impose such costs as a lien upon his property forever? What would be the public judgment of such an act, and wherein would it differ from the act under consideration?" And again: "Here, then, is a case where taxes may be assessed, not by any corporate authority of the city, but by commissioners, to whom is intrusted the erection, em-



bellishment, and control of this park, and this without consent of the property owners.

"We do not think it is within the constitutional competency of the legislature to delegate this power to these commissioners. If the principle be admitted that the legislature can, uninvited, of their mere will, impose such a burden as this upon the city of Chicago, then one much heavier and more onerous can be imposed; in short, no limit can be assigned to legislative power in this regard. If this power is possessed, then it must be conceded that the property of every citizen within it is held at the pleasure and will of the legislature. Can it be that the General Assembly of the State, just and honest as its members may be, is the depository of the rights of property of the citizen? Would there be any sufficient security for property if such a power was conceded? No well-regulated mind can entertain the idea that it is within the constitutional competency of the legislature to subject the earnings of any portion of our people to the hazards of any such legislation."

This case should be read in connection with the following in the same State, and all in the same direction. *People v. Common Council of Chicago*, 51 Ill. 58; *Lovington v. Wider*, 53 Ill. 302; *People v. Canty*, 55 Ill. 33; *Wider v. East St. Louis*, 55 Ill. 133; *Gage v. Graham*, 57 Ill. 144; *East St. Louis v. Witts*, 59 Ill. 155; *Marshall v. Silliman*, 61 Ill. 218; *Cairo, &c. R. R. Co. v. Sparta*, 77 Ill. 505; *Barnes v. Lacon*, 84 Ill. 461. See also *People v. Common Council of Detroit*, 28 Mich. 228; *State v. Edwards*, 42 Mont. 135, 111 Pac. 734, 32 L. R. A. (n. s.) 1078, Ann. Cas. 1912 A, 1063. But in Massachusetts it has been held that the legislature may compel a city to purchase and maintain a public park. *Attorney-General v. Williams*, 174 Mass. 476, 55 N. E. 77, 47 L. R. A. 314. See also *In re* opinion of the Justices, 34 R. I. 191, 83 Atl. 3. That the legislature may compel a municipality to levy a tax for a local road, see *Wilcox v. Deer Lodge Co.*, 2 Mont. 574. And where a high-

way or bridge is beneficial to several municipalities, the legislature may compel them to contribute to the expense of providing and maintaining it, even though no portion of it lies within the boundaries of some of the contributories; and the legislature may apportion the expense. *State v. Williams*, 68 Conn. 131, 35 Atl. 24, 421, 48 L. R. A. 465, aff. in *Williams v. Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617. Upon power of legislature to impose burdens of this character on municipalities, see cases collected in note to 48 L. R. A. 465.

The case of *People v. Batchellor*, 53 N. Y. 128, seems to us clearly inconsistent with *Thomas v. Leland*, *supra*. But, on the other hand, the case of *Duanesburgh v. Jenkins*, 57 N. Y. 177, goes to the full extent of holding that a subscription of a town to a railroad, made on condition of subsequent assent of the town thereto, may be relieved of the condition by the legislature and enforced against the town, though the original subscription was by a commission which the town did not choose. It is a little difficult, therefore, to determine what the law of New York now is on this subject, especially as in *New York, &c. R. R. Co. v. Van Horn*, 57 N. Y. 473, the power of the legislature to make valid an ineffectual individual contract is denied. Other New York cases bearing on the subject are *Williams v. Duanesburg*, 66 N. Y. 135; *Horton v. Thompson*, 71 N. Y. 521; *Rogers v. Rochester, etc., R. Co.*, 21 Hun, 46; *Thompson v. Mamakating*, 37 Hun, 402. But leaving out of view the New York cases, and a few others which were decided on the ground of an apportionment of local benefits, we think the case in Alabama will stand substantially alone. Before that decision the Supreme Court of Illinois were able to say, in a case calling for a careful and thorough examination of the authorities, that counsel had "failed to find a case wherein it had been held that the legislature can compel a city against its will to incur a debt by the issue of its bonds for a local improvement." *People v.*

4. And there is much good reason for assenting also to what several respectable authorities have held, that where a demand is asserted against a municipality, though of a nature that the legislature would have a right to require it to incur and discharge, yet if its legal and equitable obligation is disputed, the corporation has the right to have the dispute settled by the courts, and cannot be bound by a legislative allowance of the claim.<sup>1</sup>

Having concisely stated these general views, we add merely, that those cases which hold that the State may raise bounty moneys

Mayor, &c., 51 Ill. 17, 31. See also cases, pp. 1031-1037, *infra*. And see *Cook Farm Co. v. Detroit*, 124 Mich. 426, 83 N. W. 130, holding that citizens must be permitted to pass upon the proposition to allow a board the power of local taxation, decided on authority of *Park Commissioners v. Detroit*, 28 Mich. 228.

<sup>1</sup> It was held in *People v. Hawes*, 37 Barb. 440, that the legislature had no right to direct a municipal corporation to satisfy a claim made against it for damages for breach of contract, out of the funds or property of such corporation. In citing the cases of *Guilford v. Supervisors of Chenango*, 13 N. Y. 143, and *People v. Supervisors of New York*, 11 Abb. 14, a distinction is drawn by which the cases are supposed to be reconciled with the one then under decision. "Those cases and many others," say the court, p. 455, "related not to the right or power of the legislature to compel an individual or corporation to pay a debt or claim, but to the power of the legislature to raise money by tax, and apply such money, when so raised, to the payment thereof. We could not, under the decisions of the courts on this point, made in these and other cases, now hold that the legislature had not authority to impose a tax to pay any claim, or to pay it out of the State treasury; and for this purpose to impose a tax upon the property of the whole State, or any portion of the State. This was fully settled in *People v. Mayor, &c. of Brooklyn*, 4 N. Y. 419; but neither that case nor the case in 13 N. Y. 143, in any manner gave a warrant for the opinion that the legislature had a right to direct a mu-

nicipal corporation to pay a claim for damages for breach of a contract out of the funds or property of such corporation, without a submission of such claim to a judicial tribunal." If by this is meant that the legislature has power to compel a corporation to tax its citizens for the payment of a demand, but has not the authority to make it a charge against the corporation in any other mode, the distinction seems to be one of form rather than of substance. It is no protection to the rights of property of a municipal corporation to hold that the legislature cannot determine upon a claim against it, if at the same time the corporation may be compelled by statute to assume and discharge the obligation through the levy of a tax for its satisfaction. But if it is only meant to declare that the legislature cannot adjudicate upon disputed claims, there can be no good reason to find fault with the decision. It is one thing to determine that the nature of a claim is such as to make it proper to satisfy it by taxation, and another to adjudge how much is justly due upon it. The one is the exercise of legislative power, the other of judicial. See *Sanborn v. Rice*, 9 Minn. 273; *Commonwealth v. Pittsburgh*, 34 Pa. St. 496; *Plimpton v. Somerset*, 33 Vt. 283; *Gage v. Graham*, 57 Ill. 144. But the power to decide upon the breach of a contract by a corporation, and the extent of the damages which have resulted, is less objectionable and less likely to lead to oppression, than the power to impose through taxation a claim upon a corporation which it never was concerned in creating, against which it protests, and

by taxation, to be paid to persons in the military service, we think stand by themselves, and are supported by different principles from any which can fairly be summoned to the aid of some of the other cases which we have cited. The burden of the public defense unquestionably rests upon the whole community; and the legislature may properly provide for its apportionment and discharge in such manner as its wisdom may prescribe. But those cases which hold it competent for the legislature to give its consent to a municipal corporation engaging in works of public improvement outside its territorial limits, and becoming a stockholder in a private corporation, must be conceded on all hands to have gone to the very limit of constitutional power in this direction; and to hold that the legislature may go even further, and, under its power to control the taxation of the political divisions and organizations of the State, may *compel* them, without the consent of their citizens, to raise money for such or any other unusual purposes, or to contract debts therefor, seems to us to be introducing new principles into our system of local self-government, and to be sanctioning a centralization of power not within the contemplation of the makers of the American constitutions. We think, where any such forced taxation is resisted by the municipal organization, it will be very difficult to defend it as a proper exercise of legislative authority in a government where power is distributed on the principles which prevail here.

### *Legislative Control of Corporate Property.*

The legislative power of the State controls and disposes of the property of the State. How far it may also control and dispose

which is unconnected with the ordinary functions and purposes of municipal government.

In *Borough of Dunmore's Appeal*, 52 Pa. St. 374, a decision was made which seems to conflict with that in *People v. Hawes*, *supra*, and with the subsequent case of *Baldwin v. Mayor, &c. of New York*, 42 Barb. 549. The Pennsylvania court decided that the constitutional guaranty of the right to jury trial had no application to municipal corporations, and a commission might be created by the legislature to adjust the demands between them. See also *In re Pennsylvania Hall*, 5 Pa. St. 204; *Layton v. New Orleans*, 12 La. Ann. 515.

In *People v. Power*, 25 Ill. 187, it was held competent for the legislature

to apportion the taxes collected in a county between a city therein and the remainder of the county, and that the county revenues "must necessarily be within the control of the legislature for political purposes." And see *Portwood v. Montgomery Co.*, 52 Miss. 523.

In Louisiana it has been held that while the legislature may compel a municipal corporation to pay a debt which is equitable in character, though not binding in law, it has no power to compel such a corporation to pay a claim with respect to which it is under no obligation moral or equitable; and the less so where the issue of obligation *vel non* has been finally decided between the parties, by a court of last resort, and where the fund from which

of the property of those agencies of government which it has created and endowed with corporate powers, is a question which happily there has been very little occasion to discuss in the courts. Being created as an agency of government, it is evident that the municipality cannot in itself have that complete and absolute control and power of disposition of its property which is possessed by natural persons and private corporations in respect to their several possessions. For it can hold and own property only for corporate purposes,<sup>1</sup> and its powers are liable at any time to be so modified by legislation as to render the property no longer available. Moreover, the charter rights may be altogether taken away; and in that case the legislature has deprived the corporation of its property by depriving it of corporate capacity to hold it. And in many ways, while the corporation holds and enjoys property, the legislature must possess power to interfere with its control, at least incidentally; for the mere fact that the corporation possesses property cannot deprive the State of its complete authority to mold and change the corporate organization, and enlarge or diminish the powers which it possessed before. But whether the State can directly intervene and take away the corporate property, or convert it to other uses than those for which it was procured, or whether, on repealing a charter of incorporation, it can take to itself the corporate property, and dispose of it at its discretion, are different questions from any raised by the indirect and incidental interference referred to.

In the leading case, in which it was decided by the Supreme Court of the United States that a private charter of incorporation, granted by a State, was a contract between the State and the incorporators, not subject to modification or repeal, except in pursuance of a right expressly reserved, but that the charter of a municipal corporation was not such a contract, it was at the same time declared, as the opinion of the judges, that the legislature could not deprive such municipal corporations of their vested rights in property. "It may be admitted," says one of the judges, "that corporations for mere public government, such as towns, cities, and counties, may in many respects be subject to legislative control. But it will hardly be contended that even in respect to such corpora-

the payment is claimed has been placed, by the Constitution, under a particular control, and dedicated to particular uses which do not include the payment of the claim in question. *Forman v. Sewerage and Water Board*, 135 La. 1031, 66 So. 351, L. R. A. 1915 D, 927.

<sup>1</sup> Such property is held subject to a trust in behalf of the public, and the municipality is incapable of alienating it unless expressly authorized thereto. See *Huron Waterworks Co. v. Huron*, 8 S. D. 169, 65 N. W. 816, 30 L. R. A. 848.

tions the legislative power is so transcendent that it may, at its will, take away the private property of the corporation, or change the uses of its private funds acquired under the public faith. Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter, without any default or consent of the corporators? If a municipal corporation be capable of holding devises and legacies to charitable uses, as many municipal corporations are, does the legislature, under our forms of limited government, possess the authority to seize upon those funds and appropriate them to other uses, at its own arbitrary pleasure, against the will of the donors and donees? From the very nature of our government, the public faith is pledged the other way, and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction, and abrogation."<sup>1</sup> "The government has no power to revoke a grant, even of its own funds, when given to a private person or corporation for special uses. It cannot recall its own endowments, granted to any hospital or college, or city or town, for the use of such corporations. The only authority remaining to the government is judicial, to ascertain the validity of the grant, to enforce its proper uses, to suppress frauds, and, if the uses are charitable, to secure their regular administration through the means of equitable tribunals, in cases where there would otherwise be a failure of justice."<sup>2</sup>

"In respect to public corporations," says another judge, "which exist only for public purposes, such as towns, cities, etc., the legislature may, under proper limitations, change, modify, enlarge, or restrain them, securing, however, the property for the use of those for whom and at whose expense it was purchased."<sup>3</sup> These views had been acted upon by the same court in preceding cases.<sup>4</sup> They draw a distinction between the political rights and privileges conferred on corporations and which are not vested rights in any sense implying constitutional permanency, and such rights in prop-

<sup>1</sup> *Story, J., in Dartmouth College v. Woodward*, 4 Wheat. 518, 694, 695, 4 L. ed. 629.

<sup>2</sup> *Story, J., in Dartmouth College v. Woodward*, 4 Wheat. 698, 4 L. ed. 629.

<sup>3</sup> *Washington, J., in Dartmouth College v. Woodward*, 4 Wheat. 663, 4 L. ed. 629.

<sup>4</sup> *Terrett v. Taylor*, 9 Cranch, 43, 3 L. ed. 650; *Town of Pawlet v. Clark*, 9 Cranch, 292, 3 L. ed. 735. See also *State v. Haben*, 22 Wis. 660, referred to, *ante*, p. 494, note; *Aberdeen v. Saunderson*, 16 Miss. 663.

In *People v. Common Council of Detroit*, 28 Mich. 228, this subject was largely considered, and the court denied the right of the State to compel a municipal corporation to contract a debt for a mere local object; for example, a city park. Compare *People v. Board of Supervisors*, 50 Cal. 561.

In Texas it is held that municipal corporations have a constitutional right to protection in their property as against State legislation. *Milam Co. v. Bateman*, 54 Tex. 153.

erty as the corporation acquires, and which in the view of these decisions are protected by the same reasons which shield similar rights in individuals.<sup>1</sup>

When the municipal divisions of the territory of the State are changed in their boundaries, two or more consolidated in one, or one subdivided, it is conceded that the legislature possesses the power to make such disposition of the corporate property as natural equity would require in view of the altered condition of things. The fact that a portion of the citizens, before entitled to the benefits springing from the use of specific property for public purposes, will now be deprived of that benefit, cannot affect the validity of the legislative act, which is supposed in some other way to compensate them for the incidental loss.<sup>2</sup> And in many other cases the legislature properly exercises a similar power of control in respect to the corporate property, and may direct its partition and appropriation, in order to accommodate most justly and effectually, in view of new circumstances, the purposes for which it was acquired.

The rule upon the subject we take to be this: when corporate powers are conferred, there is an implied compact between the State and the corporators that the property which they are given the capacity to acquire for corporate purposes under their charter shall not be taken from them and appropriated to other uses.<sup>3</sup> If the State grants property to the corporation, the grant is an exe-

<sup>1</sup> "It is an unsound and even absurd proposition that political power conferred by the legislature can become a vested right, *as against the government*, in any individual or body of men. It is repugnant to the genius of our institutions, and the spirit and meaning of the Constitution; for by that fundamental law, all political rights not there defined and taken out of the exercise of legislative discretion, were intended to be left subject to its regulation. If corporations can set up a vested right *as against the government* to the exercise of this species of power, because it has been conferred upon them by the bounty of the legislature, so may any and every officer under the government do the same." *Nelson, J.*, in *People v. Morris*, 13 Wend. 325, 331. And see *Bristol v. New Chester*, 3 N. H. 524; *Benson v. Mayor, &c. of New York*, 10 Barb. 223.

It is competent for the legislature to transfer the control of the streets

of a city to park commissioners for boulevard or park purposes. *People v. Walsh*, 96 Ill. 232, 36 Am. Rep. 135. See *Matter of Woolsey*, 95 N. Y. 135.

<sup>2</sup> *Bristol v. New Chester*, 3 N. H. 524; *Attorney-General v. Lowrey*, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27; *Hunter v. Pittsburgh*, 207 U. S. 161, 52 L. ed. 151, 28 Sup. Ct. Rep. 40; *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 479, 38 L. R. A. (N. S.) 77; *Pennsylvania Co. v. Pittsburgh*, 226 Pa. St. 322, 75 Atl. 421, 134 Am. St. Rep. 1063. And see *ante*, pp. 395-399, notes; *post*, p. 507, note 1.

<sup>3</sup> If land is dedicated as a public square, and accepted as such, a law devoting it to other uses is void, because violating the obligation of contracts. *Warren v. Lyons City*, 22 Iowa, 351. As there was no attempt in that case to appropriate the land to such other uses under the right of eminent domain, the question of the power to do so was not considered.

cuted contract, which cannot be revoked. The rights acquired, either by such grants or by any other legitimate mode in which such a corporation can acquire property, are vested rights, and cannot be taken away. Nevertheless if the corporate powers should be repealed, the corporate ownership would necessarily cease, and even when not repealed, a modification of those powers, or a change in corporate bounds, might seriously affect, if not altogether divest, the rights of individual corporators, so far as they can be said to have any rights in public property. And in other ways, incidentally as well as by direct intervention, the State may exercise authority and control over the disposition and use of corporate property, according to the legislative view of what is proper for the public interest and just to the corporators, subject, however, to this restriction, that the purpose for which the property was originally acquired shall be kept in view, so far as the circumstances will admit, in any disposition that may be made of it.<sup>1</sup>

<sup>1</sup> This principle is asserted and sustained in *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 699, in an elaborate opinion by Mr. Justice *Clifford*. Also in *Meriwether v. Garrett*, 102 U. S. 472, 26 L. ed. 197. And see *North Yarmouth v. Skillings*, 45 Me. 133.

"That the State may make a contract with, or a grant to, a public municipal corporation, which it could not subsequently impair or resume, is not denied; but in such case the corporation is to be regarded as a private company. A grant may be made to a public corporation for purposes of private advantage; and although the public may also derive a common benefit therefrom, yet the corporation stands on the same footing, as respects such grant, as would any body of persons upon whom like privileges were conferred. Public or municipal corporations, however, which exist only for public purposes, and possess no powers except such as are bestowed upon them for public political purposes, are subject at all times to the control of the legislature, which may alter, modify, or abolish them at pleasure." *Trumbull, J.*, in *Richland County v. Lawrence County*, 12 Ill. 18.

"Public corporations are but parts of the machinery employed in carrying on the affairs of the State; and they

are subject to be changed, modified, or destroyed, as the exigencies of the public may demand. The State may exercise a general superintendence and control over them and their right and effects, so that their property is not diverted from the uses and objects for which it was given or purchased." *Trustees of Schools v. Tatman*, 13 Ill. 27, 30, per *Treat*, Ch. J. And see *Harrison v. Bridgeton*, 16 Mass. 16; *Rawson v. Spencer*, 113 Mass. 40; *Montpelier v. East Montpelier*, 27 Vt. 704; *Same v. Same*, 29 Vt. 12; *Benson v. Mayor, &c. of New York*, 10 Barb. 223; *City of Louisville v. University*, 15 B. Monr. 642; *Weymouth & Braintree Fire District v. County Commissioners*, 108 Mass. 142; *Morgan v. Beloit*, 7 Wall. 613; *Trenton v. New Jersey*, 262 U. S. 182, 67 L. ed. 937, 43 Sup. Ct. Rep. 534, 29 A. L. R. 1471

In *Trenton v. New Jersey*, 262 U. S. 182, 67 L. ed. 937, 43 Sup. Ct. Rep. 534, 29 A. L. R. 1471, the court said: "The power of the state, unrestrained by the contract clause or the Fourteenth Amendment (of the Federal Constitution), over the rights and property of cities held and used for governmental purposes cannot be questioned."

In *Hunter v. Pittsburgh*, 207 U. S. 179, 52 L. ed. 151, 28 Sup. Ct.

Rep. 40, Justice *Moody*, who delivered the opinion of the court, said: "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the State Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State, and those who legislate for the State are alone responsible for any unjust

or oppressive exercise of it. . . . It will be observed that, in describing the absolute power of the State over the property of municipal corporations, we have not extended it beyond the property held and used for governmental purposes. Such corporations are sometimes authorized to hold property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal corporations in their political and governmental capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the State courts (*Dill. Mun. Corp.* 4th ed. §§ 66 to 66a inclusive; cases cited in note to *State ex rel. Bulkeley v. Williams*, 48 L. R. A. 465), and it has been held that, as to the latter class of property, the legislature is not omnipotent. If the distinction is recognized it suggests the question whether property, of a municipal corporation owned in its private and proprietary capacity may be taken from it against its will and without compensation. Mr. *Dillon* says truly that the question has never arisen directly for adjudication in this court. But it and the distinction upon which it is based have several times been noticed."

In *Higginson v. Treasurer & School House Commissioners*, 215 Mass. 583, 99 N. E. 523, 42 L. R. A. (N. S.) 215, the court said: "The property of which a city or town has acquired absolute ownership as an agency of the State, and which it holds strictly for public uses, is subject to legislative control. It may be transferred to some other agency of government charged with the same duties, or it may be devoted to other public purposes. . . . The property which a municipality holds in its private capacity is not subject to the unrestricted authority of the legislature, and no person can deprive it of such property rights against its will, except by the exercise of eminent domain with payment of full compensation." See also *Agawam v. Hampden*, 130 Mass. 528; *Mount Hope Cemetery v.*



Boston, 158 Mass. 509, 33 N. E. 695; Springfield v. Springfield Street Railway, 182 Mass. 41, 64 N. E. 577; Worcester v. Worcester Consolidated Street Railway, 182 Mass. 49, 64 N. E. 581; Ware v. Fitchburg, 200 Mass. 61, 85 N. E. 951; Codman v. Crocker, 203 Mass. 146, 89 N. E. 177.

In *State v. St. Louis County Court*, 34 Mo. 546, the following remarks are made by the court, in considering the cause shown by the county in answer to an application to compel it to meet a requisition for the police board of St. Louis: "As to the second cause shown in the return, it is understood to mean, not that there is in fact no money in the treasury to pay this requisition, but that as a matter of law all the money which is in the treasury was collected for specific purposes from which it cannot be diverted. The specific purposes for which the money was collected were those heretofore directed by the legislature; and this act, being a later expression of the will of the legislature, controls the subject, and so far as it conflicts with previous acts repeals them. The county is not a private corporation, but an agency of the State government; and though as a public corporation it holds property, such holding is subject to a large extent to the will of the legislature. Whilst the legislature cannot take away from a county its property, it has full power to direct the mode in which the property shall be used for the benefit of the county." For like views, see *Palmer v. Fitts*, 51 Ala. 489, 492. Compare *People v. Mahaney*, 13 Mich. 481; *Richland Co. v. Richland Center*, 59 Wis. 591, 18 N. W. 497.

It will be observed that the strong expression of legislative power is generally to be found in cases where the thing actually done was clearly and unquestionably competent. In *Payne v. Treadwell*, 16 Cal. 220, 233, this language is used: "The agents of the corporation can sell or dispose the property of the corporation only in the way and according to the order of the legislature; and therefore the legislature may by law operating immediately upon the subject dispose of

this property, or give effect to any previous disposition or attempted disposition. The property itself is a trust, and the legislature is the prime and controlling power, managing and directing the use, disposition, and direction of it." Quoted and approved in *San Francisco v. Canavan*, 42 Cal. 541, 558. These strong and general expressions should be compared with what is said in *Grogan v. San Francisco*, 18 Cal. 590, in which the right of municipal corporations to constitutional protection in their property is asserted fully. The same right is asserted in *People v. Batchellor*, 53 N. Y. 128; *People v. Mayor, &c. of Chicago*, 51 Ill. 17; *People v. Tappan*, 29 Wis. 664; *People v. Hurlbut*, 24 Mich. 44; and very many other cases. See *Dillon, Mun. Corp.* §§ 39 *et seq.*, and cases referred to in notes. And see *Hewison v. New Haven*, 37 Conn. 475, and *New Orleans, &c. R. R. Co. v. New Orleans*, 26 La. Ann. 517, as to the distinction between the public or governmental character of municipal corporations, and their private character as respects the ownership and management of their own property.

A park acquired in fee by a city by the exercise of the power of eminent domain, is held by the city as an agency of government, and the legislature has the power to appropriate it or any part of it to another public use without the consent of the city. *Higginson v. Treasurer and School House Commissioners*, 212 Mass. 583, 99 N. E. 523, 42 L. R. A. (N. S.) 215. But see *State ex rel. Gerry v. Edwards*, 42 Mont. 135, 111 Pac. 734, 32 L. R. A. (N. S.) 1078, Ann. Cas. 1912 A, 1063.

The obligation of a street railroad company to the city to pave and repair streets occupied by it, based on accepted conditions of a municipal ordinance granting right of location, is not private property beyond the legislative control of the State, and State legislation taxing the company, and thereby relieving it from its obligation to the city to pave and repair such streets, is not void as violating the contract clause of the Federal Constitution. *Worcester v. Worcester*

Consol. Street R. Co., 196 U. S. 539, 49 L. ed. 591, 25 Sup. Ct. Rep. 327.

A legislative grant to a city of the power to regulate rates to be charged to a city and its inhabitants by a gas company may be withdrawn by the State from the city and conferred upon a commission, and thereby no question is presented under the contract clause of the Federal Constitution. *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U. S. 394, 63 L. ed. 1054, 39 Sup. Ct. Rep. 526, P. U. R. 1916 E, 178.

In Mississippi it has been held that the legislature has the power to divest a municipality of all control over its streets, and authorize their use by a corporation without compensation to the municipality. *Canton v. Canton Cotton Warehouse Co.*, 84 Miss. 268, 36 So. 266, 105 Am. St. Rep. 428, 65 L. R. A. 561.

With regard to contracts for the purchase of property or the employment of labor, counties, cities, and towns stand much upon the same footing as private corporations; and they cannot be compelled by an act of the legislature to pay for any species of property more than it is worth, or more than its market value at the time and in the place where it is contracted for. The power to confiscate the property of the citizens and taxpayers of a county, city, or town, by forcing them to pay for any commodity, whether it be merchandise or labor, an arbitrary price, in excess of the market value, is not one of the powers of the legislature over municipal corporations, nor the legitimate use of such corporations as agencies of the State. *Street v. Varney Electrical Supply Co.*, 160 Ind. 338, 66 N. E. 895, 98 Am. St. Rep. 325, 61 L. R. A. 154; *People v. Coler*, 166 N. Y. 1, 59 N. E. 716, 82 Am. St. Rep. 605, 52 L. R. A. 814.

One of the strongest illustrations of the power of legislation over municipal corporations is to be found in the statutes which have been passed in some States to compel these corporations to make compensation for losses occasioned by mobs and riots. The old English law made the hundred responsible for robberies, and this was

extended by the Riot Act of 1 Geo. I. to cover damages sustained at the hands of persons unlawfully, riotously, and tumultuously assembled. See *Radeliffe v. Eden*, Cowp. 485; *Wilmot v. Horton*, Doug. 701, note; *Hyde v. Cogan*, Doug. 699, an action growing out of the riot in which Lord Mansfield's house was sacked and his library destroyed. Similar statutes it has been deemed necessary to enact in some of the States, and they have received elaborate judicial examination and been sustained as important and beneficial police regulations, based upon the theory that, with proper vigilance on the part of the local authorities, the disorder and injury might and ought to have been prevented. *Donoghue v. Philadelphia*, 2 Pa. St. 230; *Commissioners of Kensington v. Philadelphia*, 13 Pa. St. 76; *Allegheny County v. Gibson*, 90 Pa. St. 397, 35 Am. Rep. 670; *Darlington v. New York*, 31 N. Y. 164; *Ely v. Niagara Co.*, 36 N. Y. 297; *Folson v. New Orleans*, 28 La. Ann. 936; *Street v. New Orleans*, 32 La. Ann. 577; *Underhill v. Manchester*, 45 N. H. 214; *Chadbourn v. New Castle*, 48 N. H. 196; *Chicago v. Manhattan Cement Co.*, 178 Ill. 372, 53 N. E. 68, 45 L. R. A. 848, 69 Am. St. 321; *Chicago v. Sturges*, 222 U. S. 313, 56 L. ed. 215, 32 Sup. Ct. Rep. 92; Ann. Cas. 1913 B, 1349; *Dawson Soap Co. v. Chicago*, 234 Ill. 314, 84 N. E. 920, 14 Ann. Cas. 1131; *Iola v. Birnbaum*, 71 Kan. 600, 81 Pac. 198, 6 Ann. Cas. 267; *Blake-man v. Wichita*, 93 Kan. 444, 144 Pac. 816, L. R. A. 1915 C, 578, Ann. Cas. 1916 D, 188; *Easter v. El Dorado*, 104 Kan. 57, 177 Pac. 538, 13 A. L. R. 744; *Sauger v. Kansas City*, 111 Kan. 262, 206 Pac. 891, 23 A. L. R. 294; *Butte Miners' Union v. Butte*, 58 Mont. 391, 194 Pac. 149, 13 A. L. R. 746.

Municipal corporations may be made liable for lynchings that occur within their boundaries. *Brown v. Orangeburg Co.*, 55 S. C. 45, 32 S. E. 764, 44 L. R. A. 734; see, in this connection, *Champaign Co. v. Church*, 62 Ohio St. 318, 57 N. E. 50, 48 L. R. A. 738. Upon liability for destruction by mobs, see note to 24 L. R. A. 592.

This restriction is not the less applicable where corporate powers are abolished than it is in other cases; and whatever might be the nature of the public property which the corporation had acquired, and whatever the purpose of the acquisition, the legislature, when by taking away the corporate authority it became vested with the control of the property, would be under obligation to dispose of it in such manner as to give the original corporators the benefit thereof by putting it to the use designed, if still practicable, or to some kindred or equally beneficial use having reference to the altered condition of things. The obligation is one which, from the very nature of the case, must rest for its enforcement in great measure upon the legislative good faith and sense of justice; and it could only be in those cases where there had been a clear disregard of the rights of the original corporators, in the use attempted to be made of the property, that relief could be had through judicial action.

No such restriction, however, can rest upon the legislature in regard to the rights and privileges which the State grants to municipal corporations in the nature of franchises, and which are granted only as aids or conveniences to the municipality in effecting the purposes of its incorporation. These, like the corporate powers, must be understood to be granted during pleasure.<sup>1</sup>

### *Towns and Counties.*

Thus far we have been considering general rules, applicable to all classes of municipal organizations possessed of corporate

There is no such liability in the absence of statute. *Western College v. Cleveland*, 12 Ohio St. 375. Nor is there for loss of life at hands of rioters, in absence of statute. *New Orleans v. Abagnatto*, 62 Fed. Rep. 240, 26 L. R. A. 329; *Gianfortone v. New Orleans*, 61 Fed. Rep. 64, 24 L. R. A. 592.

<sup>1</sup> *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 13 L. ed. 518. On this subject see ch. ix., *post*. The case of *Trustees of Aberdeen Academy v. Mayor, &c. of Aberdeen*, 13 S. & M. 645, appears to be *contra*. By the charter of the town of Aberdeen in 1837, the legislature granted to it the sole power to grant licenses to sell vinous and spirituous liquors within the corporate limits thereof, and to appropriate the money arising therefrom to city purposes. In 1848 an

act was passed giving these moneys to the Aberdeen Female Academy. The act was held void, on the ground that the original grant was of a franchise which constituted property, and it could not be transferred to another, though it might be repealed. The case cites *Bailey v. Mayor, &c.*, 3 Hill, 531, and *St. Louis v. Russell*, 9 Mo. 507, which seem to have little relevancy; also 4 Wheat. 663, 698, 699, 4 L. ed. 665, 674, and 2 Kent, 305, note, for the general rule protecting municipal corporations in their vested rights to property. The case of *Benson v. Mayor, &c. of New York*, 10 Barb. 223, also holds the grant of a ferry franchise to a municipal corporation to be irrevocable, but the authorities generally will not sustain this view. See *post*, p. 576, and note.

powers, and by which these powers may be measured, or the duties which they impose defined. In regard to some of these organizations, however, there are other and peculiar rules which require separate mention. Some of them are so feebly endowed with corporate life, and so much hampered, controlled, and directed in the exercise of the functions which are conferred upon them, that they are sometimes spoken of as nondescript in character, and as occupying a position somewhere between that of a corporation and a mere voluntary association of citizens. Counties, townships, school districts, and road districts do not usually possess corporate powers under special charters; but they exist under general laws of the State,<sup>1</sup> which apportion the territory of the State into political divisions for convenience of government, and require of the people residing within those divisions the performance of certain public duties as a part of the machinery of the State; and, in order that they may be able to perform these duties, vest them with certain corporate powers. Whether they shall assume those duties or exercise those powers, the people of the political divisions are not allowed the privilege of choice; the legislature assumes this division of the State to be essential in republican government, and the duties are imposed as a part of the proper and necessary burden which the citizens must bear in maintaining and perpetuating constitutional liberty.<sup>2</sup> Usually their functions are wholly of a public

<sup>1</sup> A constitutional provision that the legislature shall pass no special act conferring corporate powers, applies to public as well as private corporations. *State v. Cincinnati*, 20 Ohio St. 18; *Clegg v. School District*, 8 Nev. 178; *School District v. Insurance Co.*, 103 U. S. 707, 26 L. ed. 601; *Longview v. Crawfordsville*, 164 Ind. 117, 73 N. E. 78, 68 L. R. A. 622, 3 Ann. Cas. 496; *Ferry v. King County*, 43 Wash. 61, 86 Pac. 210, 9 Ann. Cas. 1170.

<sup>2</sup> *Granger v. Pulaski County*, 26 Ark. 37; *Scales v. Chattahoochee County*, 41 Ga. 225; *Palmer v. Fitts*, 51 Ala. 489; *Rogers Locomotive Machine Works v. American Emigrant Co.*, 164 U. S. 559, 41 L. ed. 552; 17 Sup. Ct. Rep. 188; *Board of Commissioners v. Wheeler*, 39 Colo. 207, 89 Pac. 50; *Cook County v. Chicago*, 311 Ill. 234, 142 N. E. 512, 31 A. L. R. 442; *State v. Board of Commissioners*, 170 Ind. 595, 85 N. E. 513; *McSurely v. McGrew*, 140 Iowa, 163, 118 N. W.

415, 132 Am. St. Rep. 248; *Yamhill County v. Foster*, 53 Oreg. 124, 99 Pac. 286.

“A county is one of the civil divisions of the State for political and judicial purposes, created by the sovereign power of the State of its own will, without the consent of the people who inhabit it. 7 Am. & Eng. Ency. Law (2d Ed.), 900. It is *quasi* corporate in character, but has only such powers as are expressly provided by law or are necessarily implied by those expressed.’ *Independent Pub. Co. v. Lewis & Clark County*, 30 Mont. 83, 75 Pac. 860. In *Board of Commissioners v. Watson*, 7 Okla. 174, 54 Pac. 441, it is said: ‘A county is but a subordinate political subdivision of sovereignty created for governmental purposes and for greater convenience in carrying on the public affairs.’ . . . Legislative power over counties is supreme, except in so far as it is restricted by the Constitution in express terms or by necessary im-

nature, and there is no room to imply any contract between them and the State, in their organization as corporate bodies, except that which springs from the ordinary rules of good faith, and which requires that the property they shall acquire, by local taxation or otherwise, for the purposes of their organization, shall not be seized by the State, and appropriated in other ways. They are, therefore, sometimes called *quasi* corporations,<sup>1</sup> to distinguish them from the corporations in general, which possess more completely the functions of an artificial entity. Chief Justice *Parker*, of Massachusetts, in speaking of school districts, has said, "That they are not bodies, politic and corporate, with the general powers of corporations, must be admitted; and the reasoning advanced to show their defect of power is conclusive. The same may be said of towns and other municipal societies; which, although recognized by various statutes, and by immemorial usage, as persons or aggregate corporations, with precise duties which may be enforced, and privileges which may be maintained by suit at law, yet are deficient in many of the powers incident to the general character of corporations. They may be considered, under our institutions, as *quasi* corporations, with limited powers, coextensive with the duties imposed upon

plication." *Hersey v. Nelson*, 47 Mont. 132, 131 Pac. 30, Ann. Cas. 1914 C, 963.

<sup>1</sup> *Riddle v. Proprietors, &c.*, 7 Mass. 169, 187; *School District v. Wood*, 13 Mass. 192; *Adams v. Wiscasset Bank*, 1 Me. 361; *Denton v. Jackson*, 2 Johns. Ch. 320; *Todd v. Birdsall*, 1 Cow. 260, 13 Am. Dec. 522; *Beardsley v. Smith*, 16 Conn. 367; *Eastman v. Meredith*, 36 N. H. 284; *Hopple v. Brown*, 13 Ohio St. 311; *Commissioners of Hamilton Co. v. Mighels*, 7 Ohio St. 109; *Ray County v. Bentley*, 49 Mo. 236; *Pasadena School Dist. v. Hollywood City School Dist.*, 156 Cal. 416, 105 Pac. 122, 26 L. R. A. (N. S.) 485, 20 Ann. Cas. 87; *Pasadena School Dist. v. Pasadena*, 166 Cal. 7, 134 Pac. 985, 47 L. R. A. (N. S.) 892, Ann. Cas. 1915 B. 1039; *Mac-Millan Co. v. Clarke*, 184 Cal. 491, 194 Pac. 1030, 17 A. L. R. 288; *Hassett v. Carroll*, 85 Conn. 23, 81 Atl. 1013, Ann. Cas. 1913 A, 333; *Jackson County v. Kaul*, 77 Kan. 717, 96 Pac. 45, 17 L. R. A. (N. S.) 552; *Hersey v. Nelson*, 47 Mont. 132, 131 Pac. 30, Ann. Cas. 1914 C, 963; *Davie v. Douglas County*, 98 Neb. 479, 153

N. W. 509, L. R. A. 1916 B, 1261; *O'Brien v. Rockingham County*, 80 N. H. 522, 120 Atl. 254; *Smith v. Robersonville Graded School*, 141 N. C. 143, 53 S. E. 524, 8 Ann. Cas. 529; *Pittsburg v. Sterrett Subdistrict School*, 204 Pa. St. 635, 54 Atl. 463, 61 L. R. A. 183; *Crabb v. Celeste School Dist.*, 105 Tex. 194, 146 S. W. 528, 39 L. R. A. (N. S.) 601, Ann. Cas. 1915 B, 1146; *Howard v. Tacoma School Dist.*, 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917 D, 792; *McGillvra v. Seattle School Dist.*, No. 1, 113 Wash. 619, 194 Pac. 817, 12 A. L. R. 917; *Herald v. Board of Education*, 65 W. Va. 765, 65 S. E. 102, 31 L. R. A. (N. S.) 588.

In Nebraska counties are not municipal corporations. *Sherman Co. v. Simons*, 109 U. S. 735, 27 L. ed. 1093, 3 Sup. Ct. Rep. 502.

It is not competent to organize a town of parcels of territory which are not contiguous. *Chicago, &c. Railway Co. v. Oconto*, 50 Wis. 189, 6 N. W. 607, 36 Am. Rep. 840. See *Smith v. Sherry*, 50 Wis. 210, 6 N. W. 561.

them by statute or usage, but restrained from the general use of authority which belongs to these metaphysical persons by the common law. The same may be said of all the numerous corporations which have been from time to time created by various acts of the legislature; all of them enjoying the power which is expressly bestowed upon them, and perhaps, in all instances where the act is silent, possessing, by necessary implication, the authority which is requisite to execute the purposes of their creation." "It will not do to apply the strict principles of law respecting corporations in all cases to these aggregate bodies which are created by statute in this Commonwealth. By the several statutes which have been passed respecting school districts, it is manifest that the legislature has supposed that a division of towns, for the purpose of maintaining schools, will promote the important object of general education; and this valuable object of legislative care seems to require, in construing their acts, that a liberal view should be had to the end to be effected." <sup>1</sup> Following out this view, the courts of the New England States have held, that when judgments are recovered against towns, parishes, and school districts, any of the property of private owners within the municipal division is liable to be taken for their discharge. The reasons for this doctrine, and the custom upon which it is founded, are thus stated by the Supreme Court of Connecticut: —

"We know that the relation in which the members of municipal corporations in this State have been supposed to stand, in respect to the corporation itself, as well as to its creditors, has elsewhere been considered in some respects peculiar. We have treated them, for some purposes, as parties to corporate proceedings, and their individuality has not been considered as merged in their corporate connection. Though corporators, they have been holden to be parties to suits by or against the corporation, and individually liable for its debts. Heretofore this has not been doubted as to the inhabitants of towns, located ecclesiastical societies, and school districts.

"From a recurrence to the history of the law on this subject, we are persuaded that the principle and usage here recognized and followed, in regard to the liability of the inhabitants of towns and other communities, were very early adopted by our ancestors. And whether they were considered as a part of the common law of England, or originated here, as necessary to our state of society, it is not very material to inquire. We think, however, that the principle is not of domestic origin, but to some extent was operative

<sup>1</sup> *School District v. Wood*, 13 Mass. 192, 197.

and applied in the mother country, especially in cases where a statute fixed a liability upon a municipality which had no corporate funds. The same reasons and necessity for the application of such a principle and practice existed in both countries. Such corporations are of a public and political character; they exercise a portion of the governing power of the State. Statutes impose upon them important public duties. In the performance of these, they must contract debts and liabilities, which can only be discharged by a resort to individuals, either by taxation or execution. Taxation, in most cases, can only be the result of the voluntary action of the corporation, dependent upon the contingent will of a majority of the corporators, and upon their tardy and uncertain action. It affords no security to creditors, because they have no power over it. Such reasons as these probably operated with our ancestors in adopting the more efficient and certain remedy by execution, which has been resorted to in the present case, and which they had seen to some extent in operation in the country whose laws were their inheritance.

"The plaintiff would apply to these municipal or *quasi* corporations the close principles applicable to private corporations. But inasmuch as they are not, strictly speaking, corporations, but only municipal bodies, without pecuniary funds, it will not do to apply to them literally, and in all cases, the law of corporations.<sup>1</sup>

"The individual liability of the members of *quasi* corporations, though not expressly adjudged, was very distinctly recognized in the case of *Russell v. The Men of Devon*.<sup>2</sup> It was alluded to as a known principle in the case of the *Attorney-General v. The City of Exeter*,<sup>3</sup> applicable as well to cities as to hundreds and parishes. That the rated inhabitants of an English parish are considered as the real parties to suits against the parish is now supposed to be well settled; and so it was decided in the cases of *The King v. The Inhabitants of Woburn*,<sup>4</sup> and *The King v. The Inhabitants of Hardwick*.<sup>5</sup> And, in support of this principle, reference was made to the form of the proceedings; as that they are entitled 'against the inhabitants,' &c.

"In the State of Massachusetts, from whose early institutions we have borrowed many valuable specimens, the individual responsibility of the inhabitants of towns for town debts has long been established. Distinguished counsel in the case of the Mer-

<sup>1</sup> *School District v. Wood*, 13 Mass. 192.

<sup>2</sup> 2 Term Rep. 660.

<sup>3</sup> 2 Russ. 45.

<sup>4</sup> 10 East, 395.

<sup>5</sup> 11 East, 577.

chants' Bank *v.* Cook,<sup>1</sup> referring to municipal bodies, say: 'For a century past the practical construction of the bar has been that, in an action by or against a corporation, a member of the corporation is a party to the suit.' In several other cases in that State the same principle is repeated. In the case of *Riddle v. The Proprietors of the Locks and Canals on Merrimack River*,<sup>2</sup> *Parsons*, Ch. J., in an allusion to this private responsibility of corporators, remarks: 'And the sound reason is, that having no corporate fund, and no legal means of obtaining one, each corporator is liable to satisfy any judgment obtained against the corporation.' So in *Brewer v. Inhabitants of New Gloucester*,<sup>3</sup> the court say: 'As the law provides that, when judgment is recovered against the inhabitants of a town, execution may be levied upon the property of any inhabitant, each inhabitant must be considered as a party.' In the case before referred to of the Merchants' Bank *v.* Cook, *Parker*, Ch. J., expresses the opinion of the court upon this point thus: 'Towns, parishes, precincts, etc., are but a collection of individuals, with certain corporate powers for political and civil purposes, without any corporate funds from which a judgment can be satisfied; but each member of the community is liable, in his person and estate, to the execution which may issue against the body; each individual, therefore, may be well thought to be a party to a suit brought against them by their collective name. In regard to banks, turnpike, and other corporations, the case is different.' The counsel concerned in the case of *Mower v. Leicester*,<sup>4</sup> without contradiction, speak of this practice of subjecting individuals as one of daily occurrence. The law on this subject was very much considered in the case of *Chase v. The Merrimack Bank*,<sup>5</sup> and was applied and enforced against the members of a territorial parish. 'The question is', say the court, 'whether, on an execution against a town or parish, the body or estate of any inhabitant may be lawfully taken to satisfy it. This question seems to have been settled in the affirmative by a series of decisions, and ought no longer to be considered as an open question.' The State of Maine, when separated from Massachusetts, retained most of its laws and usages, as they had been recognized in the parent State; and, among others, the one in question. In *Adams v. Wiscasset Bank*,<sup>6</sup> *Mellen*, Ch. J., says: 'It is well known that all judgments against *quasi* corporations may be satisfied out of the property of any individual inhabitant.'

<sup>1</sup> 4 Pick. 405.<sup>2</sup> 7 Mass. 187.<sup>3</sup> 14 Mass. 216.<sup>4</sup> 9 Mass. 247.<sup>5</sup> 19 Pick. 564.<sup>6</sup> 1 Greenl. 361.



"The courts of this State, from a time beyond the memory of any living lawyer, have sanctioned and carried out this usage, as one of common-law obligation; and it has been applied, not to towns only, but also, by legal analogy, to territorial ecclesiastical societies and school districts. The forms of our process against these communities have always corresponded with this view of the law. The writs have issued against the *inhabitants* of towns, societies, and districts *as parties*. As early in the history of our jurisprudence as 1705, a statute was enacted authorizing communities, such as towns, societies, etc., to prosecute and defend suits, and for this purpose to appear, either by *themselves*, agents, or attorneys. If the inhabitants were not then considered as parties individually, and liable to the consequences of judgments against such communities as parties, there would have been a glaring impropriety in permitting them to appear and defend by themselves; but, if parties, such a right was necessary and indispensable. Of course this privilege has been and may be exercised.<sup>1</sup>

"Our statute providing for the collection of taxes enacts that the treasurer of the State shall direct his warrant to the collectors of the State tax in the several towns. If neither this nor the further proceedings against the collectors and the selectmen authorized by the statute shall enforce the collection of the tax, the law directs that then the treasurer shall issue his execution against the inhabitants of such town. Such an execution may be levied upon the estate of the inhabitants; and this provision of the law was not considered as introducing a new principle, or enforcing a novel remedy, but as being only in conformity with the well-known usage in other cases. The levy of an execution under this statute produced the case of *Beers v. Botsford*.<sup>2</sup> There the execution, which had been issued against the town of Newtown by the treasurer of the State, had been levied upon the property of the plaintiff, an inhabitant of that town, and he had thus been compelled to pay the balance of a State tax due from the town. He sued the town of Newtown for the recovery of the money so paid by him. The most distinguished professional gentlemen in the State were engaged as counsel in that case; and it did not occur, either to them or to the court, that the plaintiff's property had been taken without right: on the contrary, the case proceeded throughout on the conceded principle of our common law, that the levy was properly made upon the estate of the plaintiff. And without this the plaintiff could not have recovered of the town, but must have resorted to his action against

<sup>1</sup> 1 Swift's System, 227.

<sup>2</sup> 3 Day, 159.

the officer for his illegal and void levy. In *Fuller v. Hampton*,<sup>1</sup> *Peters, J.*, remarked that, if costs are recovered against a town, the writ of execution to collect them must have been issued against the property of the inhabitants of the town; and this is the invariable practice. The case of *Atwater v. Woodrich*,<sup>2</sup> also grew out of this ancient usage. The ecclesiastical society of Bethany had been taxed by the town of Woodrich for its moneys at interest, and the warrant for the collection of the tax had been levied upon the property of the plaintiff, and the tax had thus been collected of him, who was an inhabitant of the located society of Bethany. *Brainerd, J.*, who drew up the opinion of the court, referring to this proceeding, said: 'This practice with regard to towns has prevailed in New England, so far as I have been able to investigate the subject, from an early period, — from its first settlement, — a practice brought by our forefathers from England, which had there obtained in corporations similar to the towns incorporated in New England.' It will here be seen that the principle is considered as applicable to territorial societies as to towns, because the object to be obtained was the same in both, — 'that the town or society should be brought to a sense of duty, and make provision for payment and indemnity'; a very good reason, and very applicable to the case we are considering.

"The law on this subject was more distinctly brought out and considered by this court in the late case of *McCloud v. Selby*,<sup>3</sup> in which this well-known practice, as it had been applied to towns and ecclesiastical societies, was extended and sanctioned as to school districts; 'else it would be breaking in upon the analogies of the law.' 'They are communities for different purposes, but essentially of the same character.' And no doubt can remain, since the decision of this case, but that the real principle of all the cases on this subject, has been, and is, that the inhabitants of *quasi* corporations are parties individually, as well as in their corporate capacities, to all actions in which the corporation is a party. And to the same effect is the language of the elementary writers." <sup>4</sup>

<sup>1</sup> 5 Conn. 417.

<sup>2</sup> 6 Conn. 223.

<sup>3</sup> 10 Conn. 390-395.

<sup>4</sup> *Beardsley v. Smith*, 16 Conn. 375, citing 2 Kent, 221; *Angell & Ames* on Corp. 374; 1 *Swift's Dig.* 72, 794; 5 *Dane's Abr.* 158. And see *Dillon, Mun. Corp. c. 1*. It was held competent in the above case to extend the same principle to incorporated cities; and an act of the legislature permitting

the enforcement of city debts in the same mode was sustained. For a more recent case in Massachusetts than these cited, see *Gaskill v. Dudley*, 6 Met. 546.

A statute allowing judgments against a town to be collected from the goods of individuals is due process of law under the fourteenth amendment. *Eames v. Savage*, 77 Me. 212.

So far as this rule rests upon the reason that these organizations have no common fund, and that no other mode exists by which demands against them can be enforced, it cannot be considered applicable in those States where express provision is made by law for compulsory taxation to satisfy any judgment recovered against the corporate body, — the duty of levying the tax being imposed upon some officer, who may be compelled by *mandamus* to perform it. Nor has any usage, so far as we are aware, grown up in any of the newer States, like that which had so early an origin in New England. More just, convenient, and inexpensive modes of enforcing such demands have been established by statute, and the rules concerning them are conformed more closely to those which are established for other corporations.

On the other hand, it is settled that these corporations are not liable to a private action, at the suit of a party injured by a neglect of their officers to perform a corporate duty, unless such action is given by statute.<sup>1</sup> This doctrine has been frequently applied where suits have been brought against towns, or the highway officers of towns, to recover for damages sustained in consequence of defects in the public ways. The common law gives no such action, and it is therefore not sustainable at all, unless given by statute.<sup>2</sup> A distinction is made between those corporations which are created as exceptions, and receive special grants of power for the peculiar convenience and benefit of the corporators, on the one hand, and the incorporated inhabitants of a district, who are by statute invested with particular powers, without their consent, on the other. In the latter case, the State may impose corporate duties, and compel their performance, under penalties; but the corporators, who are made such whether they will or no, cannot be considered in the light of persons who have voluntarily, and for a consideration, assumed obligations, so as to owe a duty to every person interested in the performance.<sup>3</sup>

<sup>1</sup> On right of action given to injured party to sue for damages where sheriff fails to prevent lynching, see *Champaign Co. v. Church*, 62 Ohio St. 318, 57 N. E. 50, 48 L. R. A. 738.

<sup>2</sup> This rule, however, has no application to the case of neglect to perform those obligations which are incurred by the political subdivisions of the State when special duties are imposed on them by law. *Hannon v. St. Louis Co. Court*, 62 Mo. 313. But such liability is strictly construed. Where a county is chargeable with highway

repairs, it is not liable for injury to one on the highway caused by the fall of a dead tree which had stood near the road. *Watkins v. County Court*, 30 W. Va. 657, 5 S. E. 654.

<sup>3</sup> *Mower v. Leicester*, 9 Mass. 247; *Bartlett v. Crozier*, 17 Johns. 439; *Farnum v. Concord*, 2 N. H. 392; *Adams v. Wiscasset Bank*, 1 Me. 361; *Baxter v. Winoski Turnpike*, 22 Vt. 114; *Beardsley v. Smith*, 16 Conn. 368; *Chidsey v. Canton*, 17 Conn. 475; *Young v. Commissioners, &c.*, 2 N. & McC. 537; *Commissioners of*

Highways *v.* Martin, 4 Mich. 557; Morey *v.* Newfane, 8 Barb. 645; Lorillard *v.* Monroe, 11 N. Y. 392; Galen *v.* Clyde and Rose Plank Road Co., 27 Barb. 543; Reardon *v.* St. Louis, 36 Mo. 555; Sherbourne *v.* Yuba Co., 21 Cal. 113; State *v.* County of Hudson, 30 N. J. L. 137; Hedges *v.* Madison Co., 6 Ill. 567; Granger *v.* Pulaski Co., 26 Ark. 37; Weightman *v.* Washington, 1 Black, 39, 17 L. ed. 52; Ball *v.* Winchester, 32 N. H. 435; Eastman *v.* Meredith, 36 N. H. 284; Waltham *v.* Kemper, 55 Ill. 346; Sutton *v.* Board, 41 Miss. 236; Cooley *v.* Freeholders, 27 N. J. L. 415; Bigelow *v.* Randolph, 14 Gray, 541; Symonds *v.* Clay Co., 71 Ill. 355; People *v.* Young, 72 Ill. 411; Frazer *v.* Lewiston, 76 Me. 531; Altnow *v.* Sibley, 30 Minn. 186, 14 N. W. 877; Yeager *v.* Tippecanoe, 81 Ind. 46; Abbett *v.* Com'rs Johnson Co., 114 Ind. 61, 16 N. E. 127; Logan County *v.* Adler, 69 Colo. 290, 194 Pac. 621, 20 A. L. R. 512; Cook County *v.* Chicago, 311 Ill. 234, 142 N. E. 512, 31 A. L. R. 442; Beeks *v.* Dickinson County, 131 Iowa, 244, 108 N. W. 311, 6 L. R. A. (N. S.) 831, 9 Ann. Cas. 812; Wood *v.* Boone County, 153 Iowa, 92, 133 N. W. 377, 39 L. R. A. (N. S.) 168, Ann. Cas. 1913 D, 1070; Shawnee County *v.* Jacobs, 79 Kan. 76, 99 Pac. 817, 21 L. R. A. (N. S.) 209; Ernst *v.* West Covington, 116 Ky. 850, 76 S. W. 1089, 105 Am. St. Rep. 241, 63 L. R. A. 652, 3 Ann. Cas. 882; Smith *v.* Louisville Sewerage Commissioners, 146 Ky. 562, 143 S. W. 3, 38 L. R. A. (N. S.) 151; Stanley *v.* Sangerville, 119 Me. 26, 109 Atl. 189, 9 A. L. R. 348; Daniels *v.* Board of Education, 191 Mich. 339, 158 N. W. 23, L. R. A. 1916 F, 468; Dick *v.* Board of Education, (Mo.), 238 S. W. 1073, 21 A. L. R. 1327; Davie *v.* Douglas County, 98 Neb. 479, 153 N. W. 509, L. R. A. 1916 B, 1261; Wheeler *v.* Gilsum, 73 N. H. 429, 62 Atl. 597, 3 L. R. A. (N. S.) 135; O'Brien *v.* Rockingham County, 80 N. H. 522, 120 Atl. 254; Buckalew *v.* Chosen Freeholders, 91 N. J. L. 517, 104 Atl. 308, 2 A. L. R. 718; Howard *v.* Tacoma School Dist. No. 10, 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917 D, 792; Juul *v.* School Dist., 168 Wis. 111, 169 N. W. 309,

9 A. L. R. 904. These cases follow the leading English case of Russell *v.* Men of Devon, 2 T. R. 667.

In Gates *v.* Milan, 76 N. H. 135, 80 Atl. 39, 35 L. R. A. (N. S.) 599, the court said: "'The liability of towns in respect to highways does not differ in character or extent from that which would attach to the State if it provided and maintained highways directly. It depends upon the same conditions. It is limited to that which the State permits, as set forth in the statutes on the subject.' Sargent *v.* Gilford, 66 N. H. 543, 27 Atl. 306. See Hall *v.* Concord, 71 N. H. 367, 52 Atl. 864; O'Brien *v.* Derry, 73 N. H. 198, 203, 60 Atl. 843; Wheeler *v.* Gilsum, 73 N. H. 429, 62 Atl. 597. It has also been determined that towns possess a private corporate capacity in accordance with which they perform certain acts as a private corporation might, and in consequence of which their liability for damages to others is tested by the principles applied to private persons. O'Brien *v.* Derry, *supra*; Lockwood *v.* Dover, 73 N. H. 209, 61 Atl. 32. 'So as to the motive of municipal corporations, the theory of their dual character is too firmly imbedded in the common law to be removed, except by the law-making power.' Rhobidas *v.* Concord, 70 N. H. 90, 114, 47 Atl. 82. When they act in a private capacity, they are subject to the same legal obligations as a private corporation; when they exercise purely governmental functions, they are not ordinarily and in the absence of express statutory authorization held responsible in damages for injuries suffered by others in consequence of their negligent performance of those functions. The recognized rule for determining whether a city or town is responsible for the acts of any particular officers or agents is the character of the duty in the performance of which they were engaged at the time of the injury. If it is a public, governmental duty, in the performance of which the corporation is clothed with sovereignty, then the officer is not to be regarded as the agent of the corporation, for whose negligence it can be held responsible.

The reason which exempts these public bodies from liability to private actions, based upon neglect to perform public obligations, does not apply to villages, boroughs, and cities, which accept special charters from the State. The grant of the corporate franchise, in these cases, is usually made only at the request of the citizens to be incorporated, and it is justly assumed that it confers what to them is a valuable privilege. This privilege is a consideration for the duties which the charter imposes. Larger powers of self-government are given than are confided to towns or counties; larger privileges in the acquisition and control of corporate property; and special authority is conferred to make use of the public highways for the special and peculiar convenience of the citizens of the municipality in various modes not permissible elsewhere. The grant by the State to the municipality of a portion of its sovereign powers, and their acceptance for these beneficial purposes, is regarded as raising an implied promise, on the part of the corporation, to perform the corporate duties, and as imposing the duty of performance, not for the benefit of the State merely, but for the benefit of every individual interested in its performance.<sup>1</sup> In this respect these

. . . But if it is a private, municipal duty, — one voluntarily undertaken by the corporation for its particular local advantage or pecuniary profit, — then the officer, as respects that duty, is the agent of the corporation, for whose negligence it is liable, as in the case of private corporations or parties. *Lockwood v. Dover, supra*, 213."

A county engaged in building a bridge upon a public highway acts as a subdivision of the State government, and is not liable for the negligent performance of such work, unless expressly made so by statute. *Shawnee County v. Jacobs*, 79 Kan. 76, 99 Pac. 817, 21 L. R. A. (N. S.) 209.

A county is not liable for obstructing a river: *White Star Co. v. Gordon Co.*, 81 Ga. 47, 7 S. E. Rep. 231; nor for failure of its treasurer to pay to city money belonging to the latter. *Marquette Co. v. Ishpeming Treas.*, 49 Mich. 244, 13 N. W. 609.

In the very carefully considered case of *Eastman v. Meredith*, 36 N. H. 284, it was decided, on the principle above stated, that if a building erected by a town for a town-house is so imperfectly constructed that the floor-

ing gives way at the annual town-meeting, and an inhabitant and legal voter, in attendance on the meeting, receives thereby a bodily injury, he cannot maintain an action against the town to recover damages for this injury. The case is carefully distinguished from those where corporations have been held liable for the negligent use of their own property by means of which others are injured. The familiar maxim that one shall so use his own as not to injure that which belongs to another is of general application. A similar ruling was made after careful consideration in a case where a child was injured by the unsafe condition of a school building which a city was obliged to maintain. The duty being one to the public imposed by law, there is no liability in the absence of statute. *Hill v. Boston*, 122 Mass. 344. So if the duty is assumed under a general law but not expressly imposed. *Wixon v. Newport*, 13 R. I. 454. See *Wild v. Paterson*, 47 N. J. L. 406, 1 Atl. 490, and cases *supra*, p. 451.

<sup>1</sup> *Selden, J.*, in *Weet v. Brockport*, 16 N. Y. 161, note. See also *Mayor of Lyme v. Turner*, Cowp. 86; *Henley v.*

Lyme Regis, 5 Bing. 91; s. c. in error, 3 B. & Adol. 77, and 1 Bing. N. C. 222; Mayor, &c. of New York v. Furze, 3 Hill, 612; Rochester White Lead Co. v. Rochester, 3 N. Y. 463; Hutson v. Mayor, &c. of New York, 9 N. Y. 163; Conrad v. Ithaca, 16 N. Y. 158; Mills v. Brooklyn, 32 N. Y. 489; Barton v. Syracuse, 36 N. Y. 54; Lee v. Sandy Hill, 40 N. Y. 442; Clark v. Washington, 12 Wheat. 40, 6 L. ed. 544; Riddle v. Proprietors of Locks, &c., 7 Mass. 169; Bigelow v. Inhabitants of Randolph, 14 Gray, 541; Mears v. Commissioners of Wilmington, 9 Ired. 73; Browning v. Springfield, 17 Ill. 143; Bloomington v. Bay, 42 Ill. 503; Springfield v. LeClaire, 49 Ill. 476; Peru v. French, 55 Ill. 317; Pittsburg v. Grier, 22 Pa. St. 54; Jones v. New Haven, 34 Conn. 1; Stackhouse v. Lafayette, 26 Ind. 17; Brinkmeyer v. Evansville, 29 Ind. 187; Sawyer v. Corse, 17 Gratt. 230; Richmond v. Long, 17 Gratt. 375; Noble v. Richmond, 31 Gratt. 271, 31 Am. Rep. 726; Blake v. St. Louis, 40 Mo. 569; Scott v. Mayor, &c. of Manchester, 37 Eng. L. & Eq. 495; Smoot v. Wetumpka, 24 Ala. 112; Albritten v. Huntsville, 60 Ala. 486, 31 Am. Rep. 46; Detroit v. Corey, 9 Mich. 165; Rusch v. Davenport, 6 Iowa, 443; Commissioners v. Duckett, 20 Md. 468; Covington v. Bryant, 7 Bush, 248; Weightman v. Washington, 1 Black, 39, 17 L. ed. 52; Chicago v. Robbins, 2 Black, 418, 17 L. ed. 298; Nebraska v. Campbell, 2 Black, 590, 17 L. ed. 271; Galveston v. Posnainsky, 62 Tex. 118; Hutchinson v. Olympia, 2 Wash. 314; Kellogg v. Janesville, 34 Minn. 132; Winona v. Botzet, 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204; Davoust v. Alameda, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847; Chafor v. Long Beach, 174 Cal. 478, 163 Pac. 670, L. R. A. 1917 E, 685, Ann. Cas. 1918 D, 106; Pasadena v. Railroad Commission, 183 Cal. 526, 192 Pac. 25, 10 A. L. R. 1425; Denver v. Spencer, 34 Colo. 270, 82 Pac. 590, 114 Am. St. Rep. 158, 2 L. R. A. (N. S.) 147, 7 Ann. Cas. 1042; Denver v. Davis, 37 Colo. 370, 86 Pac. 1027, 119 Am. St. Rep. 293, 6 L. R. A. (N. S.) 1013, 11 Ann. Cas. 187; Den-

ver v. Maurer, 47 Colo. 209, 106 Pac. 875, 135 Am. St. Rep. 210; Judson v. Winsted, 80 Conn. 384, 68 Atl. 999, 15 L. R. A. (N. S.) 91; Carson v. Genesee, 9 Idaho, 244, 74 Pac. 862, 108 Am. St. Rep. 127; Eaton v. Weiser, 12 Idaho, 544, 86 Pac. 541, 118 Am. St. Rep. 225, 9 L. R. A. (N. S.) 524, 10 Ann. Cas. 444; Gathman v. Chicago, 236 Ill. 9, 86 N. E. 152, 19 L. R. A. (N. S.) 1178, 15 Ann. Cas. 830; Johnston v. Chicago, 258 Ill. 494, 101 N. E. 960, 45 L. R. A. (N. S.) 1167, Ann. Cas. 1914 B, 339; Jones v. Sioux City, 185 Iowa, 1178, 170 N. W. 445, 10 A. L. R. 474; Davis v. New Orleans Public Belt R. Co., 155 La. 504, 99 So. 419, 31 A. L. R. 1303; Libby v. Portland, 105 Me. 370, 74 Atl. 805, 26 L. R. A. (N. S.) 141, 18 Ann. Cas. 547; Dickinson v. Boston, 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664; Keever v. Mankato, 113 Minn. 55, 129 N. W. 158, 33 L. R. A. (N. S.) 339; Barree v. Cape Girardeau, 197 Mo. 382, 95 S. W. 330, 114 Am. St. Rep. 763, 6 L. R. A. (N. S.) 1090; Munick v. Durham, 181 N. C. 188, 106 S. E. 665, 24 A. L. R. 538; Aldrich v. Youngstown, 106 Ohio St. 342, 140 N. E. 164, 27 A. L. R. 1497; Northwest Steel Co. v. School Dist., 76 Oreg. 321, 148 Pac. 1134, Ann. Cas. 1917 B, 1086, L. R. A. 1915 F, 629; Armstrong v. Philadelphia, 249 Pa. St. 39, 94 Atl. 455, Ann. Cas. 1917 B, 1082; Brown v. Salt Lake City, 33 Utah, 222, 93 Pac. 570, 126 Am. St. Rep. 828, 14 L. R. A. (N. S.) 619, 14 Ann. Cas. 1004; Engelking v. Spokane, 59 Wash. 446, 110 Pac. 25, 29 L. R. A. (N. S.) 481; Piper v. Madison, 140 Wis. 311, 122 N. W. 730, 133 Am. St. Rep. 1078, 25 L. R. A. (N. S.) 239; Highway Trailer Co. v. Janesville Electric Co., 178 Wis. 340, 190 N. W. 110, 27 A. L. R. 1268. And see Kent v. Worthing Local Board, L. R. 10 Q. B. D. 118. The same rule applies to cities existing under a general law. Boulder v. Niles, 9 Col. 415, 12 Pac. 632.

A city is liable for a defect in a sidewalk maintained by it though in fact outside the highway line: Mansfield v. Moore, 124 Ill. 133, 16 N. E. 246; for negligence of an abutter who for

his own purposes renders a sidewalk unsafe, if it has notice. *Philadelphia v. Smith*, (Pa. St.), 16 Atl. Rep. 493. See *Dooley v. Sullivan*, 112 Ind. 451, 14 N. E. 566. That legislature may exempt municipal corporations from such liability, see *Wilmington v. Ewing*, 2 Penn. (Del.) 66, 43 Atl. 305, 45 L. R. A. 79.

In the *Case of Detroit v. Blackeby*, 21 Mich. 84, this whole subject is considered at length; and the court (one judge dissenting) deny the soundness of the principle stated in the text, and hold that municipal corporations existing under special charters are not liable to individuals for injuries caused by neglect to perform corporate duties, unless expressly made so by statute. This case is referred to and dissented from in *Waltham v. Kemper*, 55 Ill. 347, and approved in *Navasota v. Pearce*, 46 Tex. 525; *Young v. Charleston*, 20 S. C. 116, and *Arkadelphia v. Windham*, 49 Ark. 139, 4 S. W. 450. The rule it sanctions is considerably modified in Michigan by later cases. See *Barron v. Detroit*, 94 Mich. 601, 54 N. W. 273, 34 Am. St. Rep. 366, 19 L. R. A. 452; *Hodgins v. Bay City*, 156 Mich. 687, 121 N. W. 274, 132 Am. St. Rep. 546. In South Carolina it is held that an action for tort cannot be maintained against a municipal corporation unless it is expressly authorized by statute. *Irvine v. Greenwood*, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N.S.) 363; *Triplet v. Columbia*, 111 S. C. 7, 96 S. E. 675, 1 A. L. R. 349.

In *Murtaugh v. St. Louis*, 44 Mo. 479, 480, *Currier, J.*, says: "The general result of the adjudications seems to be this: When the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation for its private benefit, and injury ensues from the negligence or misfeasance of such officer or servant, the corporation is liable, as in the case of private corporations or parties; but when the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for the private corporate advan-

tage, then the corporation is not liable for the consequences of such acts or omissions." Citing *Bailey v. New York*, 3 Hill, 531; *Martin v. Brooklyn*, 1 Hill, 550; *Richmond v. Long's Adm'r*, 17 Gratt. 375; *Sherbourne v. Yuba Co.*, 21 Cal. 113; *Dargan v. Mobile*, 31 Ala. 469; *Stewart v. New Orleans*, 9 La. Ann. 461; *Prother v. Lexington*, 13 B. Monr. 559.

In *Bulger v. Eden*, 352, 357, 19 Atl. 829, 9 L. R. A. 205, the court said: "The liabilities of municipal corporations for the torts or negligent acts of their officers are fixed by statute. They are to be held liable for the negligence or misconduct of their officers only when made so by express statute, or [when] the act out of which the claim originates was within the scope of their corporate powers, and was directly and expressly ordered by the corporation." Quoted with approval in *Waugh v. Prince*, 121 Me. 67, 115 Atl. 612.

In Massachusetts it has been held that the work of removing ashes from dwelling houses in accordance with the direction of an ordinance by teams of the sanitary division of the street department of a city, without charge, is of a public nature, and the city is not liable to a person injured through the negligence of the driver of such a team while engaged in this work. *Haley v. Boston*, 191 Mass. 291, 77 N. E. 888, 5 L. R. A. (N. S.) 1005. See also *Bruhnke v. La Crosse*, 155 Wis. 485, 144 N. W. 1100, 50 L. R. A. (N. S.) 1147.

Where a street is roped off by order of a court, a city is not liable for an injury caused thereby. *Belvin v. Richmond*, 85 Va. 574, 8 S. E. 378. And as to exemption from liability in exercising or failing to exercise legislative authority, see *ante*, pp. 444-450, and notes. As to who are to be regarded as municipal officers, see *Maximilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468, and cases there cited.

Upon remedy over by municipality against wrongdoer after payment of damages for injury done by him or through his negligence, see *Washington Gas Light Co. v. District of Columbia*, 161 U. S. 316, 40 L. ed. 712, 16 Sup. Ct.

corporations are looked upon as occupying the same position as private corporations, which, having accepted a valuable franchise, on condition of the performance of certain public duties, are held by the acceptance to contract for the performance of those duties. In the case of public corporations, however, the liability is contingent on the law affording the means of performing the duty, which, in some cases, by reason of restrictions upon the power of taxation, they might not possess. But, assuming the corporation to be clothed with sufficient power by the charter to that end, the liability of a city or village, vested with control of its streets, for any neglect to keep them in repair, or for any improper construction, has been determined in many cases.<sup>1</sup> And a similar liability would

Rep. 564, and note to s. c. in 40 L. ed. U. S. 712.

<sup>1</sup> *Weet v. Brockport*, 16 N. Y. 161, note; *Hickok v. Plattsburg*, 16 N. Y. 161; *Nelson v. Canisteo*, 100 N. Y. 89; *Morey v. Newfane*, 8 Barb. 645; *Browning v. Springfield*, 17 Ill. 143; *Hyatt v. Rondout*, 44 Barb. 385; *Lloyd v. Mayor, &c. of New York*, 5 N. Y. 369; *Rusch v. Davenport*, 6 Iowa, 443; *Denver v. Maurer*, 47 Colo. 209, 106 Pac. 875, 135 Am. St. Rep. 210; *Addington v. Littleton*, 50 Colo. 623, 115 Pac. 896, 34 L. R. A. (N. S.) 1012, Ann. Cas. 1912 C, 753; *Carl v. New Haven*, 93 Conn. 622, 107 Atl. 502, 13 A. L. R. 1; *Carson v. Genesee*, 9 Idaho, 244, 74 Pac. 862, 108 Am. St. Rep. 127; *Sand Point v. Doyle*, 11 Idaho, 642, 83 Pac. 598, 4 L. R. A. (N. S.) 810; *Miller v. Mullan*, 17 Idaho, 28, 104 Pac. 660, 19 Ann. Cas. 1107; *Sherwin v. Aurora*, 257 Ill. 458, 100 N. E. 938, 43 L. R. A. (N. S.) 1116; *Wheeler v. Ft. Dodge*, 131 Iowa, 566, 108 N. W. 1057, 9 L. R. A. (N. S.) 146; *Jones v. Sioux City*, 185 Iowa, 1178, 170 N. W. 445, 10 A. L. R. 474; *Harrodsburg v. Abram*, 138 Ky. 157, 127 S. W. 758, 29 L. R. A. (N. S.) 199; *Louisville, etc., R. Co. v. Mulverhill*, 147 Ky. 360, 144 S. W. 83, Ann. Cas. 1913 D, 183; *Covington v. Lee*, 28 Ky. L. Rep. 492, 89 S. W. 493, 2 L. R. A. (N. S.) 481; *McCormack v. Robin*, 126 La. 594, 52 So. 779, 139 Am. St. Rep. 549; *Nessen v. New Orleans*, 134 La. 455, 64 So. 286, 51 L. R. A. (N. S.) 324; *Sundell v. Tintah*, 117 Minn. 170, 134 N. W. 639, 38 L. R.

A. (N. S.) 1127; *Ackeret v. Minneapolis*, 129 Minn. 190, 151 N. W. 976, L. R. A. 1915 D, 1111; *Briglia v. St. Paul*, 134 Minn. 97, 158 N. W. 794, L. R. A. 1916 F, 1216; *Hillstrom v. St. Paul*, 134 Minn. 451, 159 N. W. 1076, L. R. A. 1917 B, 548; *Conner v. Nevada*, 188 Mo. 148, 86 S. W. 256, 107 Am. St. Rep. 314; *Barree v. Cape Girardeau*, 197 Mo. 382, 95 S. W. 330, 114 Am. St. Rep. 763, 6 L. R. A. (N. S.) 1090; *Randolph v. Springfield*, 302 Mo. 33, 257 S. W. 449, 31 A. L. R. 612; *Tewksbury v. Lincoln*, 84 Neb. 571, 121 N. W. 994, 23 L. R. A. (N. S.) 282; *Updike v. Omaha*, 87 Neb. 228, 127 N. W. 229, 30 L. R. A. (N. S.) 589; *Chaney v. Riverton*, 104 Neb. 189, 177 N. W. 845, 10 A. L. R. 244; *Oklahoma City v. Reed*, 17 Okla. 518, 87 Pac. 645, 33 L. R. A. (N. S.) 1083; *Marth v. Kingfisher*, 22 Okla. 602, 98 Pac. 436, 18 L. R. A. (N. S.) 1238; *Rowe v. Richards*, 32 S. D. 66, 142 N. W. 664, L. R. A. 1915 E, 1069; *Schuler v. Mobridge*, 44 S. D. 488, 184 N. W. 281; *Norberg v. Hagna*, 46 S. D. 568, 195 N. W. 438, 29 A. L. R. 841; *Berger v. Salt Lake City*, 56 Utah 403, 191 Pac. 233, 13 A. L. R. 5; *Fifield's Adm'x v. Rochester*, 89 Vt. 329, 95 Atl. 675, Ann. Cas. 1918 A, 1016; *Hewitt v. Seattle*, 62 Wash. 377, 113 Pac. 1084, 32 L. R. A. (N. S.) 632. And see *Dillon, Mun. Corp. c. 18*, and cases cited in the preceding note. See also *Gibson v. Huntington*, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561, and note.

But in some jurisdictions it has



been held that such liability does not exist in the absence of statute. *Collier v. Ft. Smith*, 73 Ark. 447, 84 S. W. 480, 68 L. R. A. 237; *Milton v. Bangor R. etc., Co.*, 103 Me. 218, 68 Atl. 826, 125 Am. St. Rep. 293, 15 L. R. A. (N. S.) 203; *Miller v. Detroit*, 156 Mich. 630, 121 N. W. 490, 132 Am. St. Rep. 537, 16 Ann. Cas. 832; *Price v. Goldsboro Tp.*, 172 N. C. 84, 89 S. E. 1066, L. R. A. 1917 A, 992. See also *Gates v. Milan*, 76 N. H. 135, 80 Atl. 39, 35 L. R. A. (N. S.) 599.

The cases of *Weet v. Brockport*, and *Hickok v. Plattsburg*, were criticized by Mr. Justice *Marvin*, in the case of *Peck v. Batavia*, 32 Barb. 634, where, as well as in *Cole v. Medina*, 27 Barb. 218, he held that a village merely authorized to make and repair sidewalks, but not in terms absolutely and imperatively required to do so, had a discretion conferred upon it in respect to such walks, and was not responsible for a refusal to enact ordinances or by-laws in relation thereto; nor, if it enacted such ordinances or by-laws, was it liable for damages arising from a neglect to enforce them. The doctrine that a power thus conferred is discretionary does not seem consistent with the ruling in some of the other cases cited, and is criticized in *Hyatt v. Rondout*, 44 Barb. 385. But see *ante*, pp. 444-450, and notes.

In Kentucky it has been held the city is not liable for the negligence of its employees in charge of an engine and roller engaged in street work. *Danville v. Fox*, 142 Ky. 476, 134 S. W. 883, 32 L. R. A. (N. S.) 636.

In Iowa it has been held that clearing an alley of weeds is an exercise of the police power and that the city is not liable for injury resulting from the negligence of one whom it employs to do this. *McFadden v. Jewell*, 119 Iowa, 321, 93 N. W. 302, 97 Am. St. Rep. 321, 60 L. R. A. 401.

A municipality is liable for injuries caused by negligence in not keeping its streets in a reasonably safe condition for lawful uses, and for injuries caused by negligent operations or conditions upon the streets that amount to a nuisance. *Maxwell v. Miami*, 87 Fla. 107, 100 So. 147.

A city is liable to a pedestrian negligently run down and injured by its superintendent of streets while driving an automobile in the performance of his duty. *Hewitt v. Seattle*, 62 Wash. 377, 113 Pac. 1084, 32 L. R. A. (N. S.) 632.

In *Harris v. District of Columbia*, 256 U. S. 650, 65 L. ed. 1146, 41 Sup. Ct. Rep. 610, 14 A. L. R. 1471, Justice *McReynolds*, in delivering the opinion of the court, said: "It is established doctrine that when acting in good faith municipal corporations are not liable for the manner in which they exercise discretionary powers of a public or legislative character. A different rule generally prevails as to their private or corporate powers. *Dillon on Municipal Corporations* (5th Ed.), § 1626 *et seq.*, and cases cited. Application of these general principles to the facts of particular cases has occasioned much difficulty. The circumstances being stated, it is not always easy to determine what power a municipal corporation is exercising. But, nothing else appearing, we are of opinion that, when sweeping the streets a municipality is exercising its discretionary powers to protect public health and comfort and is not performing a special corporate or municipal duty to keep them in repair." Justice *Holmes*, Justice *Brandeis*, and Justice *Clarke* dissented. See also *Bruhnke v. La Crosse*, 155 Wis. 485, 144 N. W. 1100, 50 L. R. A. (N. S.) 1147.

A city is not, as a rule, bound to make safe for travel the area outside of a public street, nor to erect barriers to prevent travelers from straying off the street to adjoining land upon which there may be dangerous places. It is bound to provide such guards only where the street itself is unsafe, for travel by reason of the close proximity of excavations, embankments, and the like. *Briglia v. St. Paul*, 134 Minn. 97, 158 N. W. 794, L. R. A. 1916 F, 1216.

Calling public meetings for political or philanthropic purposes is no part of the business of a municipal corporation, and it is not liable to one who, in lawfully passing by where the

exist in other cases where the same reasons would be applicable.

But if the ground of the action is the omission by the corporation to repair a defect, it would seem that notice of the defect should be brought home to the corporation, or to officers charged with some duty respecting the streets, or that facts should appear sufficient to show that, by proper vigilance, it must have been known.<sup>1</sup> On the other hand, if the injury has happened in consequence of de-

meeting is held, is injured by the discharge of a cannon fired by persons concerned in the meeting. *Boyland v. Mayor, &c. of New York*, 1 Sandf. 27.

The noise of a cannon fired outside a highway is not a defect in the way for which a city is liable. *Lincoln v. Boston*, 148 Mass. 517, 20 N. E. 329.

In Minnesota it has been held that the legislature may relieve a municipal corporation from liability for injuries caused by the neglect of the municipal authorities to keep the streets in proper repair, or it may impose or recognize the liability upon such conditions as it thinks advisable. *Schigley v. Waseca*, 106 Minn. 94, 118 N. W. 259, 19 L. R. A. (N. S.) 689, 16 Ann. Cas. 169.

<sup>1</sup> *Hart v. Brooklyn*, 36 Barb. 226; *Dewey v. City of Detroit*, 15 Mich. 307; *Garrison v. New York*, 5 Bosw. 497; *McGinity v. Mayor, &c. of New York*, 5 Duer, 674; *Decatur v. Fisher*, 53 Ill. 407; *Chicago v. McCarthy*, 75 Ill. 602; *Requa v. Rochester*, 45 N. Y. 129; *Hume v. New York*, 47 N. Y. 639; *Springfield v. Doyle*, 76 Ill. 202; *Rosenburg v. Des Moines*, 41 Iowa, 415; *Vandersliste v. Philadelphia*, 103 Pa. St. 102; *Dotton v. Albion*, 50 Mich. 129, 50 N. W. 46; *Davis v. Guilford*, 55 Conn. 351, 11 Atl. 350; *Montgomery v. Conner*, 155 Ala. 422, 46 So. 761, 21 L. R. A. (N. S.) 951; *Daytona v. Edson*, 46 Fla. 463, 34 So. 954, 4 Ann. Cas. 1000; *Jaines v. Tampa*, 52 Fla. 292, 42 So. 729, 120 Am. St. Rep. 203, 11 Ann. Cas. 510; *Bovey v. Dublin*, 145 Ga. 339, 89 S. E. 197, Ann. Cas. 1918 E, 176; *Eaton v. Weiser*, 12 Idaho, 544, 86 Pac. 541, 118 Am. St. Rep. 225; *Miller v. Mullan*, 17 Idaho 28, 104, Pac. 660, 19 Ann. Cas. 1107; *Beviness v. Missouri Valley*, 162 Iowa, 720, 144

N. W. 628, 51 L. R. A. (N. S.) 218; *Covington v. Lee*, 28 Ky. L. Rep. 492, 89 S. W. 493, 2 L. R. A. (N. S.) 481; *American Dist. Tel. Co. v. Oldham*, 148 Ky. 320, 146 S. W. 764, Ann. Cas. 1913 E, 376; *Ashland v. Baggs*, 161 Ky. 728, 171 S. W. 461, Ann. Cas. 1916 B, 1005; *Magaha v. Hagerstown*, 95 Md. 62, 51 Atl. 832, 93 Am. St. Rep. 317; *Boutlier v. Malden*, 226 Mass. 479, 116 N. E. 251, Ann. Cas. 1918 C, 910; *Allen v. West Bay City*, 140 Mich. 111, 103 N. W. 514, 6 Ann. Cas. 35; *Schigley v. Waseca*, 106 Minn. 94, 118 N. W. 259, 16 Ann. Cas. 169; *Engel v. Minneapolis*, 138 Minn. 438, 165 N. W. 278, L. R. A. 1918 B, 647; *Dougherty v. St. Louis*, 251 Mo. 514, 158 S. W. 326, 46 L. R. A. (N. S.) 330; *Sheets v. McCook*, 95 Neb. 139, 145 N. W. 252, 51 L. R. A. (N. S.) 321; *Fox v. Manchester*, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474; *Cohen v. New York*, 204 N. Y. 424, 97 N. E. 866, 39 L. R. A. (N. S.) 985; *Stern v. International R. Co.*, 220 N. Y. 284, 115 N. E. 759, 2 A. L. R. 487; *White v. New Bern*, 146 N. C. 447, 59 S. E. 992, 125 Am. St. Rep. 476, 13 L. R. A. (N. S.) 1166; *Jackson v. Grand Forks*, 24 N. D. 601, 140 N. W. 718, 45 L. R. A. (N. S.) 75; *Columbus v. Penrod*, 73 Ohio St. 209, 76 N. E. 826, 112 Am. St. Rep. 716, 3 L. R. A. (N. S.) 386; *Shawnee v. Sears*, 39 Okla. 789, 137 Pac. 107, 50 L. R. A. (N. S.) 885; *New Castle v. Kurtz*, 210 Pa. St. 183, 59 Atl. 989, 105 Am. St. Rep. 798, 69 L. R. A. 488, 1 Ann. Cas. 943; *Beall v. Seattle*, 28 Wash. 593, 69 Pac. 12, 92 Am. St. Rep. 892, 61 L. R. A. 583; *Blankenship v. King County*, 68 Wash. 84, 122 Pac. 616, 40 L. R. A. (N. S.) 182.

Notice of defect is notice of the facts, whether the authorities consider them as constituting a defect or

fective construction, notice is not essential, as the facts must be supposed to have been known from the first.<sup>1</sup>

In regard to all those powers which are conferred upon the corporation, not for the benefit of the general public, but of the corporators, — such as the power to construct works to supply a city with water, or gas-works, or sewers, and the like, — the corporation is held to a still more strict liability, and is made to respond in damages to the parties injured by the negligent manner in which the work is constructed, or guarded, even though, under its charter, the agents for the construction are not chosen or controlled by the corporation, and even where the work is required by law to be let to the lowest responsible bidder.

In *Bailey v. Mayor, etc., of New York*,<sup>2</sup> an action was brought against the city by one who had been injured in his property by the careless construction of the Croton dam for the purpose of supplying the city with water. The work was constructed under the control of water commissioners, in whose appointment the city had no voice; and upon this ground, among others, and also on the ground that the city officers were acting in a public capacity, and like other public agents, not responsible for the misconduct of those necessarily appointed by them, it was insisted the city could not be held liable. *Nelson*, Ch. J., examining the position that, “admitting the water commissioners to be the appointed agents of the defendants, still the latter are not liable, inasmuch as they were acting solely for the State in prosecuting the work in question, and therefore are not responsible for the conduct of those necessarily employed by them for that purpose,” says: “We admit, if the defendants are to be regarded as occupying this relation, and are not chargeable with any want of diligence in the selection of agents, the conclusion contended for would seem to follow. They would then be entitled to all the immunities of public officers charged with a duty which, from its nature, could not be executed without availing themselves of the services of others; and the doctrine of *respondeat superior* does not apply to such cases. If a public officer authorize the doing of an act not within the scope of his authority, or if he be

not. *Hinckley v. Somerset*, 145 Mass. 326, 14 N. E. 166.

When excavation is made by city employees acting under proper authority, city must be deemed to have notice. *Wilson v. Troy*, 135 N. Y. 96, 32 N. E. 44, 18 L. R. A. 449, 31 Am. St. 817.

<sup>1</sup> *Alexander v. Mt. Sterling*, 71 Ill.

366; *Hinckley v. Somerset*, 145 Mass. 326, 14 N. E. 166; *Corbin v. Benton*, 151 Ky. 483, 152 S. W. 241, 43 L. R. A. (N. S.) 591; *Stewart v. Woodmere Cemetery Ass'n*, 211 Mich. 282, 178 N. W. 654.

<sup>2</sup> 3 Hill, 531; s. c. in error, 2 Denio, 433.

guilty of negligence in the discharge of duties to be performed by himself, he will be held responsible; but not for the misconduct or malfeasance of such persons as he is obliged to employ. But this view cannot be maintained on the facts before us. The powers conferred by the several acts of the legislature, authorizing the execution of this great work, are not, strictly and legally speaking, conferred for the benefit of the public; the grant is a special, private franchise, made as well for the private emolument and advantage of the city as for the public good. The State, in its sovereign character, has no interest in it. It owns no part of the work. The whole investment, under the law, and the revenue and profits to be derived therefrom, are a part of the private property of the city, as much so as the lands and houses belonging to it situate within its corporate limits.

"The argument of the defendants' counsel confounds the powers in question with those belonging to the defendants in their character as a municipal or public body, — such as are granted exclusively for public purposes to counties, cities, towns, and villages, where the corporations have, if I may so speak, no private estate or interest in the grant.

"As the powers in question have been conferred upon one of these public corporations, thus blending, in a measure, those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in the mind, and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each.

"But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quo hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred.<sup>1</sup>

<sup>1</sup> Citing *Dartmouth College v. Woodward*, 4 Wheat. 668, 672, 4 L. ed. 629; *Philips v. Bury*, 1 Ld. Raym. 8, 2 T. R. 352; *Allen v. McKeen*, 1 Sumn. 297; *People v. Morris*, 13 Wend. 331-338, 2 Kent's Com. 275 (4th ed.); *United States Bank v. Planters' Bank*, 9 Wheat. 907, 6 L. ed. 244; *Clark v.*

"Suppose the legislature, instead of the franchise in question, had conferred upon the defendants banking powers, or a charter for a railroad leading into the city, in the usual manner in which such powers are conferred upon private companies, could it be doubted that they would hold them in the same character, and be subject to the same duties and liabilities? I cannot doubt but they would. These powers, in the eye of the law, would be entirely distinct and separate from those appertaining to the defendants as a municipal body. So far as related to the charter thus conferred, they would be regarded as a private company, and be subject to the responsibilities attaching to that class of institutions. The distinction is well stated by the Master of the Rolls in *Moodalay v. East India Co.*,<sup>1</sup> in answer to an objection made by counsel. There the plaintiff had taken a lease from the company, granting him permission to supply the inhabitants of Madras

Corp. of Washington, 12 Wheat. 40, 6 L. ed. 544; *Moodalay v. East India Co.*, 1 Brown's Ch. R. 469. See, in addition to the cases cited by the court, *Touchard v. Touchard*, 5 Cal. 306; *Gas Co. v. San Francisco*, 9 Cal. 453; *Richmond v. Long*, 17 Gratt. 375; *Atkins v. Randolph*, 31 Vt. 226; *Small v. Danville*, 51 Me. 359; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Philadelphia v. Fox*, 64 Pa. St. 169; *Detroit v. Corey*, 9 Mich. 165; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Western College v. Cleveland*, 12 Ohio, (N. S.) 375; *Hewinson v. New Haven*, 37 Conn. 475, 9 Am. Rep. 342; *People v. Batchellor*, 53 N. Y. 128; *Welsh v. St. Louis*, 73 Mo. 71; *Winona v. Botzet*, 94 C. C. A. 563, 169 Fed. 321, 23 L. R. A. (N. S.) 204; *Davoust v. Alameda*, 149 Cal. 69, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847; *Judson v. Winsted*, 80 Conn. 384, 68 Atl. 999, 15 L. R. A. (N. S.) 91; *Eaton v. Weiser*, 12 Idaho, 544, 86 Pac. 541, 118 Am. St. Rep. 225; *Stedwell v. Chicago*, 297 Ill. 486, 130 N. E. 732, 17 A. L. R. 829; *Miller Grocery Co. v. Des Moines*, 195 Iowa, 1310, 192 N. W. 306; 28 A. L. R. 815; *Hinze v. Iola*, 92 Kan. 779, 142 Pac. 947; Ann. Cas. 1916 B, 281; *Hodgins v. Bay City*, 156 Mich. 687, 121 N. W. 274, 132 Ann. St. Rep. 546; *Johnson v. Bay City*, 164 Mich. 251, 129 N. W. 29, Ann. Cas. 1912 B, 866; *Keever v.*

*Mankato*, 113 Minn. 55, 129 N. W. 158, 775, 33 L. R. A. (N. S.) 339, Ann. Cas. 1912 A, 216; *Frasch v. New Ulm*, 130 Minn. 41, 153 N. W. 121, L. R. A. 1915 E, 749; *Emmons v. Virginia*, 152 Minn. 295, 188 N. W. 561, 29 A. L. R. 860; *Riley v. Independence*, 258 Mo. 671, 167 S. W. 1022, Ann. Cas. 1915 D, 748; *Henry v. Lincoln*, 93 Neb. 331, 140 N. W. 664, 50 L. R. A. (N. S.) 174; *Oakes Mfg. Co. v. New York*, 206 N. Y. 221, 99 N. E. 540, 42 L. R. A. (N. S.) 286; *Fisher v. New Bern*, 140 N. C. 506, 53 S. E. 342, 111 Am. St. Rep. 857, 5 L. R. A. (N. S.) 542; *Minnick v. Durham*, 181 N. C. 188, 106 S. E. 665, 24 A. L. R. 538; *Piqua v. Morris*, 98 Ohio St. 42, 120 N. E. 300, 7 A. L. R. 129; *Brown v. Salt Lake City*, 33 Utah, 222, 93 Pac. 570, 126 Am. St. Rep. 828, 14 L. R. A. (N. S.) 619, 14 Ann. Cas. 1004; *Giuricevic v. Tacoma*, 57 Wash. 329, 106 Pac. 908, 28 L. R. A. (N. S.) 533; *Bjork v. Tacoma*, 76 Wash. 225, 135 Pac. 1005, 48 L. R. A. (N. S.) 331; *Wigal v. Parkersburg*, 74 W. Va. 25, 81 S. E. 554, 52 L. R. A. (N. S.) 465; *Piper v. Madison*, 140 Wis. 311, 122 N. W. 730, 133 Am. St. Rep. 1078, 25 L. R. A. (N. S.) 239. But see *Irvine v. Greenwood*, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363.

<sup>1</sup> 1 Brown's Ch. R. 469.

with tobacco for ten years. Before the expiration of that period, the company dispossessed him, and granted the privilege to another. The plaintiff, preparatory to bringing an action against the company, filed a bill of discovery. One of the objections taken by the defendants was, that the removal of the plaintiff was incident to their character as a sovereign power, the exercise of which could not be questioned in a bill or suit at law. The Master of the Rolls admitted that no suit would lie against a sovereign power for anything done in that capacity; but he denied that the defendants came within the rule. 'They have rights,' he observed, 'as a sovereign power; they have also duties as individuals; if they enter into bonds in India, the sums secured may be recovered here. So in this case, as a private company, they have entered into a private contract, to which they must be liable.' It is upon the like distinction that municipal corporations, in their private character as owners and occupiers of lands and houses, are regarded in the same light as individual owners and occupiers, and dealt with accordingly. As such, they are bound to repair bridges, highways, and churches; are liable to poor rates; and, in a word, to the discharge of any other duty or obligation to which an individual owner would be subject."<sup>1</sup>

<sup>1</sup> 2 Inst. 703; *Thursfield v. Jones*, Sir T. Jones, 187; *Rex v. Gardner*, Cowp. 79; *Mayor of Lynn v. Turner*, Cowp. 87; *Henley v. Mayor of Lyme Regis*, 5 Bing. 91; s. c. in House of Lords, 1 Bing. N. C. 222. See also *Lloyd v. Mayor, &c. of New York*, 5 N. Y. 369; *Commissioners v. Duckett*, 20 Md. 468.

"The corporation of the City of New York possesses two kinds of powers, — one governmental and public, and, to the extent they are held and exercised, is clothed with sovereignty; the other private, and, to the extent they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the former, the corporation is a municipal government, and while in the exercise of the latter, is a corporate, legal individual." Per *Foot, J.* in *Lloyd v. Mayor, etc., of New York*, 5 N. Y. 369. See upon this point also *Western Fund Saving Society v. Philadelphia*, 31 Pa. St. 175; *Louisville v. Com.*, 1 Duvall,

295; *People v. Common Council of Detroit*, 28 Mich. 228; *ante*, pp. 490-495, and notes.

"The dual capacity of New England towns as municipal corporations, in the absence of special legislation, is firmly established, and has been recognized for many years (*Libby v. Portland*, 105 Me. 370, 74 Atl. 805, 26 L. R. A. (n.s.) 141, 18 Ann. Cas. 547; *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Oliver v. Worcester*, 102 Mass. 499, 3 Am. Rep. 485), and the same dual capacity has been recognized elsewhere (*Bailey v. New York*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669). In their governmental capacity, as political subdivisions of the State, they discharge certain public duties imposed upon them by the legislature; and for the better discharge of those duties the inhabitants meet in town meeting for the choice of officers, for action upon reports of such officers, or committees, for the transaction of the necessary business connected with the discharge of the public duties imposed, and for the discussion of public

In *Storrs v. City of Utica*,<sup>1</sup> it was held that a city, owing to the public the duty of keeping its streets in a safe condition for travel, was liable to persons receiving injury from the neglect to keep proper lights and guards at night around an excavation which had been made for the construction of a sewer, notwithstanding it had contracted for all proper precautions with the persons executing the work. And in the *City of Detroit v. Corey*,<sup>2</sup> the corporation was held liable in a similar case, notwithstanding the work was required by the charter to be let to the lowest bidder. *Manning, J.*, in speaking to the point whether the contractors were to be considered as the agents of the city, so that the maxim *respondeat superior* should apply, says: "It is to be observed that the power under which they acted, and which made that lawful which would otherwise have been unlawful, was not a power given to the city for governmental purposes, or a public municipal duty imposed on the city, as to keep its streets in repair, or the like, but a special legislative grant to the city for private purposes. The sewers of the city, like its works for supplying the city with water, are the private property of the city; they belong to the city. The corporation and its corporators, the citizens, are alone interested in them; the outside public or people of the State at large have no interest in them, as they have in the streets of the city, which are public highways.

"The donee of such a power, whether the donee be an individual or a corporation, takes it with the understanding — for such are the requirements of the law in the execution of the power — that it shall be so executed as not unnecessarily to interfere with the

affairs. The town upon such occasions acts in a legislative capacity and as a political body, and no action lies against a town for what is done by it as a political body and as a part of the administration of the government. . . . In its corporate capacity as the owner of property held for its profit and advantage, the rights and liabilities of the town are measured strictly by the laws which determine all private rights and liabilities, and under the same conditions as a private corporation. *Libby v. Portland*, 105 Me. 370, 74 Atl. 805, 26 L. R. A. (N. S.) 141, 18 Ann. Cas. 547; *Oliver v. Worcester*, 102 Mass. 489, 500, 3 Am. Rep. 485; *Woodward v. Water District*, 116 Me. 86, 91, 100 Atl. 317, L. R. A. 1917 D, 678. The maxim of *respondeat superior* may apply to them. 4 Dillon, Mun. Corp. (5th ed.)

§ 1655 (974)." *Stanley v. Saugerville*, 119 Me. 26, 109 Atl. 189, 9 A. L. R. 348.

If a town, holding common land within its limits, which is not required at the time for any public purpose, lays out such land in house lots, which it leases to tenants for a substantial rental, it will be liable to one of its tenants, in the same way that a private owner would be, for injuries sustained by reason of its negligence in maintaining a defective and dangerous plank walk for the common use of such tenants. *Davis v. Rockport*, 213 Mass. 279, 100 N. E. 612, 43 L. R. A. (N. S.) 1139.

<sup>1</sup> 17 N. Y. 104.

<sup>2</sup> 9 Mich. 165. Compare *Mills v. Brooklyn*, 32 N. Y. 489; *Jones v. New Haven*, 34 Conn. 1.

rights of the public, and that all needful and proper measures will be taken, in the execution of it, to guard against accidents to persons lawfully using the highway at the time. He is individually bound for the performance of these obligations; he cannot accept the power divested of them, or rid himself of their performance by executing them through a third person as his agent. He may stipulate with the contractor for their performance, as was done by the city in the present case, but he cannot thereby relieve himself of his personal liability, or compel an injured party to look to his agent, instead of himself, for damages." And in answer to the objection that the contract was let to the lowest bidder, as the law required, it is shown that the provision of law to that effect was introduced for the benefit of the city, to protect it against frauds, and that it should not, therefore, relieve it from any liability.<sup>1</sup>

<sup>1</sup> See also *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 463; *Grant v. City of Brooklyn*, 41 Barb. 381; *City of Buffalo v. Holloway*, 14 Barb. 101, and 7 N. Y. 493; *Lloyd v. Mayor, &c. of New York*, 5 N. Y. 369; *Delmonico v. Mayor, &c. of New York*, 1 Sandf. 222; *Barton v. Syracuse*, 37 Barb. 292; *Storrs v. Utica*, 17 N. Y. 104; *Springfield v. LeClaire*, 49 Ill. 476; *Blake v. St. Louis*, 40 Mo. 569; *Baltimore v. Pendleton*, 15 Md. 12; *St. Paul v. Seitz*, 3 Minn. 297; *Denver v. Rhodes*, 9 Col. 554, 13 Pac. 729; *Wilson v. Wheeling*, 19 W. Va. 323; *Birmingham v. McCary*, 84 Ala. 469, 4 So. 630; *Logansport v. Dick*, 70 Ind. 65; *Brasso v. Buffalo*, 90 N. Y. 679; *Turner v. Newburgh*, 109 N. Y. 301, 16 N. E. 344; *Circleville v. Neuding*, 41 Ohio St. 465; *Jacksonville v. Drew*, 19 Fla. 106; *Joslyn v. Detroit*, 74 Mich. 458, 42 N. W. 50; *McCoull v. Manchester*, 85 Va. 579, 8 S. E. 379; *Langley v. Augusta*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. Rep. 133; *Hines v. Nevada*, 150 Iowa, 62, 130 N. W. 181, 32 L. R. A. (N. S.) 797; *Hart v. Neillsville*, 125 Wis. 546, 104 N. W. 699, 1 L. R. A. (N. S.) 952, 4 Ann. Cas. 1085; also numerous cases collected and classified in *Dillon on Municipal Corporations*. But this doctrine seems not to obtain in *Pennsylvania*: *School Dist. v. Fuess*, 98 Pa. St. 600; *Susquehanna Depot v. Simmons*, 112 Pa. St. 384, 5 Atl. 434.

If the injury arises from something not collateral to the work, the city is not liable, as where horses are frightened by the noise of blasting in an adjoining street: *Herrington v. Lansingburgh*, 110 N. Y. 145, 17 N. E. 728; or a person is injured by the blasting. *Blumb v. Kansas City*, 84 Mo. 112; *Murphy v. Lowell*, 128 Mass. 396. Compare *Joliet v. Harwood*, 86 Ill. 110.

A municipal corporation is not liable for neglect to devise and construct a proper system of drainage. *Carr v. Northern Liberties*, 35 Pa. St. 324. See *ante*, pp. 444, 447, and notes.

Cities are not liable for the illegal conduct of officials in the discharge of duty. *Dillon, Mun. Corp.* §§ 774-778, and cases cited; *Grumbine v. Washington*, 2 McArthur, 578.

The following cases including some very recent ones, in which the liability of municipal corporations for neglect of public duties has been considered:

For nuisance in highway, sewer, &c.: *Todd v. Troy*, 61 N. Y. 506; *Master-ton v. Mt. Vernon*, 58 N. Y. 391; *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592; *Woodward v. Worcester*, 121 Mass. 245; *Chicago v. Brophy*, 79 Ill. 277; *Chicago v. O'Brennan*, 65 Ill. 160; *Wilkins v. Rutland*, 61 Vt. 336, 17 Atl. Rep. 735; *Kibele v. Philadelphia*, 105 Pa. St. 41; *Duffy v. Dubuque*, 63 Iowa, 171, 18 N. W. 900; *Kunz v. Troy*,



104 N. Y. 344, 10 N. E. 442; *Langan v. Atchison*, 35 Kan. 318, 11 Pac. 38; *Dalton v. Wilson*, 118 Ga. 100, 44 S. E. 830, 98 Am. St. Rep. 101; *Wheeler v. Ft. Dodge*, 131 Iowa, 566, 108 N. W. 1057, 9 L. R. A. (N. S.) 146; *McDowell v. Preston*, 104 Minn. 263, 116 N. W. 470, 18 L. R. A. (N. S.) 190; *Chaney v. Riverton*, 104 Neb. 189, 177 N. W. 845, 10 A. L. R. 244; *Charles Eneu Johnson Co. v. Philadelphia*, 336 Pa. St. 510, 84 Atl. 1014, 42 L. R. A. (N. S.) 512, Ann. Cas. 1914 A, 68. See *Stock v. Boston*, 149 Mass. 410, 21 N. E. 871; *Ray v. St. Paul*, 40 Minn. 458, 42 N. W. 297.

For invasion of private right or property: *Sheldon v. Kalamazoo*, 24 Mich. 383; *Babcock v. Buffalo*, 56 N. Y. 268; *Lee v. Sandy Hill*, 40 N. Y. 442; *Phinizy v. Augusta*, 47 Ga. 260; *Helena v. Thompson*, 29 Ark. 569; *Kobs v. Minneapolis*, 22 Minn. 159; *Louisville v. Hekemann*, 161 Ky. 523, 171 S. W. 165, L. R. A. 1915 C, 747; *Kelley v. Boston*, 186 Mass. 165, 71 N. E. 299, 66 L. R. A. 429; *Johnson v. Somerville*, 195 Mass. 370, 81 N. E. 268, 10 L. R. A. (N. S.) 715; *Gillmor v. Salt Lake City*, 32 Utah, 180, 89 Pac. 714, 12 L. R. A. (N. S.) 537, 13 Ann. Cas. 1016; *Sehy v. Salt Lake City*, 41 Utah, 535, 126 Pac. 691, 42 L. R. A. (N. S.) 915; *Cunningham v. Seattle*, 40 Wash. 59, 82 Pac. 143, 4 L. R. A. (N. S.) 629, 42 Wash. 134, 84 Pac. 641; *Lowe v. Conroy*, 120 Wis. 151, 97 N. W. 942, 102 Am. St. Rep. 983, 66 L. R. A. 907, 1 Ann. Cas. 341.

For negligent construction of sewers: *Nims v. Troy*, 59 N. Y. 500; *Van Pelt v. Davenport*, 42 Iowa, 308; *Rowe v. Portsmouth*, 56 N. H. 291; *Ashley v. Port Huron*, 35 Mich. 296, 20 Am. Rep. 628, note; *Noonan v. Albany*, 79 N. Y. 470, 35 Am. Rep. 540; *Chicago v. Hesing*, 83 Ill. 204, 25 Am. Rep. 378; *Post v. Boston*, 141 Mass. 189, 4 N. E. 815; *Larson Bros. Wholesale Grocery Co. v. Kansas City*, 115 Kan. 589, 224 Pac. 47; *Pevear v. Lynn*, 249 Mass. 486, 144 N. E. 379; *Mitchell Realty Co. v. West Allis*, 184 Wis. 352, 199 N. W. 390.

For negligence in construction and improvement of streets: *Pekin v.*

*Winkel*, 77 Ill. 56; *Bloomington v. Brokaw*, 77 Ill. 194; *Pekin v. Brereton*, 67 Ill. 477; *Chicago v. Langlass*, 66 Ill. 361; *Mead v. Derby*, 40 Conn. 205; *Milledgeville v. Cooley*, 55 Ga. 17; *Prentiss v. Boston*, 112 Mass. 43; *Saltmarsh v. Bow*, 56 N. H. 428; *Sewall v. St. Paul*, 20 Minn. 511; *Kentworthy v. Ironton*, 41 Wis. 647; *Hoyt v. Hudson*, 41 Wis. 105; *Talbot v. Taunton*, 140 Mass. 552, 5 N. E. 616; *Gray v. Danbury*, 54 Conn. 574, 10 Atl. 198; *Allen v. McCalman*, 229 Ill. App. 221; *Pikeville v. Riddle*, 200 Ky. 395, 255 S. W. 63; *Ashland v. Williams*, 203 Ky. 300, 262 S. W. 273; *Frankfort v. Bowen's Adm'x*, 205 Ky. 309, 265 S. W. 785; *Bowen's Adm'x v. Louisville, etc., R. Co.*, 205 Ky. 314, 265 S. W. 787; *Berry v. Durham*, 186 N. C. 421, 119 S. E. 748; *Graham v. Charlotte*, 186 N. C. 649, 120 S. E. 466.

For defective sidewalk: *Springfield v. Doyle*, 76 Ill. 202; *Champaign v. Pattison*, 50 Ill. 62; *Townsend v. Des Moines*, 42 Iowa, 657; *Rice v. Des Moines*, 40 Iowa, 638; *McAuley v. Boston*, 113 Mass. 503; *Harriman v. Boston*, 114 Mass. 241; *Morse v. Boston*, 109 Mass. 446; *Hanscom v. Boston*, 141 Mass. 242, 5 N. E. 249; *McLaughlin v. Corry*, 77 Pa. St. 109; *Boucher v. New Haven*, 40 Conn. 456; *Congdon v. Norwich*, 37 Conn. 414; *Stewart v. Ripon*, 38 Wis. 584; *Chapman v. Macon*, 55 Ga. 566; *Moore v. Minneapolis*, 19 Minn. 300; *Furnell v. St. Paul*, 20 Minn. 117; *Omaha v. Olmstead*, 5 Neb. 446; *Higert v. Greencastle*, 43 Ind. 574; *Providence v. Clapp*, 17 How. 161, 15 L. ed. 72; *Smith v. Leavenworth*, 15 Kan. 81; *Atchison v. King*, 9 Kan. 550; *Gillison v. Charleston*, 16 W. Va. 282, 37 Am. Rep. 763; *Cromarty v. Boston*, 127 Mass. 329, 34 Am. Rep. 381; *Sherwood v. Dist. Columbia*, 3 Mackey, 276; *Saulsbury v. Ithaca*, 94 N. Y. 27; *Pomfrey v. Saratoga*, 104 N. Y. 459, 11 N. E. 43; *Cloughessey v. Waterbury*, 51 Conn. 405; *Denver v. Burrows*, 76 Colo. 17, 227 Pac. 840; *Burgess v. Plainville*, 101 Conn. 68, 124 Atl. 829; *Norman v. Sioux City*, 197 Iowa, 1310, 197 N. W. 18; *Jordan v. Lexington*, 133 Miss. 440, 97 So. 758; *Megson v. St. Louis, (Mo.)*,

[Upon the ground that municipal corporations are not liable for negligence in the performance of governmental functions, the greater weight of authority supports the rule that a city which provides free to its inhabitants instrumentalities for diversion or exercise in a public park, is not liable to persons injured while using such instrumentalities, because defective or out of repair, due to negligence of the city, its servants or agents;<sup>1</sup> but in some of the States it has been held that under such circumstances a city will be liable for injuries resulting from its negligence.<sup>2</sup>]

264 S. W. 15; *De Pledge v. New York*, 203 N. Y. Supp. 428, 208 App. Div. 10; *Kuhn v. East Syracuse*, 204 N. Y. Supp. 697, 209 App. Div. 186; *Anderson v. Jamestown*, 50 N. D. 531, 196 N. W. 753; *Quapaw v. Holden*, 96 Okla. 281, 222 Pac. 680; *Heather v. Mitchell*, 47 S. D. 281, 198 N. W. 353; *Erle v. Norfolk*, 139 Va. 38, 123 S. E. 364; *Clausing v. Kershaw*, 129 Wash. 67, 224 Pac. 573.

For allowing sidewalk to remain in icy condition: *Beane v. St. Joseph*, 215 Mo. App. 554, 256 S. W. 1093. See also *Gerrie v. Port Huron*, 226 Mich. 630, 198 N. W. 236; *Heather v. Mitchell*, 47 S. D. 281, 198 N. W. 353; *Randall v. Hot Springs*, 47 S. D. 357, 199 N. W. 40; *Beaudin v. Oconto*, 183 Wis. 341, 197 N. W. 792.

For injury by limb falling from tree overhanging street: *Jones v. New Haven*, 34 Conn. 1. See *Gubasko v. New York*, 1 N. Y. Supp. 215.

For injury by fall of an awning over sidewalk: *Bohen v. Waseca*, 32 Minn. 176, 19 N. W. 730; *Larson v. Grand Forks*, 3 Dak. 307, 19 N. W. 414.

For failure to keep street in repair: *Gorham v. Cooperstown*, 59 N. Y. 660; *Hines v. Lockport*, 50 N. Y. 236; *Bell v. West Point*, 51 Miss. 262; *Chicago v. McGiven*, 78 Ill. 347; *Alton v. Hope*, 68 Ill. 167; *Centralia v. Scott*, 59 Ill. 129; *Winbigler v. Los Angeles*, 45 Cal. 36; *Market v. St. Louis*, 56 Mo. 189; *Wiley v. Belfast*, 61 Me. 569; *Bill v. Norwich*, 39 Conn. 222; *Lindholm v. St. Paul*, 19 Minn. 245; *Shartle v. Minneapolis*, 17 Minn. 308; *O'Leary v. Mankato*, 21 Minn. 65; *Griffin v. Williamstown*, 6 W. Va. 312; *King v. Beaumont*, 296 Fed. 531; *Humboldt*

*County v. Dakota City*, 197 Iowa, 457, 196 N. W. 53; *Donahoe v. Webster Groves*, (Mo. App.), 259 S. W. 505; *Cooper v. Caruthersville*, (Mo. App.), 264 S. W. 46; *Quapaw v. Holden*, 96 Okla. 281, 222 Pac. 680; *Armstrong v. Tulsa*, 102 Okla. 49, 226 Pac. 560; *Heather v. Mitchell*, 47 S. D. 281, 198 N. W. 353; *Neagle v. Tacoma*, 127 Wash. 528, 221 Pac. 588.

For failure to keep sewers in repair: *Munn v. Pittsburg*, 40 Pa. St. 364; *Jersey City v. Kiernan*, 50 N. J. L. 246, 13 Atl. 170; *Bigham v. Pittsburgh*, 83 Pa. Super. Ct. 449.

<sup>1</sup> *Kellar v. Los Angeles*, 179 Cal. 605, 178 Pac. 505; *Pennell v. Wilmington*, 7 Penn. (Del.) 229, 78 Atl. 915; *Cornelisen v. Atlanta*, 146 Ga. 416, 91 S. E. 415; *Warrenton v. Smith*, 149 Ga. 567, 101 S. E. 681; *Hibbard v. Wichita*, 98 Kan. 498, 159 Pac. 399, L. R. A. 1917 A, 399; *Board of Park Com'rs v. Prinz*, 127 Ky. 460, 105 S. W. 948; *Bolster v. Lawrence*, 225 Mass. 387, 114 N. E. 722, L. R. A. 1917 B, 1285; *Heino v. Grand Rapids*, 202 Mich. 363, 168 N. W. 512, L. R. A. 1918 F, 528; *Emmons v. Virginia*, 152 Minn. 295, 188 N. W. 561, 29 A. L. R. 860; *Caughlin v. Omaha*, 103 Neb. 726, 174 N. W. 220; *Bisbing v. Asbury Park*, 80 N. J. L. 416, 78 Atl. 196, 33 L. R. A. (N. s.) 523; *Blair v. Granger*, 24 R. I. 17, 51 Atl. 1042; *Nashville v. Burns*, 131 Tenn. 281, 174 S. W. 1111, L. R. A. 1915 D, 1108; *Nelson v. Spokane*, 104 Wash. 219, 176 Pac. 149; *Bernstein v. Milwaukee*, 158 Wis. 578, 149 N. W. 382, L. R. A. 1915 C, 435, 8 N. C. C. A. 624; *Gensch v. Milwaukee*, 179 Wis. 95, 190 N. W. 843.

<sup>2</sup> *Canon City v. Cox*, 55 Colo. 264,

*Validity of Incorporation Proceedings.*

We have not deemed it important, in considering the subject embraced within this chapter, to discuss the various questions which might be suggested in regard to the validity of the proceedings by which it is assumed in any case that a municipal corporation has become constituted. These questions are generally questions between the corporators and the State, with which private individuals are supposed to have no concern. In proceedings where the question whether a corporation exists or not arises collaterally, the courts will not permit its corporate character to be questioned, if it appear to be acting under color of law, and recognized by the State as such. Such a question should be raised by the State itself, by *quo warranto* or other direct proceeding.<sup>1</sup> And the rule, we apprehend, would be no different, if the constitution itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the State; and private parties could not enter upon any question of regularity. And the State itself may justly be precluded, on the

133 Pac. 1040; *Ft. Collins v. Roten*, 72 Colo. 182, 210 Pac. 326; *Kokomo v. Loy*, 185 Ind. 18, 112 N. E. 994; *Sarber v. Indianapolis*, 72 Ind. App. 594, 126 N. E. 330; *Capp v. St. Louis*, 251 Mo. 345, 158 S. W. 616, 46 L. R. A. (n. s.) 731, Ann. Cas. 1915 C, 245; *Healy v. Kansas City*, 277 Mo. 619, 211 S. W. 59; *Silverman v. New York*, 114 N. Y. Supp. 59; *Bloom v. Newark*, 3 Ohio N. P. (n. s.) 480; *Anadarko v. Swain*, 42 Okla. 741, 142 Pac. 1104; *Guilmartin v. Philadelphia*, 201 Pa. St. 518, 51 Atl. 312; *Rhine v. Philadelphia*, 24 Pa. Super. Ct. 564; *Haithcock v. Columbia*, 115 S. C. 29, 104 S. E. 335; *Norberg v. Hagna*, 46 S. D. 568, 195 N. W. 438, 29 A. L. R. 841.

<sup>1</sup> *State v. Carr*, 5 N. H. 367; *President, &c. of Mendota v. Thompson*, 20 Ill. 197; *Hamilton v. President, &c. of Carthage*, 24 Ill. 22. These were prosecutions by municipal corporations for recovery of penalties imposed by by-laws, and where the plea of *nul tiel* corporation was interposed and overruled. See also *Kayer v. Bremen*, 16 Mo. 88; *Kettering v. Jacksonville*, 50 Ill. 39; *Bird v. Perkins*, 33 Mich. 28; *Worley v.*

*Harris*, 82 Ind. 493; *Coe v. Los Angeles*, 42 Cal. App. 479, 183 Pac. 822; *Velasquez v. Zimmerman*, 30 Colo. 355, 70 Pac. 419; *People v. Bowman*, 247 Ill. 276, 93 N. E. 244; *State v. Shufford*, 77 Kan. 263, 94 Pac. 137; *Black v. Early*, 208 Mo. 281, 106 S. W. 1014; *State v. Bellflower*, 129 Mo. App. 138, 108 S. W. 117; *State v. Small*, 131 Mo. App. 470, 109 S. W. 1079; *Salem v. Young*, 142 Mo. App. 160, 125 S. W. 857; *State v. Gooch*, 175 Mo. App. 270, 157 S. W. 846; *Morris v. Fagan*, 85 N. J. L. 617, 90 Atl. 267; *Prankard v. Cooley*, 132 N. Y. Supp. 289, 147 App. Div. 145; *State v. Butterfield*, 92 Ohio St. 428, 111 N. E. 279; *Mitchell v. Carter*, 31 Okla. 592, 122 Pac. 691; *Adler v. Jenkins*, 33 Okla. 117, 124 Pac. 29; *Ex parte Koen*, 58 Tex. Cr. App. 279, 125 S. W. 401; *Board of Education v. Berry*, 62 W. Va. 433, 59 S. E. 169. But see *Waldrop v. Kansas City, etc., R. Co.*, 131 Ark. 453, 199 S. W. 369; *Albershart v. Donaldson*, 149 Ky. 510, 149 S. W. 873; *Hurley v. Motz*, 151 Ky. 451, 152 S. W. 248.

principle of estoppel, from raising such an objection, where there has been long acquiescence and recognition.<sup>1</sup>

<sup>1</sup> In *People v. Maynard*, 15 Mich. 463, 470, where the invalidity of an act organizing a county, passed several years before, was suggested on constitutional grounds, *Campbell, J.*, says: "If this question had been raised immediately, we are not prepared to say that it would have been altogether free from difficulty. But inasmuch as the arrangement there indicated had been acted upon for ten years before the recent legislation, and had been recognized as valid by all parties interested, it cannot now be disturbed. Even in private associations the acts of parties interested may often estop them from relying on legal objections, which might have availed them if not waived. But in public affairs, where the people have organized themselves under color of law into the ordinary municipal bodies, and have gone on year after year raising taxes, making improvements, and exercising their usual franchises, their rights are properly regarded as depending quite as much on the acquiescence as on the regularity of their origin, and no *ex post facto* inquiry can be permitted to undo their corporate existence. Whatever may be the rights of individuals before such general acquiescence, the corporate standing of the community can no longer be open to question. See *Rumsey v. People*, 19 N. Y. 41; and *Lanning v. Carpenter*, 20 N. Y. 474, where the effect of the invalidity

of an original county organization is very well considered in its public and private bearings. There have been direct legislative recognitions of the new division on several occasions. The exercise of jurisdiction being notorious and open in all such cases, the State as well as county and town taxes being all levied under it, there is no principle which could justify any court, at this late day, in going back to inquire into the regularity of the law of 1857." See also *Clapp v. Otoe County*, 104 Fed. 473, 45 C. C. A. 579; *State v. Butterfield*, 92 Ohio St. 428, 111 N. E. 279.

A similar doctrine has been applied in support of the official character of persons who, without authority of law, have been named for municipal officers by State legislation, and whose action in such offices has been acquiesced in by the citizens or authorities of the municipality. See *People v. Salomon*, 54 Ill. 51; *People v. Lothrop*, 24 Mich. 235. Compare *Kimball v. Alcorn*, 45 Miss. 151. But such acquiescence could not make them local officers and representatives of the people for new and enlarged powers subsequently attempted to be given by the legislature. *People v. Common Council of Detroit*, 28 Mich. 228. Nor in respect to powers not purely local. *People v. Springwells*, 25 Mich. 153. And see *People v. Albertson*, 55 N. Y. 50.

## CHAPTER IX

### PROTECTION TO PERSON AND PROPERTY UNDER THE CONSTITUTION OF THE UNITED STATES

As the government of the United States was to be one of enumerated powers, it was not deemed important by the framers of the Constitution that a bill of rights should be incorporated among its provisions. If, among the powers conferred, there was none which would authorize or empower the government to deprive the citizen of any of those fundamental rights which it is the object and the duty of government to protect and defend, and to insure which is the sole purpose of bills of rights, it was thought to be at least unimportant to insert negative clauses in that instrument, inhibiting the government from assuming any such powers, since the mere failure to confer them would leave all such powers beyond the sphere of its constitutional authority. And, as Mr. Hamilton argued, it might seem even dangerous to do so. "For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge, with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a right to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights."<sup>1</sup>

It was also thought that bills of rights, however important under a monarchical government, were of no moment in a constitution of government framed by the people for themselves, and

<sup>1</sup> Federalist, No. 84.

under which public affairs were to be managed by means of agencies selected by the popular choice, and subject to frequent change by popular action. "It has been several times truly remarked, that bills of rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was Magna Charta, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the Petition of Right, assented to by Charles the First, in the beginning of his reign. Such also was the Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of Parliament, called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and, as they retain everything, they have no need of particular reservations. 'WE, THE PEOPLE OF THE UNITED STATES, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America.' This is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government."<sup>1</sup>

Reasoning like this was specious, but it was not satisfactory to many of the leading statesmen of that day, who believed that "the purposes of society do not require a surrender of all our rights to our ordinary governors; that there are certain portions of right not necessary to enable them to carry on an effective government, and which experience has nevertheless proved they will be constantly encroaching on, if submitted to them; that there are also certain fences which experience has proved peculiarly efficacious against wrong, and rarely obstructive of right, which yet the governing powers have ever shown a disposition to weaken and remove."<sup>2</sup> And these governing powers will be no less disposed to be aggressive when chosen by majorities than when selected by the accident of birth, or at the will of privileged classes. Indeed if, during the long struggle for constitutional liberty in England, covering the whole of the seventeenth century, importance was justly attached to a distinct declaration and enumeration of individual rights on the part of the government, when it was still in the

<sup>1</sup> Federalist, No. 84, by Hamilton.

<sup>2</sup> Jefferson's Works, Vol. III. p. 201.

power of the governing authorities to infringe upon or to abrogate them at any time, and when, consequently, the declaration could possess only a moral force, a similar declaration would appear to be of even more value in the Constitution of the United States, where it would constitute authoritative law, and be subject to no modification or repeal, except by the people themselves whose rights it was designed to protect, nor even by them except in the manner by the Constitution provided.<sup>1</sup>

<sup>1</sup> Mr. Jefferson sums up the objections to a bill of rights in the Constitution of the United States, and answers them as follows: "1. That the rights in question are reserved by the manner in which the federal powers are granted. Answer: A constitutive act may certainly be so formed as to need no declaration of rights. The act itself has the force of a declaration, as far as it goes; and if it goes to all material points, nothing more is wanting. In the draft of a constitution which I had once a thought of proposing in Virginia, and printed afterwards, I endeavored to reach all the great objects of public liberty, and did not mean to add a declaration of rights. Probably the object was imperfectly executed; but the deficiencies would have been supplied by others in the course of discussion. But in a constitutive act which leaves some precious articles unnoticed, and raises implications against others, a declaration of rights becomes necessary by way of supplement. This is the case of our new federal Constitution. This instrument forms us into one State, as to certain objects, and gives us a legislative and executive body for these objects. It should therefore guard us against their abuses of power, within the field submitted to them. 2. A positive declaration of some essential rights could not be obtained in the requisite latitude. Answer: Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can. 3. The limited powers of the federal government, and jealousy of the subordinate governments, afford a security, which exists in no other instance. Answer: The first member of this

seems resolvable into the first objection before stated. The jealousy of the subordinate governments is a precious reliance. But observe that those governments are only agents. They must have principles furnished them whereon to found their opposition. The declaration of rights will be the text whereby they will try all the acts of the federal government. In this view it is necessary to the federal government also; as by the same text they may try the opposition of the subordinate governments. 4. Experience proves the inefficacy of a bill of rights. True. But though it is not absolutely efficacious, under all circumstances, it is of great potency always, and rarely inefficacious. A brace the more will often keep up the building which would have fallen with that brace the less. There is a remarkable difference between the characters of the inconveniences which attend a declaration of rights, and those which attend the want of it. The inconveniences of the declaration are, that it may cramp government in its useful exertions. But the evil of this is short-lived, moderate, and repairable. The inconveniences of the want of a declaration are permanent, afflictive, and irreparable. They are in constant progression from bad to worse. The executive, in our governments, is not the sole, it is scarcely the principal, object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for many years. That of the executive will come in its turn; but it will be at a remote period." Letter to Madison, March 15, 1789, Jefferson's Works, Vol. III. p. 4. See also same volume, pp. 13 and 101; Vol. II. pp. 329, 358.

The want of a bill of rights was, therefore, made the ground of a decided, earnest, and formidable opposition to the confirmation of the national Constitution by the people; and its adoption was only secured in some of the leading States in connection with the recommendation of amendments which should cover the ground.<sup>1</sup>

The clauses inserted in the original instrument, for the protection of person and property, had reference mainly to the action of the State governments, and were made limitations upon their power. The exceptions embraced a few cases only, in respect to which the experience of both English and American history had forcibly demonstrated the tendency of power to abuse, not when wielded by a prince only, but also when administered by the agencies of the people themselves.

*Bills of attainder* were prohibited to be passed, either by the Congress<sup>2</sup> or by the legislatures of the several States.<sup>3</sup> Attainder, in a strict sense, means an extinction of civil and political rights and capacities;<sup>4</sup> and at the common law it followed, as of course, on conviction and sentence to death for treason; and, in greater or less degree, on conviction and sentence for the different classes of felony.

A bill of attainder was a legislative conviction for alleged crime, with judgment of death.<sup>5</sup> Such convictions have not been uncommon under other governments, and the power to pass these bills has been exercised by the Parliament of England at some periods in its history, under the most oppressive and unjustifiable circumstances, greatly aggravated by an arbitrary course of procedure, which had few of the incidents of a judicial investigation into alleged crime. For some time before the American Revolution, however, no one had attempted to defend it as a legitimate exercise of power; and if it would be unjustifiable anywhere, there were many reasons why it would be specially obnoxious under a free government, and why consequently its prohibition, under the existing circumstances of our country, would be a matter of more than ordinary importance. Every one must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not

<sup>1</sup> For the various recommendations by Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island, see 1 Elliott's Debates, 322-334.

<sup>2</sup> Constitution of United States, art. 1, § 9.

<sup>3</sup> Constitution of United States, art. 1, § 10.

<sup>4</sup> *French v. Senate*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756.

<sup>5</sup> *French v. Senate*, 146 Cal. 604, 80 Pac. 1031, 69 L. R. A. 556, 2 Ann. Cas. 756.



properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited, — the very class of cases most likely to be prosecuted by this mode. And although it would be conceded that, if such bills were allowable, they should properly be presented only for offenses against the general laws of the land, and be proceeded with on the same full opportunity for investigation and defense which is afforded in the courts of the common law, yet it was remembered that in practice they were often resorted to because an obnoxious person was not subject to punishment under the general law,<sup>1</sup> or because, in proceeding against him by this mode, some rule of the common law requiring a particular species or degree of evidence might be evaded, and a conviction secured on proofs that a jury would not be suffered to accept as overcoming the legal presumption of innocence. Whether the accused should necessarily be served with process; what degree or species of evidence should be required; whether the rules of law should be followed, either in determining what constituted a crime, or in dealing with the accused after conviction, — were all questions which would necessarily address themselves to the legislative discretion and sense of justice; and the very qualities which are essential in a court to protect individuals on trial before them against popular clamor, or the hate of those in power, were precisely those which were likely to prove weak or wanting in the legislative body at such a time.<sup>2</sup> And what could be more obnoxious in a free government than the exercise of such a power by a popular body, controlled by a mere majority, fresh from the contests of exciting elections, and quite too apt,

<sup>1</sup> Cases of this description were most numerous during the reign of Henry VIII., and among the victims was Cromwell, who is said to have first advised that monarch to resort to this objectionable proceeding. Even the dead were attainted, as in the case of Richard III., and later, of the heroes of the Commonwealth. The most atrocious instance in history, however, only relieved by its weakness and futility, was the great act of attainder passed in 1688 by the Parliament of James II., assembled in Dublin, by which between two and three thousand persons were attainted, their property confiscated, and themselves sentenced to death if they failed to appear at a time named. And, to render the whole proceeding

as horrible in barbarity as possible, the list of the proscribed was carefully kept secret until after the time fixed for their appearance! Macaulay's History of England, c. 12.

<sup>2</sup> This was equally true, whether the attainder was at the command of the king, as in the case of Cardinal Pole's mother, or at the instigation of the populace, as in the case of Wentworth, Earl of Strafford. The last infliction of capital punishment in England under a bill of attainder was upon Sir John Fenwick, in the reign of William and Mary. It is worthy of note that in the preceding reign Sir John had been prominent in the attainder of the unhappy Monmouth. Macaulay's History of England, c. 5.

under the most favorable circumstances, to suspect the motives of their adversaries, and to resort to measures of doubtful propriety to secure party ends?

Nor were legislative punishments of this severe character the only ones known to parliamentary history; there were others of a milder form, which were only less obnoxious in that the consequences were less terrible. Those legislative convictions which imposed punishments less than that of death were called bills of pains and penalties, as distinguished from bills of attainder; but the constitutional provisions we have referred to were undoubtedly aimed at any and every species of legislative punishment for criminal or supposed criminal offenses; and the term "bill of attainder" is used in a generic sense, which would include bills of pains and penalties also.<sup>1</sup>

The thoughtful reader will not fail to discover, in the acts of the American States during the Revolutionary period, sufficient reason for this constitutional provision, even if the still more monitory history of the English attainders had not been so freshly remembered. Some of these acts provided for the forfeiture of the estates, within the Commonwealth, of those British subjects who had withdrawn from the jurisdiction because not satisfied that grievances existed sufficiently serious to justify the last resort of an oppressed people, or because of other reasons not satisfactory to the existing authorities; and the only investigation provided for was an inquiry into the desertion. Others mentioned particular persons by name, adjudged them guilty of adhering to the enemies of the State, and proceeded to inflict punishment upon them, so far as the presence of property within the Commonwealth would enable the government to do so.<sup>2</sup> These were the resorts of a time

<sup>1</sup> *Fletcher v. Peck*, 6 Cranch, 87; *Story on Constitution*, § 1344; *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366; *Drehman v. Stifle*, 8 Wall. 595, 601, 19 L. ed. 508.

"I think it will be found that the following comprise those essential elements of bills of attainder, in addition to the one already mentioned [which was that they declared certain persons attainted and their blood corrupted, so that it had lost all heritable property], which distinguish them from other legislation, and which made them so obnoxious to the statesmen who organized our government:

1. They were convictions and sentences pronounced by the legislative department of the government, instead of the judicial. 2. The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule. 3. The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence or that of his counsel, and no recognized rule of evidence governed the inquiry." Per *Miller, J.*, in *Ex parte Garland*, 4 Wall. 333, 388, 18 L. ed. 366.

<sup>2</sup> See *Belknap's History of New Hampshire*, c. 26; 2 *Ramsay's His-*

of extreme peril; and if possible to justify them in a period of revolution, when everything was staked on success, and when the public safety would not permit too much weight to scruples concerning the private rights of those who were not aiding the popular cause, the power to repeat such acts under any conceivable circumstances in which the country could be placed again was felt to be too dangerous to be left in the legislative hands. So far as proceedings had been completed under those acts, before the treaty of 1783, by the actual transfer of property, they remained valid and effectual afterwards; but so far as they were then incomplete, they were put to an end by that treaty.<sup>1</sup>

The conviction of the propriety of this constitutional provision has been so universal, that it has never been questioned, either in legislative bodies or elsewhere. Nevertheless, cases have recently arisen, growing out of the attempt to break up and destroy the government of the United States, in which the Supreme Court of the United States has adjudged certain action of Congress to be in violation of this provision and consequently void.<sup>2</sup> The action

tory of South Carolina, 351; 8 Rhode Island Colonial Records, 609; 2 Arnold's History of Rhode Island, 360, 449; Thompson v. Carr, 5 N. H. 510; Slegt v. Kane, 2 Johns. Cas. 236; Story on Const. (4th ed.) § 1344, note.

On the general subject of bills of attainder, one would do well to consult, in addition to the cases in 4 Wallace, those of Blair v. Ridgeley, 41 Mo. 63 (where it was very elaborately examined by able counsel); State v. Staten, 6 Cold. 233; Randolph v. Good, 3 W. Va. 551; *Ex parte* Law, decided by Judge Erskine, in the United States District Court of Georgia, May Term, 1866; State v. Adams, 44 Mo. 570; Beirne v. Brown, 4 W. Va. 72; Peerce v. Carskadon, 4 W. Va. 234; People v. Hayes, 140 N. Y. 484, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L. R. A. 830.

<sup>1</sup> Jackson v. Munson, 3 Caines, 137.

<sup>2</sup> On the 2d of July, 1862, Congress, by "an act to prescribe an oath of office, and for other purposes", enacted that "hereafter every person elected or appointed to any office of honor or profit under the government of the United States, either in the civil, military, or naval departments of the

public service, excepting the President of the United States, shall, before entering upon the duties of such office, take and subscribe the following oath or affirmation: I, A B, do solemnly swear or affirm that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise, the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto. And I do further swear or affirm that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office

referred to was designed to exclude from practice in the United States courts all persons who had taken up arms against the government during the recent rebellion, or who had voluntarily given aid and encouragement to its enemies; and the mode adopted to effect the exclusion was to require of all persons, before they should be admitted to the bar or allowed to practice, an oath negating any such disloyal action. This decision was not at first universally accepted as sound; and the Supreme Courts of West Virginia and of the District of Columbia declined to follow it, insisting that permission to practice in the courts is not a right, but a privilege, and that the withholding it for any reason of State policy or personal unfitness could not be regarded as the infliction of criminal punishment.<sup>1</sup>

The Supreme Court of the United States has also, upon the same reasoning, held a clause in the Constitution of Missouri, which, among other things, excluded all priests and clergymen from practicing or teaching unless they should first take a similar oath of loyalty, to be void, overruling in so doing a decision of the Supreme Court of that State.<sup>2</sup>

on which I am about to enter, so help me God." On the 24th of January, 1865, Congress passed a supplementary act as follows: "No person after the date of this act shall be admitted to the bar of the Supreme Court of the United States, or at any time after the 4th of March next shall be admitted to the bar of any Circuit or District Court of the United States, or of the Court of Claims, as an attorney or counselor of such court, or shall be allowed to appear and to be heard in any such court, by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath" aforesaid. False swearing, under each of the acts, was made perjury. See 12 Statutes at Large, 502; 13 Statutes at Large, 424. In *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366, a majority of the court held the second of these acts void, as partaking of the nature of a bill of pains and penalties, and also as being an *ex post facto* law. The act was looked upon as inflicting a punishment for past conduct; the exaction of the oath being the mode provided for ascertaining the parties upon whom the act was intended to

operate. See *Drehman v. Stifle*, 8 Wall. 595, 19 L. ed. 508. The conclusion declared by the Supreme Court of the United States in *Ex parte Garland* had been previously reached by Judge *Trigg*, of the United States Circuit Court, in *Matter of Baxter*; by Judge *Busteed*, of the District Court of Alabama, in *Matter of Shorter et al.*; and by Judge *Erschine*, of the District Court of Georgia, in *Ex parte Law*.

An elector cannot be excluded from the right to vote on the ground of being a deserter who has never been tried and convicted as such. *Huber v. Reily*, 53 Pa. St. 112; *McCafferty v. Guyer*, 59 Pa. St. 109; *State v. Symonds*, 57 Me. 148. See *ante*, p. 139, note.

<sup>1</sup> See the cases *Ex parte Magruder*, *American Law Register*, Vol. VI. n. s. p. 292; and *Ex parte Hunter*, *American Law Register*, Vol. VI. n. s. 410; 2 W. Va. 122; *Ex parte Quarrier*, 4 W. Va. 210. See also *Cohen v. Wright*, 22 Cal. 293.

<sup>2</sup> *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356. See also the case of *State v. Adams*, 44 Mo. 570, in which it was held that a legislative act declaring that the board of curators of St.

*Ex post facto laws* are also, by the same provisions of the national Constitution already cited,<sup>1</sup> forbidden to be passed, either by the States or by Congress.

At an early day it was settled by authoritative decision, in opposition to what might seem the more natural and obvious meaning of the term *ex post facto*, that in their scope and purpose these provisions were confined to laws respecting criminal punishments, and had no relation whatever to retrospective legislation of any other description. And it has, therefore, been repeatedly held, that retrospective laws, when not of a criminal nature, do not come in conflict with the national Constitution, unless obnoxious to its provisions on other grounds than their retrospective character.

"The prohibition in the letter," says *Chase, J.*, in the leading case,<sup>2</sup> "is not to pass any law concerning or after the fact; but the plain and obvious meaning and intention of the prohibition is this: that the legislatures of the several States shall not pass laws after a fact done by a subject or citizen, which shall have relation to such fact, and punish him for having done it. The prohibition, considered in this light, is an additional bulwark in favor of the personal security of the subject, to protect his person from punishment by legislative acts having a retrospective operation. I do not think it was inserted to secure the citizen in his private rights of either property or contracts. The prohibitions not to make anything but gold and silver coin a tender in payment of debts, and not to pass any law impairing the obligation of contracts,

Charles College had forfeited their office, was of the nature of a bill of attainder and void. The Missouri oath of loyalty was a very stringent one, and applied to electors, State, county, city and town officers, officers in any corporation, public or private, professors and teachers in educational institutions, attorneys and counselors, bishops, priests, deacons, ministers, elders, or other clergymen of any denomination. The Supreme Court of Missouri had held this provision valid in the following cases: *State v. Garesche*, 36 Mo. 256, case of an attorney; *State v. Cummings*, 36 Mo. 263, case of a minister, reversed as above stated; *State v. Bernoudy*, 36 Mo. 279, case of the recorder of St. Louis; *State v. McAdoo*, 36 Mo. 452, where it is held that a certificate of election issued to one who failed to take the oath

as required by the constitution was void.

In *Beirne v. Brown*, 4 W. Va. 72, and *Peerce v. Carskadon*, 4 W. Va. 234, an act excluding persons from the privilege of sustaining suits in the courts of the State, or from proceedings for a rehearing, except upon their taking an oath that they had never been engaged in hostile measures against the government, was sustained. And see *State v. Neal*, 42 Mo. 119. *Contra*, *Kyle v. Jenkins*, 6 W. Va. 371; *Lynch v. Hoffman*, 7 W. Va. 553. The case of *Peerce v. Carskadon* was reversed in 16 Wall. 234, 21 L. ed. 276, being held covered by the case of *Cummings v. Missouri*.

<sup>1</sup> Constitution of United States, art. 1, §§ 9 and 10.

<sup>2</sup> *Calder v. Bull*, 3 Dall. 386, 390, 1 L. ed. 648.

were inserted to secure private rights ; but the restriction not to pass any *ex post facto* law was to secure the person of the subject from injury or punishment, in consequence of such law. If the prohibition against making *ex post facto* laws was intended to secure personal rights from being affected or injured by such laws, and the prohibition is sufficiently extensive for that object, the other restraints I have enumerated were unnecessary, and therefore improper, for both of them are retrospective.

“I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws and retrospective laws. Every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law ; the former only are prohibited. Every law that takes away or impairs rights vested, agreeably to existing laws, is retrospective and is generally unjust, and may be oppressive ; and there is a good general rule, that a law should have no retrospect ; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement ; as statutes of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law *ex post facto*, within the prohibition that mollifies the rigor of the criminal law ; but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence for the purpose of conviction. Every law that is to have an operation before the making thereof, as to commence at an antecedent time, or to save time from the statute of limitations, or to excuse acts which were unlawful, and before committed, and the like, is retrospective. But such laws may be proper or necessary, as the case may be. There is a great and apparent difference between making an unlawful act lawful, and the making an innocent action criminal, and punishing it as a crime. The expressions *ex post facto* laws are technical ; they had been in use long before the Revolution,

and had acquired an appropriate meaning, by legislators, lawyers, and authors." <sup>1</sup>

Assuming this construction of the constitutional provision to be correct, — and it has been accepted and followed as correct by

<sup>1</sup> See also *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Satterlee v. Mathewson*, 2 Pet. 380, 7 L. ed. 458; *Watson v. Mercer*, 8 Pet. 88, 8 L. ed. 38; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773; *Carpenter v. Pennsylvania*, 17 How. 456, 15 L. ed. 127; *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366; *Baugher v. Nelson*, 9 Gill, 299; *Woard v. Winnick*, 3 N. H. 473; *Locke v. Dane*, 9 Mass. 360; *Dash v. Van Kleeck*, 7 Johns. 477; *Evans v. Montgomery*, 4 W. & S. 218; *Tucker v. Harris*, 13 Ga. 1; *Perry's Case*, 3 Gratt. 632; *Municipality No. 1 v. Wheeler*, 10 La. Ann. 745; *New Orleans v. Poutz*, 14 La. Ann. 853; *Huber v. Reily*, 53 Pa. St. 115; *Wilson v. Ohio, &c. R. R. Co.*, 64 Ill. 542; *Rooney v. North Dakota*, 196 U. S. 319, 49 L. ed. 494, 25 Sup. Ct. Rep. 264, 3 Ann. Cas. 76; *Johannessen v. United States*, 225 U. S. 227, 56 L. ed. 1066, 32 Sup. Ct. Rep. 613; *Malloy v. South Carolina*, 237 U. S. 180, 59 L. ed. 905, 35 Sup. Ct. Rep. 507; *Bankers' Trust Co. v. Blodgett*, 260 U. S. 657, 67 L. ed. 439, 43 Sup. Ct. Rep. 233; *Frisby v. United States*, 38 App. Cas. (D. C.) 22, 37 L. R. A. (N. S.) 96; *Fairfield v. Huntington*, 23 Ariz. 528, 205 Pac. 814, 22 A. L. R. 1438; *Frisby v. United States*, 38 App. Cas. (D. C.) 22, 37 L. R. A. (N. S.) 96; *State v. Tyree*, 70 Kan. 203, 78 Pac. 525, 3 Ann. Cas. 1020; *In re Clark*, 86 Kan. 539, 121 Pac. 492, 39 L. R. A. (N. S.) 680, Ann. Cas. 1913 C, 317; *Durrett v. Davidson*, 122 Ky. 851, 93 S. W. 25, 8 L. R. A. (N. S.) 546; *Eckles v. Wood*, 143 Ky. 451, 136 S. W. 907, 34 L. R. A. (N. S.) 832; *Com. v. Phelps*, 210 Mass. 78, 96 N. E. 349, 37 L. R. A. (N. S.) 566, Ann. Cas. 1912 C, 1119; *People v. Badjack*, 210 Mich. 443, 178 N. W. 228; *Gladney v. Sydnor*, 172 Mo. 318, 72 S. W. 554, 95 Am. St. Rep. 517, 60 L. R. A.

880; *Brearley School v. Ward*, 201 N. Y. 358, 94 N. E. 1001, 40 L. R. A. (N. S.) 1215, Ann. Cas. 1912 B, 251.

A prohibition law, in so far as it prohibits the sale of liquors in existence at the time of its passage, is not an *ex post facto* law, "Since, if it lessens the value of such liquors, such civil consequence does not make it retroact criminally in such sense as to bring it within the constitutional prohibition." *Gherna v. State*, 16 Ariz. 344, 146 Pac. 494, Ann. Cas. 1916 D, 94.

A law making it unlawful for a person to possess intoxicating liquors which, previously to its enactment, he had lawfully acquired for consumption as a beverage in his home, and subjecting them to seizure and destruction, is not an *ex post facto* law. *Samuels v. McCurdy*, 267 U. S. 188, 69 L. ed. 371, 45 Sup. Ct. Rep. 264, 37 A. L. R. 1378.

Where a statute prescribes the qualifications of a physician, and proscribes the grossly immoral, and authorizes the cancellation of any certificate issued by such persons, the application of this law to one whose habits were grossly immoral before the passage of the law is not in the nature of a punishment, and therefore not *ex post facto*, but has in view only the qualifications of the physician and protection of public morals. *Meffert v. State Board of Medical Registration and Examination*, 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811, affirmed 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790.

That an act providing for the punishment of an offense in respect to which prosecution is already barred is *ex post facto*, see *Moore v. State*, 43 N. J. L. 203.

Before a right to an acquittal has been "absolutely acquired by the completion of the period of limitation, that period is subject to enlargement or repeal without being obnoxious to the

the courts ever since, — it would seem that little need be said relative to the first, second, and fourth classes of *ex post facto* laws, as enumerated in the opinion quoted.<sup>1</sup> It is not essential, however, in order to render a law invalid on these grounds, that it should ex-

constitutional prohibition." *Com. v. Duffy*, 96 Pa. St. 506.

"An *ex post facto* law does not involve, in any of its definitions, a change of the place of trial of an alleged offense after its commission." *Gut v. Minnesota*, 9 Wall. 35, 19 L. ed. 573, quoted and affirmed in *Cook v. United States*, 138 U. S. 157, 34 L. ed. 906, 11 Sup. Ct. Rep. 268. Nor of the time when sentence shall be executed. *Holden v. Minnesota*, 137 U. S. 483, 34 L. ed. 734, 11 Sup. Ct. Rep. 143.

Privilege existing at time of commission of offense (*e.g.* privilege of earning a shortening of sentence by good behavior) cannot be taken away by subsequent statute. *Murphy v. Commonwealth*, 172 Mass. 264, 52 N. E. 505, 43 L. R. A. 154, 70 Am. St. 266; *State v. Tyree*, 70 Kan. 203, 78 Pac. 525, 3 Ann. Cas. 1020.

Right to secure change of magistrate or place of preliminary examination upon affidavit of accused that he believes magistrate is prejudiced against him may be withdrawn. *People v. McDonald*, 5 Wyo. 526, 42 Pac. 15, 29 L. R. A. 834.

Law shortening time between sentence and execution is *ex post facto* with regard to past crimes. *Re Tyson*, 13 Col. 482, 22 Pac. 810, 6 L. R. A. 472. But providing that State may appeal from an order granting a new trial is not. *Mallett v. North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, aff. 125 N. C. 718, 34 S. E. 651.

An amendatory act increasing the penalty of a bond essential to the suspension of sentence in a prosecution against a husband for abandonment is *ex post facto* as to prior offenses. *State v. McCoy*, 87 Neb. 385, 127 N. W. 137, 28 L. R. A. (N. S.) 583.

If when the act was committed one could escape the death penalty by pleading guilty and a law changes this before trial, it is bad. *Garvey v. People*, 6 Col. 559. So if the option

of a jury to inflict death or life imprisonment is taken away, and the former is made the only penalty. *Marion v. State*, 16 Neb. 349, 20 N. W. 289. See *Lindzey v. State*, 65 Miss. 542, 5 So. 99. Otherwise, of an act which allows a prisoner to elect between death and imprisonment. *McInturf v. State*, 20 Tex. App. 335.

An act which renders competent, in a trial for violation of the prohibition laws, the general reputation of the defendant as a violator of those laws, and makes this provision applicable to the prosecution of offenses committed before its passage, is an *ex post facto* law. *Culbertson v. Com.* 137 Va. 752, 119 S. E. 87. But where a statute does not permit any fact to be introduced in evidence against the accused which could not have been proved against him under the law as it stood at the time of the alleged commission of the offense, but merely changes the rules of evidence so as to permit an already admissible fact to be proved in a different way it is not an *ex post facto* law. *Culbertson v. Com.* 137 Va. 752, 119 S. E. 87.

<sup>1</sup> See *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443. A constitutional amendment changed the judicial rule that conviction of one grade of murder bars a subsequent conviction of a higher grade. Before it took effect a crime had been committed. After it on a plea of guilty the prisoner was convicted of murder in the second degree, but the conviction was reversed, and on new trial he was convicted in the first degree. A bare majority of the court held the act *ex post facto* as to him, as altering the rules of evidence and the punishment. The minority considered the change one in procedure, and as the evidence in question, viz., his conviction in the second degree, of the effect of which he was deprived, came into existence after the amendment, held the act good.



pressly assume the action to which it relates to be criminal, or provide for its punishment on that ground. If it shall subject an individual to a pecuniary penalty for an act which, when done, involved no responsibility,<sup>1</sup> or if it deprives a party of any valuable right — like the right to follow a lawful calling — for acts which were innocent, or at least not punishable by law when committed,<sup>2</sup> the law will be *ex post facto* in the constitutional sense, notwithstanding it does not in terms declare the acts to which the penalty is attached criminal.<sup>3</sup> But how far a law may change the punishment for a criminal offense, and make the change applicable to past offenses, is certainly a question of great difficulty, which has been increased by the decisions made concerning it. As the constitutional provision is enacted for the protection and security of accused parties against arbitrary and oppressive legislative action, it is evident that any change in the law which goes in mitigation of the punishment is not liable to this objection.<sup>4</sup> But what does go in mitigation

<sup>1</sup> *Falconer v. Campbell*, 2 McLean, 195; *Wilson v. Ohio, &c. R. R. Co.*, 64 Ill. 542.

Statute allowing punitive damages where none had been theretofore allowed is *ex post facto* with regard to past acts. *French v. Deane*, 19 Col. 504, 36 Pac. 609, 24 L. R. A. 387. But the Supreme Court of the United States has held that a statute imposing a penalty on property for nonpayment of taxes thereon is not within the constitutional prohibition. *Bankers' Trust Co. v. Blodgett*, 260 U. S. 647, 67 L. ed. 439, 43 Sup. Ct. Rep. 233. The court said: "The penalty of the statute was not in punishment of a crime, and it is only to such that the constitutional prohibition applies. It has no relation to retrospective legislation of any other description. *Johannessen v. United States*, 225 U. S. 227, 242, 56 L. ed. 1066, 32 Sup. Ct. 613;" *Bankers' Trust Co. v. Blodgett*, 260 U. S. 647, 67 L. ed. 439, 43 Sup. Ct. Rep. 233. See also *Chicago, etc., R. Co. v. Traubarger*, 238 U. S. 67, 59 L. ed. 1204, 35 Sup. Ct. Rep. 678.

<sup>2</sup> *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366.

But a divorce is not a punishment, and it may therefore be authorized for causes happening previous to the passage of the divorce act.

*Jones v. Jones*, 2 Overt. 2, 5 Am. Dec. 645; *Carson v. Carson*, 40 Miss. 349.

An act providing for destruction of liquor as a means of abating an existing liquor nuisance does not authorize a criminal proceeding, and is not *ex post facto*. *McLane v. Bonn*, 70 Iowa, 752, 30 N. W. 478. See *Drake v. Jordan*, 73 Iowa, 707, 36 N. W. 653.

A statute providing that one who has been convicted of crime is ineligible as a medical practitioner is not invalid as to a case where the conviction was prior to the enactment of the statute. *People v. Hawker*, 152 N. Y. 234, 46 N. E. 607, aff. 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573. See also *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231, distinguishing *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356, and explaining *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366.

<sup>3</sup> The repeal of an amnesty law by a constitutional convention was held in *State v. Keith*, 63 N. C. 140, to be *ex post facto* as to the cases covered by the law. An act to validate an invalid conviction would be *ex post facto*. *In re Murphy*, 1 Woolw. 141.

<sup>4</sup> *Strong v. State*, 1 Blackf. 193; *Keen v. State*, 3 Chand. 109; *Boston v. Cummins*, 16 Ga. 102; *Woart v. Winnick*, 3 N. H. 473; *State v. Arlin*, 39 N. H. 179; *Clarke v. State*, 23 Miss.

of the punishment? If the law makes a fine less in amount, or imprisonment shorter in point of duration, or relieves it from some oppressive incident, or if it dispenses with some severable portion of the legal penalty, no embarrassment would be experienced in reaching a conclusion that the law was favorable to the accused, and therefore not *ex post facto*. But who shall say, when the nature of the punishment is altogether changed, and a fine is substituted for the pillory, or imprisonment for whipping, or imprisonment at hard labor for life for the death penalty, that the punishment is diminished, or at least not increased by the change made? What test of severity does the law or reason furnish in these cases? and must the judge decide upon his own view of the pain, loss, ignominy, and collateral consequences usually attending the punishment? or may he take into view the peculiar condition of the accused, and upon that determine whether, in his particular case, the punishment prescribed by the new law is or is not more severe than that under the old.

In *State v. Arlin*,<sup>1</sup> the respondent was charged with a robbery, which, under the law as it existed at the time it was committed, was subject to be punished by solitary imprisonment not exceeding six months, and confinement for life at hard labor in the State prison. As incident to this severe punishment, he was entitled by the same law to have counsel assigned him by the government, to process to compel the attendance of witness, to a copy of his indictment, a list of the jurors who were to try him, &c. Before he was brought to trial, the punishment for the offense was reduced to solitary imprisonment not exceeding six months, and confinement at hard labor in the State prison for not less than seven nor more than thirty years. By the new act, the court, *if they thought proper*, were to assign the respondent counsel, and furnish him with process to compel the attendance of witnesses in his behalf; and, acting under this discretion, the court assigned the respondent counsel, but declined to do more; while the respondent insisted that he was entitled to all the privileges to which he would have been entitled had the law remained unchanged. The court held this claim to be unfounded in the law. "It is contended," they say, "that, notwith-

261; *Maul v. State*, 25 Tex. 166; *Rooney v. North Dakota*, 196 U. S. 319, 49 L. ed. 494, 25 Sup. Ct. Rep. 264, 3 Ann. Cas. 76; *Malloy v. South Carolina*, 237 U. S. 180, 59 L. ed. 905, 35 Sup. Ct. Rep. 507.

Statute *diminishing* the minimum period of imprisonment is not *ex post*

*facto*. *People v. Hayes*, 140 N. Y. 484, 35 N. E. 951, 23 L. R. A. 830, 37 Am. St. 572. To provide an alternative punishment of a milder form is not *ex post facto*. *Turner v. State*, 40 Ala. 21.

<sup>1</sup> 39 N. H. 179.

standing the severity of the respondent's punishment was mitigated by the alteration of the statute, he is entitled to the privileges demanded, as incidents to the offense with which he is charged, at the date of its commission; in other words, it seems to be claimed, that, by committing the alleged offense, the respondent acquired a vested right to have counsel assigned him, to be furnished with process to procure the attendance of witnesses, and to enjoy all the other privileges to which he would have been entitled if tried under laws subjecting him to imprisonment for life upon conviction. This position appears to us wholly untenable. We have no doubt the privileges the respondent claims were designed and created solely as incidents of the severe punishment to which his offense formerly subjected him, and not as incidents of the offense. When the punishment was abolished, its incidents fell with it; and he might as well claim the right to be punished under the former law as to be entitled to the privileges connected with a trial under it." <sup>1</sup>

In *Strong v. State*,<sup>2</sup> the plaintiff in error was indicted and convicted of perjury, which, under the law as it existed at the time it was committed, was punishable by not exceeding one hundred stripes. Before the trial, this punishment was changed to imprisonment in the penitentiary not exceeding seven years. The court held this amendatory law not to be *ex post facto*, as applied to the case. "The words *ex post facto* have a definite, technical signification. The plain and obvious meaning of this prohibition is, that the legislature shall not pass any law, after a fact done by any citizen, which shall have relation to that fact, so as to punish that which was innocent when done, or to add to the punishment of that which was criminal, or to increase the malignity of a crime, or to retrench

<sup>1</sup> With great deference it may be suggested whether this case does not overlook the important circumstance, that the new law, by taking from the accused that absolute right to defense by counsel, and to the other privileges by which the old law surrounded the trial, — all of which were designed as securities against unjust convictions, — was directly calculated to increase the party's peril, and was in consequence brought within the reason of the rule which holds a law *ex post facto* which changes the rules of evidence after the fact, so as to make a less amount or degree sufficient. Could a law be void as *ex post facto* which made a party liable to conviction for perjury in a previous oath on the testi-

mony of a single witness, and another law unobjectionable on this score which deprived a party, when put on trial for a previous act, of all the usual opportunities of exhibiting the facts and establishing his innocence? Undoubtedly, if the party accused was always guilty, and certain to be convicted, the new law must be regarded as mitigating the offense; but, assuming every man to be innocent until he is proved to be guilty, could such a law be looked upon as "mollifying the rigor" of the prior law, or as favorable to the accused, when its mollifying circumstance is more than counterbalanced by others of a contrary character.

<sup>2</sup> 1 Blackf. 193.

the rules of evidence so as to make conviction more easy." "Apply this definition to the act under consideration. Does this statute make a new offense? It does not. Does it increase the malignity of that which was an offense before? It does not. Does it so change the rules of evidence as to make conviction more easy? This cannot be alleged. Does it then increase the punishment of that which was criminal before its enactment? We think not."<sup>1</sup>

So in Texas it has been held that the infliction of stripes, from the peculiarly degrading character of the punishment, was worse than the death penalty. "Among all nations of civilized man, from the earliest ages, the infliction of stripes has been considered more degrading than death itself."<sup>2</sup> While, on the other hand, in South Carolina, where, at the time of the commission of a forgery, the punishment was death, but it was changed before final judgment to fine, whipping, and imprisonment, the new law was applied to the case in passing the sentence.<sup>3</sup> These cases illustrate the difficulty of laying down any rule which will be readily and universally accepted as to what is a mitigation of punishment, when its character is changed, and when from the very nature of the case there can be no common standard, by which all minds, however educated, can measure the relative severity and ignominy.

In *Hartung v. People*,<sup>4</sup> the law providing for the infliction of capital punishment had been so changed as to require the party liable to this penalty to be sentenced to confinement at hard labor in the State prison until the punishment of death should be inflicted; and it further provided that such punishment should not be inflicted under one year, nor until the governor should issue his war-

<sup>1</sup> Mr. Bishop says of this decision: "But certainly the court went far in this case." 1 Bishop, *Crim. Law*, § 219 (108).

<sup>2</sup> *Herber v. State*, 7 Tex. 69.

<sup>3</sup> *State v. Williams*, 2 Rich. 418. In *Clark v. State*, 23 Miss. 261, defendant was convicted of a mayhem. Between the commission of the act and his conviction, a statute had been passed changing the punishment for this offense from the pillory and a fine to imprisonment in the penitentiary, but providing further, that "no offense committed, and no penalty and forfeiture incurred previous to the time when this act shall take effect shall be affected by this act, except that when any punishment, forfeiture, or penalty should have been mitigated

by it, its provisions should be applied to the judgment to be pronounced for offenses committed before its adoption." In regard to this statute the court say: "We think that in every case of offense committed before the adoption of the penitentiary code, the prisoner has the option of selecting the punishment prescribed in that code in lieu of that to which he was liable before its enactment." But inasmuch as the record did not show that the defendant claimed a commutation of his punishment, the court confirmed a sentence imposed according to the terms of the old law. On this subject, see further the cases of *Holt v. State*, 2 Tex. 363; *Dawson v. State*, 6 Tex. 347.

<sup>4</sup> 22 N. Y. 95, 105.

rant for the purpose. The act was evidently designed for the benefit of parties convicted, and, among other things, to enable advantage to be taken, for their benefit, of any circumstances subsequently coming to light which might show the injustice of the judgment, or throw any more favorable light on the action of the accused. Nevertheless, the court held the act inoperative as to offenses before committed. "In my opinion," says *Denio, J.*, "it would be perfectly competent for the legislature, by a general law, to remit any separable portion of the prescribed punishment. For instance, if the punishment were fine and imprisonment, a law which should dispense with either the fine or the imprisonment might, I think, be lawfully applied to existing offenses; and so, in my opinion, the term of imprisonment might be reduced, or the number of stripes diminished, in cases punishable in that manner. Anything which, if applied to an individual sentence, would fairly fall within the idea of a remission of a part of the sentence, would not be liable to objection. And any change which should be referable to prison discipline or penal administration as its primary object might also be made to take effect upon past as well as future offenses; as changes in the manner or kind of employment of convicts sentenced to hard labor, the system of supervision, the means of restraint, or the like. Changes of this sort might operate to increase or mitigate the severity of the punishment of the convict, but would not raise any question under the constitutional provision we are considering. The change wrought by the Act of 1860, in the punishment of existing offenses of murder, does not fall within either of these exceptions. If it is to be construed to vest in the governor a discretion to determine whether the convict should be executed or remain a perpetual prisoner at hard labor, this would only be equivalent to what he might do under the authority to commute a sentence. But he can, under the Constitution, only do this once for all. If he refuses the pardon, the convict is executed according to sentence. If he grants it, his jurisdiction of the case ends. The act in question places the convict at the mercy of the governor in office at the expiration of one year from the time of the conviction, and of all of his successors during the lifetime of the convict. He may be ordered to execution at any time, upon any notice, or without notice. Under one of the repealed sections of the Revised Statutes, it was required that a period should intervene between the sentence and execution of not less than four, nor more than eight weeks. If we stop here, the change effected by the statute is between an execution within a limited time, to be prescribed by the court, or a pardon or commutation of the sentence during

that period, on the one hand, and the placing the convict at the mercy of the executive magistrate for the time, and his successors, to be executed at his pleasure at any time after one year, on the other. The sword is indefinitely suspended over his head, ready to fall at any time. It is not enough to say, even if that can be said, that most persons would probably prefer such a fate to the former capital sentence. It is enough to bring the law within the condemnation of the Constitution, that it changes the punishment after the commission of the offense, by substituting for the prescribed penalty a different one. We have no means of saying whether one or the other would be the most severe in a given case. That would depend upon the disposition and temperament of the convict. The legislature cannot thus experiment upon the criminal law. *The law, moreover, prescribes one year's imprisonment, at hard labor in the State prison, in addition to the punishment of death.* In every case of the execution of a capital sentence, it must be preceded by the year's imprisonment at hard labor. True, the concluding part of the judgment cannot be executed unless the governor concurs by ordering the execution. But as both parts may, in any given case, be inflicted, and as the convict is consequently, under this law, exposed to the double infliction, it is, within both the definitions which have been mentioned, an *ex post facto* law. It changes the punishment, and inflicts a greater punishment than that which the law annexed to the crime when committed. It is enough, in my opinion, that it changes it *in any manner* except by dispensing with divisible portions of it; but upon the other definition announced by Judge *Chase*, where it is implied that the change must be from a less to a greater punishment, this act cannot be sustained." This decision has since been several times followed in the State of New York,<sup>1</sup> and it must now be regarded as the settled law of that State, that "a law changing the punishment for offenses committed before its passage is *ex post facto* and void, under the Constitution, unless the change consists in the remission of some separable part of the punishment before prescribed, or it is referable to prison discipline or penal administration as its primary object."<sup>2</sup> And this rule seems to us a sound and sensible one, with perhaps this single qualification, — that the substitution of any other punish-

<sup>1</sup> *Shepherd v. People*, 25 N. Y. 406; *Ratzky v. People*, 29 N. Y. 124; *Kuckler v. People*, 5 Park. Cr. Rep. 212.

<sup>2</sup> Per *Davies, J.*, in *Ratzky v. People*, 29 N. Y. 124. See *Miles v. State*, 40 Ala. 39. This would seem to be the

rule in Oklahoma. *Jones v. State*, 9 Okla. Crim. Rep. 646, 133 Pac. 249, 48 L. R. A. (n. s.) 204; *Alberty v. State*, 10 Okla. Crim. Rep. 616, 140 Pac. 1025, 52 L. R. A. (n. s.) 248. See also *State ex rel. Gregory v. Jones*, 128 Fed. 626.

ment for that of death must be regarded as a mitigation of the penalty.<sup>1</sup>

[The Supreme Court of the United States has held, in a case where the punishment prescribed for murder, at the time of the commission of the crime, was death by hanging within the county jail, or its inclosure, in the presence of specified witnesses, that a subsequent act changing the mode of producing death to electrocution and fixing the place of execution within the penitentiary, and permitting the presence of more invited witnesses than had theretofore been allowed, was not *ex post facto*. Mr. Justice *McReynolds*, who delivered the opinion of the court, said: "The constitutional inhibition of *ex post facto* laws was intended to secure substantial personal rights against arbitrary and oppressive legislative action, and not to obstruct mere alteration in conditions deemed necessary to the orderly infliction of humane punishment."<sup>2</sup> The same court has held that a statute which substitutes the penitentiary for the county jail as the place of confinement of one convicted of murder in the first degree pending execution, and also as the place of execution and which requires the execution to be had on a day not less than six or more than nine months after the entry of judgment in lieu of the requirement of the existing law that it be had in not less than three or more than six months, is not *ex post facto* as applied to one who was convicted before its passage.<sup>3</sup>]

So far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be con-

<sup>1</sup> See 1 Bishop, Crim. Law. § 219 (108).

A statute changing the punishment for murder from death to imprisonment for life is not *ex post facto*. *McGuire v. State*, 76 Miss. 504, 25 So. 495. See, in this connection, *Storti v. Com.*, 180 Mass. 57, 61 N. E. 759, 52 L. R. A. 520.

<sup>2</sup> *Malloy v. South Carolina*, 237 U. S. 180, 59 L. ed. 905, 35 Sup. Ct. Rep. 507, affirming 95 S. C. 441, 78 S. E. 995, Ann. Cas. 1915 C, 1053. See also *Alberty v. State*, 10 Okla. Crim. Rep. 616, 140 Pac. 1025, 52 L. R. A. (n. s.) 248.

<sup>3</sup> *Rooney v. North Dakota*, 196 U. S. 319, 49 L. ed. 494, 25 Sup. Ct. Rep.

264, 3 Ann. Cas. 76, affirming 12 N. D. 144, 95 N. W. 513.

In Colorado it has been held that an act passed after the offense is not *ex post facto* which in a capital case directs that the imprisonment after sentence, and the execution shall be in a penitentiary instead of a jail. *In re Tyson*, 13 Col. 482, 22 Pac. Rep. 810. But in California it has been held that a statute providing that persons convicted of murder and awaiting execution shall be confined in the State's prison and executed within its walls is invalid as applied to one convicted prior to its enactment. *People v. McNulty*, 93 Cal. 427, 29 Pac. 61.

ducted only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose. The legislature may abolish courts and create new ones, [may reduce the number of judges required to preside at a trial,] and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.<sup>1</sup> Statutes giving the government additional challenges,<sup>2</sup> [or modifying the grounds of challenge,<sup>3</sup> or reducing the number of peremptory challenges allowed to the accused,<sup>4</sup>] and others which authorized the amendment of indictments,<sup>5</sup> have

<sup>1</sup> *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. ed. 417, 29 Sup. Ct. Rep. 220; *Frisby v. United States*, 38 App. Cas. (D. C.) 22, 37 L. R. A. (N. S.) 96; *People ex rel. Foote v. Clark*, 283 Ill. 221, 119 N. E. 329; *Hellen v. Medford*, 188 Mass. 42, 73 N. E. 1070, 108 Am St. Rep. 459, 69 L. R. A. 314; *Com. v. Phelps*, 210 Mass. 78, 96 N. E. 349, 37 L. R. A. (N. S.) 567, Ann. Cas. 1912 C, 1119; *People v. Green*, 201 N. Y. 172, 94 N. E. 658, Ann. Cas. 1912 A, 884.

Jurisdiction may be transferred from one court to another. *State v. Cooler*, 30 S. C. 105, 8 S. E. 69; *People v. Clark*, 283 Ill. 221, 119 N. E. 329. Taking from the jury power to judge of the law is a matter of procedure. *Marion v. State*, 20 Neb. 233, 29 N. W. 911.

A constitutional provision that crimes less than capital shall be tried by a jury of eight is *ex post facto* with regard to crimes committed before its enactment. *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620. A mere change in the constitution of the trial court which leaves unchanged all the substantial protections which the law in force at the time of commission of the alleged offense threw about the accused is not *ex post facto*. *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570.

As to what is merely a change in procedure, see dissenting opinions in *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443, cited *supra*, p. 375, note 1; *Drake v. Jordan*, 73 Iowa, 707, 36 N. W. 653.

<sup>2</sup> *Walston v. Commonwealth*, 16 B. Monr. 15; *Jones v. State*, 1 Ga. 610; *Warren v. Commonwealth*, 37 Pa. St. 45; *Walter v. People*, 32 N. Y. 147; *State v. Ryan*, 13 Minn. 370; *State v. Wilson*, 48 N. H. 398; *Commonwealth v. Dorsey*, 103 Mass. 412; *Harris v. United States*, 4 Okla. Crim. Rep. 317, 111 Pac. 982, 31 L. R. A. (N. S.) 820, Ann. Cas. 1912 B, 810.

<sup>3</sup> *Stokes v. People*, 53 N. Y. 164.

<sup>4</sup> *Dowling v. State*, 13 Miss. 664; *Harris v. United States*, 4 Okla. Crim. Rep. 317, 111 Pac. 982, 31 L. R. A. (N. S.) 820, Ann. Cas. 1912 B, 810.

<sup>5</sup> *State v. Manning*, 14 Tex. 402; *Lasure v. State*, 19 Ohio St. 43; *Sullivan v. Oneida*, 61 Ill. 242. See *State v. Corson*, 59 Me. 137.

The defendant in any case must be proceeded against and punished under the law in force when the proceeding is had. *State v. Williams*, 2 Rich. 418; *Keene v. State*, 3 Chand. 109; *People v. Phelps*, 5 Wend. 9; *Rand v. Commonwealth*, 9 Gratt. 738.

A law is not unconstitutional which precludes a defendant in a criminal case from taking advantage of variances which do not prejudice him. *Commonwealth v. Hall*, 97 Mass. 570; *Lasure v. State*, 19 Ohio St. 43. Nor one which, though passed after the commission of the offense, authorizes a change of venue to another county of the judicial district. *Gut v. State*, 9 Wall. 35, 19 L. ed. 573. Nor one which merely modifies, simplifies, and reduces the essential allegations in a criminal indictment, retaining the charge of a distinct offense. *State v. Learned*, 47 Me. 426;



been sustained and applied to past transactions, as doubtless would be any similar statute, calculated merely to improve the remedy, and in its operation working no injustice to the defendant, and depriving him of no substantial right.<sup>1</sup>

And a law is not objectionable as *ex post facto* which, in providing for the punishment of future offenses, authorizes the offender's conduct in the past to be taken into the account, and the punishment to be graduated accordingly. Heavier penalties are often provided by law for a second or any subsequent offense than for the first; and it has not been deemed objectionable that, in providing for such heavier penalties, the prior conviction authorized to be taken into the account may have taken place before the law was passed.<sup>2</sup> In such case, it is the second or subsequent offense that is punished,

State *v.* Corson, 59 Me. 137. And see People *v.* Mortimer, 46 Cal. 114.

In the absence of statutory permission, if a court allows an indictment to be amended by striking out words as surplusage, it must be resubmitted to the jury. *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781. But a statute providing that the rule of law precluding a conviction on the uncorroborated testimony of an accomplice should not apply to cases of misdemeanor, it was held could not have retrospective operation. *Hart. v. State*, 40 Ala. 32.

<sup>1</sup> But the legislature can have no power to dispense with such allegations in indictments as are essential to reasonable particularity and certainty in the description of the offense. *McLaughlin v. State*, 45 Ind. 338; *Brown v. People*, 29 Mich. 232; *People v. Olmstead*, 30 Mich. 431; *State v. O'Flaherty*, 7 Nev. 153.

A State may between the time of commission of an offense and the time of trial modify the rules of evidence regarding the proof of handwriting. *Thompson v. Missouri*, 171 U. S. 380, 43 L. ed. 204, 18 Sup. Ct. Rep. 922; *aff.* 132 Mo. 301, 34 S. W. 31.

A State may enact that jurors shall be selected from "persons of good intelligence, sound judgment, and fair character." *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904. May change mode of accusation from indictment to information. *Re Wright*, 3 Wyo. 478, 27

Pac. 565, 13 L. R. A. 748, 31 Am. St. 94.

A statute repealing a law providing that applications for separate trial by persons jointly accused should be granted as matter of course, and re-adopting the common law practice of allowing the judge to grant such applications in his discretion after hearing was held not *ex post facto* as applied to persons who had been jointly indicted for a crime committed before the passage of the act. *Beazell v. Ohio*, 269 U. S. 167, 70 L. ed. —, 46 Sup. Ct. Rep. 68.

In *Mallett v. North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730, it is held that a provision for an appeal by the State from an order granting a new trial is not *ex post facto* as applied to a criminal case tried before the statute was passed, the order for a new trial having been made after the enactment of the statute. The opinion cites the principal cases on the constitutional prohibition of *ex post facto* laws in the Federal Supreme Court. Upon *ex post facto* laws, see notes to 1 L. ed. U. S. 648, and 4 L. ed. U. S. 529.

<sup>2</sup> *Rand v. Commonwealth*, 9 Gratt. 738; *Ross's Case*, 2 Pick. 165; *People v. Butler*, 3 Cow. 347; *Ex parte Guitierrez*, 45 Cal. 429; *McDonald v. Massachusetts*, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389; *Graham v. West Virginia*, 224 U. S. 616, 56 L. ed. 917, 32 Sup. Ct. Rep. 583; *Carlesi v. New York*, 233 U. S. 51,

not the first;<sup>1</sup> and the statute would be void if the offense to be actually punished under it had been committed before it had taken effect, even though it was after its passage.<sup>2</sup> [A statute is valid which imposes a heavier penalty upon a second offender, though the penalty is imposed where the first conviction was had under the laws of another State or country.<sup>3</sup>

An act of Congress, by construing a former act as leaving in force criminal laws which the Federal Supreme Court has declared to have been repealed, cannot give retrospective criminality to acts which were done before the construing act was passed and that were not criminal except for the laws held to have been repealed.<sup>4</sup> The prohibition against *ex post facto* laws is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts.<sup>5</sup>

### *Laws Impairing the Obligation of Contracts.*

The Constitution of the United States also forbids the States passing any law impairing the obligation of contracts.<sup>6</sup> It is re-

58 L. ed. 843, 34 Sup. Ct. Rep. 576; State *ex rel.* Gregory *v.* Jones, 128 Fed. 626; People *v.* Coleman, 145 Cal. 609, 79 Pac. 238; *In re* Miller, 110 Mich. 676, 68 N. W. 990, 64 Am. St. Rep. 376, 34 L. R. A. 398; Jones *v.* State, 9 Okla. Crim. Rep. 646, 133 Pac. 249, 48 L. R. A. (N. S.) 204; State *v.* Le Pitre, 54 Wash. 166, 103 Pac. 27, 18 Ann. Cas. 922. See also Commonwealth *v.* Groves, 155 Mass. 163, 29 N. E. 579, 16 L. R. A. 256; McDonald *v.* Massachusetts, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389, affirming 173 Mass. 322, 53 N. E. 874.

Extradition treaties may provide for the surrender of persons charged with offenses previously committed. *In re* De Giacomo, 12 Blatch. 391.

<sup>1</sup> Rand *v.* Commonwealth, 9 Gratt. 738; State *ex rel.* Gregory *v.* Jones, 128 Fed. 626; Jones *v.* State, 9 Okla. Crim. Rep. 646, 133 Pac. 249, 48 L. R. A. (N. S.) 204.

<sup>2</sup> Riley's Case, 2 Pick. 171; State *ex rel.* Gregory *v.* Jones, 128 Fed. 626; Jones *v.* State, 9 Okla. Crim. Rep. 646, 133 Pac. 249, 48 L. R. A. (N. S.) 204.

<sup>3</sup> Such a statute and the imposition

of the heavier penalty under it were upheld in a case where the former conviction was of an offense against the United States and the offender had been pardoned by the President. Carlesi *v.* New York, 233 U. S. 51, 58 L. ed. 843, 34 Sup. Ct. Rep. 576.

<sup>4</sup> United States *v.* Stafoff, 260 U. S. 477, 67 L. ed. 358, 43 Sup. Ct. Rep. 197.

<sup>5</sup> Ross *v.* Oregon, 227 U. S. 100, 57 L. ed. 458, 33 Sup. Ct. Rep. 225, Ann. Cas. 1914 C, 224; Frank *v.* Mangum, 237 U. S. 309, 59 L. ed. 969, 35 Sup. Ct. Rep. 582. But see State *v.* O'Neil, 147 Iowa, 513, 126 N. W. 545, 33 L. R. A. (N. S.) 788, Ann. Cas. 1912 B, 691; State *v.* Longino, 109 Miss. 125, 67 So. 902, Ann. Cas. 1916 E, 371.

<sup>6</sup> Const. art. 1, § 10. "A State can no more impair the obligation of a contract by her organic law than by legislative enactment; for her constitution is a law within the meaning of the contract clause of the National Constitution." New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 672, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Fisk *v.* Jefferson Police Jury, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. Rep.

329; *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct. Rep. 405; *Russell v. Sebastian*, 233 U. S. 195, 58 L. ed. 912, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914 C, 1282; *Slade v. Lexington*, 141 Ky. 214, 132 S. W. 404, 32 L. R. A. (N. S.) 201; and see cases, *ante*, p. 89, note 2. A contract authorized under the interpretation and construction put upon the State constitution by the highest court of the State at the time the contract is entered into cannot be impaired by any subsequent amendment of the constitution or by any change in its construction by the courts of the State. *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736. See also *Thomas v. State*, 76 Ohio St. 341, 81 N. E. 437, 118 Am. St. Rep. 884, 10 L. R. A. (N. S.) 1112. But see *Prall v. Burckhardt*, 299 Ill. 19, 132 N. E. 280, 18 A. L. R. 992; *McCroy v. Miller*, 78 Okla. 16, 186 Pac. 1089.

Upon impairment of obligation of contract by State constitution, see note to 10 L. R. A. 405; by change in interpretation of constitution, note to 16 L. R. A. 646, and one to 44 L. ed. U. S. 886. In the connection, see *New Orleans v. Warner*, 175 U. S. 120, 44 L. ed. 96, 20 Sup. Ct. Rep. 44; and s. c. 167 U. S. 467, 42 L. ed. 239, 17 Sup. Ct. Rep. 892.

The law which impairs must be one passed after the formation of the contract. *Lehigh Water Co. v. Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; *Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437, 47 L. ed. 249; 23 Sup. Ct. Rep. 234; *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277; *Corbin v. Houlehan*, 100 Me. 246, 61 Atl. 131, 70 L. R. A. 568; *Bedard v. Mahoney*, 30 R. I. 469, 76 Atl. 113, 136 Am. St. Rep. 965. Provision operating only on contracts thereafter formed cannot impair their obligation. *Galveston, H. & S. A. R. Co. v. Texas*, 170 U. S. 226, 42 L. ed. 1017, 18 Sup. Ct. Rep. 603, aff. 89 Tex. 340, 34 S. W. 746.

The obligation of a contract is impaired by a statute which alters its terms by imposing new conditions or

dispensing with existing conditions, or which adds new duties, or releases or lessens any part of the contractual obligation, or substantially defeats its ends. *In re Fidelity State Bank*, 35 Idaho, 797, 209 Pac. 449, 31 A. L. R. 781.

It is not within the constitutional power of the legislature to enact a valid statute abrogating a contract of special deposit between a highway district and a bank, making in lieu thereof a contract of general deposit whereby the title of the highway district's money is passed to the bank, and such money becomes a part of its general assets, subject to distribution among its depositors and creditors in case of insolvency, imposing upon the highway district the status of a creditor entitled to receive only its *pro rata* share of the assets of the bank upon liquidation. *In re Fidelity State Bank*, 35 Idaho, 747, 209 Pac. 449, 31 A. L. R. 781.

Where a State by statute, and for a valuable consideration, prescribes the terms and conditions upon which it assents to a railroad company's constructing and operating its road through limited portions of its territory, it cannot, subsequently, withdraw such assent; nor can the right of the company to enjoy the privileges so obtained be burdened with conditions not prescribed in the assenting act, except such as the State, in the exercise of its police powers for purposes of taxation, and for other public objects, may legally impose in respect to business carried on and property situated within its limits. *New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952.

Where a railroad company accepts a charter and subsequent legislation entitling it to construct a line of railroad and thereby earn certain grants of land, and enters upon the construction of the road, and actually completes an important part of it by the time a new constitution for the State is adopted, that constitution cannot impair the right of the company to earn the lands attaching, under the charter and legislation above referred

markable that this very important clause was passed over almost without comment during the discussions preceding the adoption of that instrument, though since its adoption no clause which the Constitution contains has been more prolific of litigation, or given rise to more animated and at times angry controversy. It is but twice alluded to in the papers of the *Federalist*; <sup>1</sup> and though its great importance is assumed, it is evident that the writer had no conception of the prominence it was afterwards to hold in constitutional discussions, or of the very numerous cases to which it was to be applied in practice.

to, to the remainder of the line thereafter constructed. *Houston & T. C. R. Co. v. Texas*, 170 U. S. 243, 42 L. ed. 1023, 18 Sup. Ct. Rep. 610, rev. 90 Tex. 607, 40 S. W. 402.

A law requiring a State bank to pay over to the State, as depository, savings deposits which have long remained unclaimed, if the procedure is appropriate, does not violate any right of the bank under the contract clause of the Constitution. *Provident Institute for Savings v. Malone*, 221 U. S. 660, 55 L. ed. 899, 31 Sup. Ct. Rep. 661, 34 L. R. A. (N. S.) 1129; *Security Sav. Bank v. California*, 263 U. S. 282, 68 L. ed. 301, 44 Sup. Ct. Rep. 108, 31 A. L. R. 391.

A statute appropriating money for the relief of an employee of the State who was injured while in the performance of his duty does not impair the obligation of a contract. *Fairfield v. Huntington*, 23 Ariz. 528, 205 Pac. 814, 22 A. L. R. 1438.

A New York law prohibiting the sale of lottery tickets is not invalid because a lottery, the tickets in which are sold, is legal in Louisiana. *People v. Noelke*, 94 N. Y. 137.

Ordinances of a city are laws of the State within the meaning of this provision of the Constitution. *Penn Mutual Life Ins. Co. v. Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223.

In *Detroit v. Detroit Cit. St. Ry. Co.*, 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410, the lines of the railway company were constructed under a statute authorizing construction "under such regulations and upon such terms and conditions as the municipal authorities may from time to time

prescribe." The city in its agreement with the company for the construction authorized a particular rate of fare. It subsequently passed an ordinance for the reduction of the rate so fixed. The ordinance was held invalid as impairing the obligation of contract.

A city in granting to a water company power to lay pipe in the streets and to supply the citizens with water at reasonable rates, &c., has power to bind itself for a limited period not to erect any competing waterworks. Subsequent ordinance providing for the erection of a system of waterworks by the city within the limited period is invalid, and its execution may be enjoined. *Walla Walla v. W. W. Water Co.*, 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77. See also *Hamilton, &c. Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Southwest Mo. L. Co. v. Taplin*, 113 Fed. 817; *Skaneateles W. W. Co. v. Skaneateles*, 161 N. Y. 154, 55 N. E. 562; *Syracuse W. Co. v. Syracuse*, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546; *Re Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270; *Westerly W. W. v. Westerly*, 75 Fed. Rep. 181.

See on what laws are void as impairing the obligation of contracts, note to 3 L. ed. U. S. 162; on what contracts are within the rule, note to 10 L. R. A. 405. That the prohibition does not apply to Congress, see *Mitchell v. Clark*, 110 U. S. 633, 28 L. ed. 279, 4 Sup. Ct. Rep. 170, 312; *New York v. United States*, 257 U. S. 591, 66 L. ed. 385, 42 Sup. Ct. Rep. 239.

<sup>1</sup> *Federalist*, Nos. 7 and 44.

The first question that arises under this provision is, What is a contract in the sense in which the word is here employed? In the leading case upon this subject, it appeared that the legislature of Georgia had made a grant of land, but afterwards, on an allegation that the grant had been obtained by fraud, a subsequent legislature had passed another act annulling and rescinding the first conveyance, and asserting the right of the State to the land it covered. "A contract", says Ch. J. *Marshall*, "is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do or not to do a particular thing. Such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant. Since then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term 'contract' without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected. If, under a fair construction of the Constitution, grants are comprehended under the term 'contracts', is a grant from the State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the State are to be exempted from their operations, the exception must arise from the character of the contracting party, not from the words which are employed." And the court proceed to give reasons for their decision, that violence should not "be done to the natural meaning of words, for the purpose of

leaving to the legislature the power of seizing, for public use, the estate of an individual, in the form of a law annulling the title by which he holds that estate.”<sup>1</sup>

It will be seen that this leading decision settles two important points: first, that an executed contract is within the provision, and, second, that it protects from violation the contracts of States equally with those entered into between private individuals.<sup>2</sup>

<sup>1</sup> *Fletcher v. Peck*, 6 Cranch, 87, 136, 3 L. ed. 162.

<sup>2</sup> This decision has been repeatedly followed. In the founding of the Colony of Virginia the religious establishment of England was adopted, and before the Revolution the churches of that denomination had become vested, by grants of the crown or colony, with large properties, which continued in their possession after the constitution of the State had forbidden the creation or continuance of any religious establishment possessed of exclusive rights or privileges, or the compelling the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe. By statute in 1801, the legislature asserted their right to all the property of the Episcopal churches in the respective parishes of the State; and, among other things, directed and authorized the overseers of the poor and their successors in each parish, wherein any glebe land was vacant or should become so, to sell the same and appropriate the proceeds to the use of the poor of the parish. By this act, it will be seen, the State sought in effect to resume grants made by the sovereignty, — a practice which had been common enough in English history, and of which precedents were not wanting in the History of the American Colonies. The Supreme Court of the United States held the grant not revocable, and that the legislative act was therefore unconstitutional and void. *Terrett v. Taylor*, 9 Cranch, 43, 3 L. ed. 650. See also *Town of Pawlet v. Clark*, 9 Cranch, 292, 3 L. ed. 735; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *Hall v. Wisconsin*, 103 U. S. 5, 26 L. ed. 302; *People v. Platt*, 17 Johns. 195; *Montgomery v.*

*Kasson*, 16 Cal. 189; *Grogan v. San Francisco*, 18 Cal. 590; *Rehoboth v. Hunt*, 1 Pick. 224; *Lowry v. Francis*, 2 Yerg. 534; *University of North Carolina v. Foy*, 2 Hayw. 310; *State v. Barker*, 4 Kan. 379 and 435; *In re Fidelity State Bank*, 35 Idaho, 797, 209 Pac. 449, 31 A. L. R. 781; *Jones Hollow Ware Co. v. Crane*, 134 Md. 103, 106 Atl. 274, 3 A. L. R. 1658; *State v. Krahmer*, 105 Minn. 422, 117 N. W. 780, 21 L. R. A. (N. S.) 157.

When a State descends from the plane of its sovereignty and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly. *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *Georgia Pen. Cos. v. Nelms*, 71 Ga. 301.

The lien of a bondholder, who has loaned money to the State on a pledge of property by legislative act, cannot be divested or postponed by a subsequent legislative act. *Wabash, &c. Co. v. Beers*, 2 Black, 448, 17 L. ed. 327.

An agreement to receive coupons of State bonds in payment for State taxes is binding. *Hartman v. Greenhow*, 102 U. S. 672, 26 L. ed. 271; *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962. See *Keith v. Clark*, 97 U. S. 454, 24 L. ed. 1072.

When State officers acting under authority of a statute have received in payment of obligations due to the State warrants drawn on the State treasury, there is an executed contract, and the obligation is discharged, even though the warrants were illegal and void, as being issued with the intention that they circulate as money or as bills of credit or in aid of rebellion. For the courts of the State to place upon a statute thereafter passed a

And it has since been held that compacts between two States are in like manner protected.<sup>1</sup> These decisions, however, do not fully determine what under all circumstances is to be regarded as a

construction which will treat such payments as void and revive the obligation is to impair the obligation of the contract, and therefore to violate the Federal Constitution. *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545, rev. 41 S. W. 157.

Any statute which impairs any of the substantial rights secured to the holder of a tax certificate by the existing laws is unconstitutional. *State ex rel. National Bond & Security Co. v. Krahmer*, 105 Minn. 422, 117 N. W. 780, 21 L. R. A. (N. S.) 157.

After a State has granted lands to a company, and the grantee has fulfilled the conditions of the grant and earned the lands, a further enactment, that the lands shall not be transferred to the company till its debts of a certain class are paid, is void. *De Groff v. St. Paul, &c. R. R. Co.*, 23 Minn. 144; *Robertson v. Land Commissioner*, 44 Mich. 274, 6 N. W. 659.

After a contract made by a city with a company allowing it to build a railroad in certain streets, has been partly completed, the legislature cannot make the right to finish it conditional on the consent of property owners. *Hovelman v. Kansas City Ry. Co.*, 79 Mo. 632.

The power to withdraw a franchise does not give a legislature power to authorize a city to require a horse railroad company to pave outside its rails, when the city had contracted with it to pave only inside the rails. *Coast Line R. Co. v. Savannah*, 30 Fed. Rep. 646. See *New Orleans v. Great South Tel. Co.*, 40 La. Ann. 41, 3 So. 533; *McGee v. San Jose*, 68 Cal. 91, 8 Pac. 641; *Chicago Union Tr. Co. v. Chicago*, 199 Ill. 259, 65 N. E. 243.

Where a statute abandons an incomplete contract made by the State, the obligation of the contract remains as before, and forms the measure of the other party's right to recover from the State for the damages sus-

tained. *Brown v. Colorado*, 106 U. S. 95, 27 L. ed. 132, 1 Sup. Ct. Rep. 175; *Hays v. Port of Seattle*, 251 U. S. 233, 64 L. ed. 243, 40 Sup. Ct. Rep. 125; *Caldwell v. Donaghey*, 108 Ark. 60, 156 S. W. 839, 45 L. R. A. (N. S.) 721, Ann. Cas. 1915 B, 133. But where the statute under which a State grants permission to a foreign corporation to do business within its borders provides that such permission may be revoked upon violation of the statute by the corporation, a forfeiture of the permission because of such violation does not impair the obligation of any contract. *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518, aff. 19 Tex. Civ. App. 1, 44 S. W. 936.

An application for the purchase of State lands under an act governing the sale of such lands, and the expenditure of money in accordance with its provisions for the survey of the lands, does not, before any part of the purchase price is paid, create a contract binding on the State and protected against impairment. *Banning Co. v. California*, 240 U. S. 142, 60 L. ed. 569, 36 Sup. Ct. Rep. 338. See also *Wisconsin, etc., R. Co. v. Powers*, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107.

A railroad company was organized under general statutes which provided for the alteration, amendment, or repeal of corporate charters. Filing a map of a proposed route does not vest in it any right to condemn lands upon the proposed route, such that the State is precluded from taking these lands for other purposes without impairing, to the damage of the company, the obligation of a contract. *Adirondack R. Co. v. N. Y.*, 176 U. S. 335, 44 L. ed. 492, 20 Sup. Ct. Rep. 460, aff. 160 N. Y. 225, 54 N. E. 689.

<sup>1</sup>On the separation of Kentucky from Virginia, a compact was entered into between the proposed new and the old State, by which it was agreed "that all private grants and interests of

contract.<sup>1</sup> A grant of land by a State is a contract, because in making it the State deals with the purchaser precisely as any other vendor might; and if its mode of conveyance is any different, it is only because, by virtue of its sovereignty, it has power to convey by other modes than those which the general law opens to private individuals. But many things done by the State may seem to hold out promises to individuals which after all cannot be treated as contracts without hampering the legislative power of the State in a manner that would soon leave it without the means of performing its essential functions. The State creates offices, and appoints persons to fill them; it establishes municipal corporations with large and valuable privileges for its citizens; by its general laws it holds out inducements to immigration; it passes exemption laws, and laws for the encouragement of trade and agriculture; and under all these laws a greater or less number of citizens expect to derive profit and emolument. But can these laws be regarded as contracts between the State and the officers and corporations who

lands, within the said district, derived from the laws of Virginia, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State." After the admission of the new State to the Union, "occupying claimant" laws were passed by its legislature, such as were not in existence in Virginia, and by the force of which, under certain circumstances, the owner might be deprived of his title to land, unless he would pay the value of lasting improvements made upon it by an adverse claimant. These acts were also held void; the compact was held inviolable under the Constitution, and it was deemed no objection to its binding character, that its effect was to restrict, in some directions, the legislative power of the State entering into it. *Green v. Biddle*, 8 Wheat. 1, 5 L. ed. 547. See also *Hawkins v. Barney's Lessee*, 5 Pet. 457, 8 L. ed. 190.

<sup>1</sup> Authority to construct and maintain a dam for the purpose of improving a water-power is only a license and may be revoked at any time. *St. Anthony Falls W. P. Co. v. Bd. of Water Com'rs*, 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157.

Rate of interest allowed upon an unpaid judgment is not contractual

unless the judgment is upon a contract to pay interest at a given rate until the debt is paid, and in all other cases it may be changed at any time by the State, and such changed rate will be operative thenceforth. *Morley v. L. S. & M. S. R. Co.*, 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54, aff. 95 N. Y. 667, and following *O'Brien v. Young*, 95 N. Y. 428, 47 Am. Rep. 64. *Contra*, *Butler v. Rockwell*, 17 Col. 290, 29 Pac. 458, 17 L. R. A. 611, and note; *Wyoming Nat. Bk. v. Brown*, 7 Wyo. 494, 53 Pac. 291, 9 Wyo. 153, 61 Pac. 465, on rehearing, holds that contract is merged in judgment, and rate of interest on judgment is not contractual.

Judgment upon a tort is not a contract, and power to levy taxes may be so restricted as to make such judgment against a city practically worthless. *Sherman v. Langham*, 92 Tex. 13, 40 S. W. 140, 42 S. W. 961, 39 L. R. A. 258; *Louisiana v. New Orleans*, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211; *Louisiana v. Police Jury*, 111 U. S. 716, 28 L. ed. 574, 4 Sup. Ct. Rep. 648.

An appeal bond is a contract within the constitutional prohibition. *Schuster v. Weiss*, 114 Mo. 158, 21 S. W. 438, 19 L. R. A. 182.



are, or the citizens of the State who expect to be, benefited by their passage, so as to preclude their being repealed?

On these points it would seem that there could be no difficulty. When the State employs officers or creates municipal corporations as the mere agencies of government, it must have the power to discontinue the agency whenever it comes to be regarded as no longer important. "The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government."<sup>1</sup> They may, therefore, discontinue offices or change the salary or other compensation, or abolish or change the organization of municipal corporations at any time, according to the existing legislative view of State policy unless forbidden by their own constitutions from doing so.<sup>2</sup> And

<sup>1</sup> *Dartmouth College v. Woodward*, 4 Wheat. 518-629, 4 L. ed. 629, 658, per *Marshall*, Ch. J.

<sup>2</sup> *Butler v. Pennsylvania*, 10 How. 402, 13 L. ed. 472; *United States v. Hartwell*, 6 Wall. 385, 18 L. ed. 830; *Newton v. Commissioners*, 100 U. S. 557, 25 L. ed. 710; *Warner v. People*, 2 Denio, 272; *Conner v. New York*, 2 Sandf. 355, and 5 N. Y. 285; *People v. Green*, 58 N. Y. 295; *State v. Van Baumbach*, 12 Wis. 310; *Coffin v. State*, 7 Ind. 157; *Benford v. Gibson*, 15 Ala. 521; *Perkins v. Corbin*, 45 Ala. 103; *Evans v. Populus*, 22 La. Ann. 121; *Commonwealth v. Bacon*, 6 S. & R. 322; *Commonwealth v. Mann*, 5 W. & S. 403, 418; *Koontz v. Franklin Co.*, 76 Pa. St. 154; *French v. Commonwealth*, 78 Pa. St. 339; *Augusta v. Sweeney*, 44 Ga. 463; *County Commissioners v. Jones*, 18 Minn. 199; *People v. Lippincott*, 67 Ill. 333; *In re Bulger*, 45 Cal. 553; *Opinions of Justices*, 117 Mass. 603; *Kendall v. Canton*, 53 Miss. 526; *Williams v. Newport*, 12 Bush, 438; *State v. Douglass*, 26 Wis. 428; *State v. Kalb*, 50 Wis. 178, 6 N. W. 557; *Robinson v. White*, 26 Ark. 139; *Alexander v. McKenzie*, 2 S. C. 81; *Harvey v. Com'rs Rush Co.*, 32 Kan. 159, 4 Pac. 153; *Com. v. Bailey*, 81 Ky. 395; *McDonald v. New Haven*, 94 Conn. 403, 109 Atl. 176, 10 A. L. R. 193; *Attorney General v. Tufts*, 239 Mass. 458, 131 N. E. 573, 17 A. L. R. 274; *Saginaw County Board of Sup'rs v. Hubinger*, 137 Mich. 72,

100 N. W. 261, 4 Ann. Cas. 792; *State v. Plasters*, 74 Neb. 652, 105 N. W. 1092, 13 Ann. Cas. 154; *State v. Murphy*, 30 Nev. 409, 97 Pac. 391, 18 L. R. A. (N. S.) 1210; *People v. State Board of Tax Commissioners*, 174 N. Y. 417, 67 N. E. 69, 105 Am. St. Rep. 674, 63 L. R. A. 884; *Mial v. Ellington*, 134 N. C. 131, 46 S. E. 961, 65 L. R. A. 697; *Shawnee v. Hewett*, 37 Okla. 125, 130 Pac. 546, 4 A. L. R. 195; *Malone v. Williams*, 118 Tenn. 390, 103 S. W. 798, 121 Am. St. Rep. 1002; *Tanner v. Edwards*, 31 Utah, 80, 86 Pac. 765, 120 Am. St. Rep. 919, 10 Ann. Cas. 1091; *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917 A, 1244. Compare *People v. Bull*, 46 N. Y. 57, 7 Am. Rep. 302; *Wyandotte v. Drennan*, 46 Mich. 478, 9 N. W. 500.

"The people of the State by constitutional provision may abolish any office at any time. . . . The officeholder has no vested right therein, nor does he hold the office by contract." *Lockett v. Madison County*, 137 Miss. 1, 101 So. 851, 37 A. L. R. 814.

"Where an office is created by statute, it is wholly within the control of the legislature. The term, the mode of appointment, and the compensation may be altered at pleasure, and the latter may be even taken away without abolishing the office. Such extreme legislation is not to be deemed probable in any case. But we are now discussing the legislative power, not its expediency or propriety.

Having the power, the legislature will exercise it for the public good, and it is the sole judge of the exigency which demands its interference." Per *Sandford, J.*, 2 Sandf. 355, 369.

"The selection of officers who are nothing more than public agents for the effectuating of public purposes is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this upon the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense." *Daniel, J.*, in *Butler v. Pennsylvania*, 10 How. 402, 416, 13 L. ed. 472. "But after services have been rendered under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate. This contract is a completed contract. Its obligation is perfect, and rests on the remedies which the law gives for its enforcement", and cannot be impaired by a change in the State constitution. *Fisk v. Jefferson Police Jury*, 116 U. S. 131, 29 L. ed. 587, 6 Sup. Ct. Rep. 329.

See also *Barker v. Pittsburgh*, 4 Pa. St. 49; *Standiford v. Wingate*, 2 Duv. 443; *Taft v. Adams*, 3 Gray, 126; *Walker v. Peelle*, 18 Ind. 264; *People v. Haskell*, 5 Cal. 357; *Dart v. Houston*, 22 Ga. 506; *Williams v. Newport*, 12 Bush, 438; *Territory v. Pyle*, 1 Oreg. 149; *Bryan v. Cattell*, 15 Iowa, 538.

If the term of an office is fixed by the Constitution, the legislature can-

not remove the officer, — except as that instrument may allow, — either directly, or indirectly by abolishing the office. *People v. Dubois*, 23 Ill. 547; *State v. Messmore*, 14 Wis. 163; *Commonwealth v. Gamble*, 62 Pa. St. 343, 1 Am. Rep. 422; *Lowe v. Commonwealth*, 3 Met. (Ky.) 240; *State v. Wiltz*, 11 La. Ann. 489; *Goodin v. Thoman*, 10 Kan. 191; *State v. Draper*, 50 Mo. 353; *Adams v. Roberts*, 119 Ky. 364, 83 S. W. 1035; *Morris v. Glover*, 121 Ga. 751, 49 S. E. 786; *Hall v. Tarver*, 128 Ga. 410, 57 S. E. 720; *Conner v. Gray*, 88 Miss. 489, 41 So. 186, 9 Ann. Cas. 120; *Magee v. Brister*, 109 Miss. 183, 68 So. 77; *State v. Douglass*, 33 Nev. 82, 110 Pac. 177; *State ex rel. Burke v. Hinkel*, 144 Wis. 444, 129 N. W. 393. Or by shortening the constitutional term. *Brewer v. Davis*, 9 Humph. 212. Compare *Christy v. Commissioners*, 39 Cal. 3. But if after the election of a justice, his town becomes part of a city, his office ceases. *Gertum v. Board*, 109 N. Y. 170, 16 N. E. 328. Nor can the legislature take from a constitutional officer a portion of the characteristic duties belonging to the office, and devolve them upon an office of its own creation. *State v. Brunst*, 26 Wis. 413, 7 Am. Rep. 84, disapproving *State v. Dews*, R. M. Charl. 397. See also *People v. Howland*, 155 N. Y. 270, 49 N. E. 775, 41 L. R. A. 838; *Cameron v. Parker*, 2 Okla. 277, 38 Pac. 14. Compare *Warner v. People*, 2 Denio, 272; *People v. Albertson*, 55 N. Y. 50; *People v. Raymond*, 37 N. Y. 428; *King v. Hunder*, 65 N. C. 603, 6 Am. Rep. 754. Nor, where the office is elective, can the legislature fill it, either directly, or by extending the term of the incumbent. *People v. Bull*, 46 N. Y. 57; *People v. McKinney*, 52 N. Y. 374. Where the constitution prohibits the removal of an officer during his term except for cause, it equally prohibits the transfer of the duties and emoluments of the office. *State Prison v. Day*, 124 N. C. 362, 32 S. E. 748, 46 L. R. A. 295. See also on these points cases, p. 139, *supra*. Compare *People v. Flanagan*, 66 N. Y. 237.

although municipal corporations, as respects the property which they hold, control, and manage, for the benefit of their citizens, are governed by the same rules and subject to the same liabilities as individuals, yet this property, so far as it has been derived from the State, or obtained by the exercise of the ordinary powers of government, must be held subject to control by the State, but under the restriction only, that it is not to be appropriated to uses foreign to those for which it has been acquired. And the franchises conferred upon such a corporation, for the benefit of its citizens, must be liable to be resumed at any time by that authority which may mold the corporate powers at its will, or even revoke them altogether. The greater power will comprehend the less.<sup>1</sup> If, however,

As to control of municipal corporations, see further *Marietta v. Fearing*, 4 Ohio, 427; *Bradford v. Cary*, 5 Me. 339; *Bush v. Shipman*, 5 Ill. 186; *Trustees, &c. v. Tatman*, 13 Ill. 27; *People v. Morris*, 13 Wend. 325; *Mills v. Williams*, 11 Ired. 558; *People v. Banvard*, 27 Cal. 470; *ante*, ch. viii.

But where the State contracts as an individual, it is bound as an individual would be: *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; even though the contract creates an official relation. *Hall v. Wisconsin*, 103 U. S. 5, 26 L. ed. 302.

A public office is not property, and a provision that "no person shall be deprived of . . . property without . . . the judgment of his peers" is not applicable to a lawful removal from office upon a charge of gross immorality. *Moore v. Strickling*, 46 W. Va. 515, 33 S. E. 274, 50 L. R. A. 279. That notice is necessary to a valid removal of an elected officer, see *Jacques v. Little*, 51 Kan. 300, 33 Pac. 106, 20 L. R. A. 304.

<sup>1</sup> *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 13 L. ed. 518; *Saginaw County v. Hubinger*, 137 Mich. 72, 100 N. W. 261, 4 Ann. Cas. 792; *State v. Superior Court*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915 C, 287, Ann. Cas. 1913 D, 78.

In *East Hartford v. Hartford Bridge Co.*, 10 How. 511, 533, 13 L. ed. 518, Mr. Justice *Woodbury*, in speaking of the grant of a ferry franchise to a municipal corporation, says: "Our opinion is . . . that the parties to this grant did not by their charter

stand in the attitude towards each other of making a contract by it, such as is contemplated in the Constitution, and as could not be modified by subsequent legislation. The legislature was acting here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interests. They changed as those interests demanded. The grantees, likewise the towns, being mere organizations for public purposes, were liable to have their public powers, rights, and duties, modified or abolished at any moment by the legislature. They are incorporated for public, and not private, objects. They are allowed to hold privileges or property only for public purposes. The members are not shareholders nor joint partners in any corporate estate which they can sell or devise to others, or which can be attached and levied on for their debts. Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes.

It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies."

A different doctrine was advanced by Mr. Justice *Barculo*, in *Benson v. Mayor, &c. of New York*, 10 Barb. 234, who cites in support of his opinion, that ferry grants to the city of New York could not be taken away by the legislature, what is said by Chancellor *Kent* (2 *Kent's Com.* 275), that "public corporations . . . may be empowered to take and hold private property for municipal uses; and such property is invested with the security of other private rights. So corporate franchises attached to public corporations are legal estates, coupled with an interest, and are protected as private property." This is true in a general sense, and it is also true that, in respect to such property and franchises, the same rules of responsibility are to be applied as in the case of individuals. *Bailey v. Mayor, &c. of New York*, 3 Hill, 531. But it does not follow that the legislature, under its power to administer the government, of which these agencies are a part, and for the purposes of which the grant has been made, may not at any time modify the municipal powers and privileges, by transferring the grant to some other agency, or revoking it when it seems to have become unimportant. A power to tax is not private property or a vested right which when once conferred upon a municipality by legislative act cannot be subsequently modified or repealed. The grant of such power is not a contract. *Williamson v. New Jersey*, 130 U. S. 189, 32 L. ed. 915, 9 Sup. Ct. Rep. 453; *Richmond v. Richmond, &c. R. R. Co.*, 21 Gratt., 604, 611. See *ante*, p. 515, note 3.

In *People v. Power*, 25 Ill. 187, 191, *Breese, J.*, in speaking of a law which provided that three-fourths of the taxes collected in the county of Sangamon, with certain deductions, should be paid over to the city of Springfield, which is situated therein, says: "While private

corporations are regarded as contracts which the legislature cannot constitutionally impair, as the trustee of the public interests it has the exclusive and unrestrained control over public corporations; and as it may create, so it may modify or destroy, as public exigency requires or the public interests demand. *Coles v. Madison County, Breese*, 115. Their whole capacities, powers, and duties are derived from the legislature, and subordinate to that power. If, then, the legislature can destroy a county, they can destroy any of its parts, and take from it any one of its powers. The revenues of a county are not the property of the county, in the sense in which revenue of a private person or corporation is regarded. The whole State has an interest in the revenue of a county; and for the public good the legislature must have the power to direct its application. The power conferred upon a county to raise a revenue by taxation is a political power, and its application when collected must necessarily be within the control of the legislature for political purposes. This act of the legislature nowhere proposes to take from the county of Sangamon, and give to the city of Springfield, any property belonging to the county, or revenues collected for the use of the county. *But if it did it would not be objectionable.* But, on the contrary, it proposes alone to appropriate the revenue which may be collected by the county, by taxes levied on property both in the city and county, in certain proportions ratably to the city and county."

It is held in *People v. Ingersoll*, 58 N. Y. 1, that the franchise to levy taxes by a county for county purposes was not exercised by the county as agent for the State, but as principal. And see *Bush v. Shipman*, 5 Ill. 186; *Richland County v. Lawrence County*, 12 Ill. 1; *Sangamon Co. v. Springfield*, 63 Ill. 66; *Borough of Dunmore's Appeal*, 52 Pa. St. 374; *Guilford v. Supervisors of Chenango*, 18 Barb. 615, and 13 N. Y. 143; *ante*, pp. 499-507, and cases cited.

Statute exempting city's waterworks from taxation is not irrepealable.

a grant is made to a municipal corporation charged with a trust in favor of an individual, private corporation, or charity, the interest which the *cestui que trust* has under the grant may sustain it against legislative revocation; a vested equitable interest being property in the same sense and entitled to the same protection as a legal.<sup>1</sup>

Those charters of incorporation, however, which are granted, not as a part of the machinery of the government, but for the private benefit or purposes of the corporators, stand upon a different footing, and are held to be contracts between the legislature and the corporators, having for their consideration the liabilities and duties which the corporators assume by accepting them; and the

Covington v. Kentucky, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383.

<sup>1</sup> See Town of Pawlet v. Clark, 9 Cranch, 292, 3 L. ed. 735, and Terrett v. Taylor, 9 Cranch, 43, 3 L. ed. 650.

The municipal corporation holding property or rights in trust might even be abolished without affecting the grant; but the Court of Chancery might be empowered to appoint a new trustee to take charge of the property, and to execute the trust. *Montpelier v. East Montpelier*, 29 Vt. 12.

Power to repeal a charter cannot be exercised so as to injure creditors already entitled to payment. *Morris v. State*, 62 Tex. 728.

A municipal corporation, like the State, may enter into contracts by legislative action. Where, for example, a village by ordinance grants to a railroad company permission to use the streets of the village for its road-bed, on condition of grading and graveling them at its own expense, the ordinance when accepted constitutes a contract from which neither party can withdraw. *Cincinnati, &c. R. R. Co. v. Carthage*, 36 Ohio St. 631. See also *Hovelman v. Kansas City Ry. Co.*, 79 Mo. 632; *Coast Line Ry. Co. v. Savannah*, 30 Fed. Rep. 646; *Los Angeles v. Water Co.*, 61 Cal. 65; *Chicago, Mun., &c. Co. v. Lake*, 130 Ill. 42, 22 N. E. 616; *Cleveland v. Cleveland Electric R. Co.*, 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 764; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253; *Vicksburg v. Vicksburg*

*Waterworks Co.*, 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762; *Boise, etc., Water Co. v. Boise City*, 230 U. S. 84, 57 L. ed. 1400; 33 Sup. Ct. Rep. 997; *New York Electric Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, 59 L. ed. 184, 35 Sup. Ct. Rep. 72, L. R. A. 1918 E, 874, Ann. Cas. 1915 A, 906; *Northern Ohio Traction, etc., Co. v. Ohio*, 245 U. S. 574, 62 L. ed. 481, 38 Sup. Ct. Rep. 196, L. R. A. 1918 E, 865; *Omaha Water Co. v. Omaha*, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614; *Stockton Gas & Electric Co. v. San Joaquin County*, 148 Cal. 313, 83 Pac. 54, 5 L. R. A. (N. S.) 174, 7 Ann. Cas. 511; *Colorado, etc., R. Co. v. Fort Collins*, 52 Colo. 281, 121 Pac. 747, Ann. Cas. 1913 D, 646; *Washington v. Atlantic Coast Line R. Co.*, 136 Ga. 638, 71 S. E. 1066, 38 L. R. A. (N. S.) 867; *Rushville v. Rushville Natural Gas Co.*, 164 Ind. 162, 73 N. E. 87, 3 Ann. Cas. 86; *Shreveport Traction Co. v. Shreveport*, 122 La. 1, 47 So. 40, 129 Am. St. Rep. 345; *Northwestern Tel. Exch. Co. v. Anderson*, 12 N. D. 585, 98 N. W. 706, 102 Am. St. Rep. 580, 65 L. R. A. 771, 1 Ann. Cas. 110; *Cincinnati v. Public Utilities Commission*, 98 Ohio St. 320, 121 N. E. 688, 3 A. L. R. 705.

Grant to a public corporation of all moneys received by a certain county from fines and penalties may be revoked at pleasure of legislature. *Watson Seminary v. Co. Ct. of Pike Co.*, 149 Mo. 57, 50 S. W. 880, 45 L. R. A. 675.

grant of the franchise can no more be resumed by the legislature, or its benefits diminished or impaired without the consent of the grantees, than any other grant of property or valuable thing, unless the right to do so is reserved in the charter itself.<sup>1</sup> As the power to

<sup>1</sup> *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629; *Trustees of Vincennes University v. Indiana*, 14 How. 268, 14 L. ed. 416; *Planters' Bank v. Sharp*, 6 How. 301, 12 L. ed. 447; *Piqua Bank v. Knoop*, 16 How. 369, 14 L. ed. 977; *Binghamton Bridge Case*, 3 Wall. 51, 18 L. ed. 137; *Norris v. Trustees of Abingdon Academy*, 7 G. & J. 7; *Grammar School v. Burt*, 11 Vt. 632; *Brown v. Hummel*, 6 Pa. St. 86; *State v. Heyward*, 3 Rich. 389; *People v. Manhattan Co.*, 9 Wend. 351; *Commonwealth v. Cullen*, 13 Pa. St. 132; *Commercial Bank of Natchez v. State*, 14 Miss. 599; *Backus v. Lebanon*, 11 N. H. 19; *Michigan State Bank v. Hastings*, 1 Doug. (Mich.) 225; *Bridge Co. v. Hoboken Co.*, 13 N. J. Eq. 81; *Miners' Bank v. United States*, 1 Greene (Iowa), 553; *Edwards v. Jagers*, 19 Ind. 407; *State v. Noyes*, 47 Me. 189; *Bruffet v. G. W. R. R. Co.*, 25 Ill. 353; *People v. Jackson & Michigan Plank Road Co.*, 9 Mich. 285; *Bank of the State v. Bank of Cape Fear*, 13 Ired. 75; *Mills v. Williams*, 11 Ired. 558; *Hawthorne v. Calef*, 2 Wall. 10, 17 L. ed. 776; *Wales v. Stetson*, 2 Mass. 143; *Nichols v. Bertram*, 3 Pick. 342; *King v. Dedham Bank*, 15 Mass. 447; *State v. Tombeckbee Bank*, 2 Stew. 30; *Central Bridge v. Lowell*, 15 Gray, 106; *Bank of the Dominion v. McVeigh*, 20 Gratt. 457; *Sloan v. Pacific R. R. Co.*, 61 Mo. 24; *State v. Richmond, &c. R. R. Co.*, 73 N. C. 527; *Turnpike Co. v. Davidson Co.*, 3 Tenn. Ch. 397; *Detroit v. Plank Road Co.*, 43 Mich. 140, 5 N. W. 275; *Penn. R. R. Co. v. Baltimore, &c. R. R. Co.*, 60 Md. 263; *Com. v. Erie & W. Tr. Co.*, 107 Pa. St. 112; *Houston & T. C. Ry. Co. v. Texas & P. Ry. Co.*, 70 Tex. 649, 8 S. W. 498; *City R. Co. v. Citizens' Street R. Co.*, 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Mich. Tel. Co. v. St. Joseph*, 121 Mich. 502, 80 N. W. 383, 47 L. R. A. 87; *Ingersoll v. Nassau Electric R. Co.*,

157 N. Y. 453, 52 N. E. 545, 43 L. R. A. 236; *Franklin Co. Grammar School v. Bailey*, 62 Vt. 467, 20 Atl. 820, 10 L. R. A. 405, and note; *Nashville, M. & S. Turnp. Co. v. Davidson County*, 106 Tenn. 258, 61 S. W. 68; *State v. Lebanon & N. Turnp. Co. (Tenn.)*, 61 S. W. 1096; *Arkansas Stove Co. v. State*, 94 Ark. 27, 125 S. W. 1001, 140 Am. St. Rep. 103, 27 L. R. A. (N. S.) 255; *Mt. Carmel Public Utility, etc., Co. v. Public Utilities Commission*, 297 Ill. 303, 130 N. E. 693, 21 A. L. R. 571; *Street v. Varney Electrical Supply Co.*, 160 Ind. 338, 66 N. E. 895, 98 Am. St. Rep. 325, 61 L. R. A. 154; *Shreveport Traction Co. v. Shreveport*, 122 La. 1, 47 So. 40, 129 Am. St. Rep. 345; *Yoncalla State Bank v. Gemmill*, 134 Minn. 334, 159 N. W. 798, L. R. A. 1917 A, 1223; *Somerville v. St. Louis Min., etc., Co.*, 46 Mont. 268, 127 Pac. 464, L. R. A. 1915 B, 811; *Mohall Farmers' Elevator Co. v. Hall*, 44 N. D. 430, 176 N. W. 131.

The charter of a corporation constitutes not only a contract between the state and the corporation, but also a contract between the corporation and its stockholders and between the stockholders *inter se*, which latter contracts are entitled to protection under the Federal constitutional prohibition against any law impairing the obligation of contracts. *Mohall Farmers' Elevator Co. v. Hall*, 44 N. D. 430, 176 N. W. 131.

The doctrine that the charter of a corporation is a contract, entitled to protection under the constitutional prohibition, is applicable to corporations organized under a general corporation law. *Mohall Farmers' Elevator Co. v. Hall*, 44 N. D. 430, 176 N. W. 131. The mere passage of an act of incorporation, however, does not make the contract; and it may be repealed prior to a full acceptance by the incorporators. *Mississippi Society v. Musgrove*, 44 Miss. 820, 7 Am. Rep.

723. Or amended, *Cincinnati, H. & I. R. R. Co. v. Clifford*, 113 Ind. 460, 15 N. E. 524. See, further, *Chinleclamouche L. & B. Co. v. Com.*, 100 Pa. St. 438.

After the adoption of a constitutional amendment allowing amendment and repeal of charters, a corporation, previously chartered, accepted acts of the legislature. Held that its charter thereby became subject to alteration under the amendment, and that it was affected by a constitutional amendment passed thereafter. *Penn. R. R. Co. v. Duncan*, 111 Pa. St. 352. In affirming this decision it is held that the corporation took its charter subject to changes in the constitution and general laws of the State. *Penn. R. R. Co. v. Miller*, 132 U. S. 75, 33 L. ed. 267, 10 Sup. Ct. Rep. 34.

An act, passed after the granting of a charter, allowing the corporation in a proper case to be wound up, is valid. A corporation is subject to such reasonable regulation as the legislature may prescribe short of a material interference with its privileges. *Chicago Life Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681.

Until the corporation has entered upon the execution of a general power granted to it (*e.g.* to mortgage its property) the legislature may modify at will the conditions under which that power may be exercised (*e.g.* may enact that subsequent judgments against the corporation shall be prior liens upon its property). *East Tenn., V. & G. R. Co. v. Frazier*, 139 U. S. 288, 35 L. ed. 196, 11 Sup. Ct. Rep. 517.

The provision in a railroad charter prescribing the manner in which it may take lands for its purposes, only gives a remedy which may be altered. *Mississippi R. R. Co. v. McDonald*, 12 Heisk. 54.

Giving the right of cumulative voting to stockholders in a corporation with an irrevocable charter, which provides that each share shall have one vote, is a violation of contract. *State v. Greer*, 78 Mo. 188.

A statute relieving a street railway company from the obligation to repair

any portion of the streets over which its tracks are laid, does not impair the obligation of a contract. *Springfield v. Springfield St. Ry. Co.*, 182 Mass. 41, 64 N. E. 577; *Worcester v. Worcester St. Ry. Co.*, 182 Mass. 49, 64 N. E. 581. As to the right to regulate charges for transportation of persons and property, see *post*, p. 1300.

It is under the protection of the decision in the *Dartmouth College Case* that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country at large, and upon the legislation of the country, than the States to which they owe their corporate existence. Every privilege granted or right conferred — no matter by what means or on what pretense — being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless, or corrupt legislation; and a clause of the Federal Constitution, whose purpose was to preclude the repudiation of debts and just contracts, protects and perpetuates the evil.

In *Mills v. Williams*, 11 Ired. 558, 561, *Pearson, J.*, states the difference between the acts of incorporation of public and private corporations as follows: "The substantial distinction is this: Some corporations are created by the mere will of the legislature, there being no other party interested or concerned. To this party a portion of the power of the legislature is delegated, to be exercised for the general good, and subject at all times to be modified, changed, or annulled. Other corporations are the result of contract. The legislature is not the only party interested; for, although it has a public purpose to be accomplished, it chooses to do it by the instrumentality of a second party. These two parties make a contract. The legislature, for and in consideration of certain labor and outlay of money, confers upon the party of the second part the privilege of being a corporation, with certain powers and capacities. The expectation of benefit

grant unamendable and irrepealable charters is one readily susceptible of being greatly abused, to the prejudice of important public interest, and has been greatly abused in the past, the people in a majority of the States, in framing or amending their constitutions, have prudently guarded against it by reserving the right to alter, amend, or repeal all laws that may be passed, conferring corporate powers. These provisions give protection from the time of their adoption, but the improvident grants theretofore made are beyond their reach.<sup>1</sup> In many States the constitutions also pro-

to the public is the moving consideration on one side; that of expected remuneration for the outlay is the consideration on the other. It is a *contract*, and therefore cannot be modified, changed, or annulled, without the consent of both parties."

An incorporated academy, whose endowment comes exclusively from the public, is a public corporation. *Dart v. Houston*, 22 Ga. 506. Compare *State v. Adams*, 44 Mo. 570.

The grant of a franchise by a municipality to a water company will not preclude the municipality from constructing an independent system of waterworks of its own. *Knoxville Water Company v. Knoxville*, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224; *Meridian v. Farmers' Loan & Trust Co.*, 143 Fed. 67, 74 C. C. A. 221, 6 Ann. Cas. 599. See also *Skaneateles Waterworks Co. v. Skaneateles*, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400, affirming, 161 N. Y. 154, 55 N. E. 562, 46 L. R. A. 687. Compare *Westerly Waterworks v. Westerly*, 75 Fed. Rep. 181. Indeed, so strictly are such franchises construed that it has been held that an exclusive franchise granted to a water company for a period of years as against "any other person or corporation" will not preclude the city itself from building waterworks of its own. *Knoxville Water Company v. Knoxville*, 200 U. S. 22, 50 L. ed. 353, 26 Sup. Ct. Rep. 224. Compare *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585; *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 Ann. Cas. 253.

A State Constitution provided that in any city where there were no public works owned by the municipality for supplying the same with water, any individual or corporation of the State should have the privilege of using the public streets and laying down pipes, etc., for the purpose, subject to the right of the municipal government to regulate the charges. It was held that this provision, coupled with the duty imposed on the governing body to fix water rates annually, and the corresponding duty of the water company to comply with the regulations, both under severe penalties, did not import a contract that a corporation constructing works as invited should not be subject to competition from the public source. *Madera Waterworks v. Madera*, 228 U. S. 454, 57 L. ed. 915, 33 Sup. Ct. Rep. 571.

The grant of a franchise to a water company which does not purport to be exclusive will not preclude the grant of a franchise to a competing company. *Syracuse Water Company v. Syracuse*, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546; *In re Brooklyn*, 143 N. Y. 596, 38 N. E. 983, 26 L. R. A. 270, affirmed in 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Skaneateles Water Works Co. v. Skaneateles*, 161 N. Y. 154, 55 N. E. 562, 46 L. R. A. 687, affirmed 184 U. S. 453, 46 L. ed. 585, 22 Sup. Ct. Rep. 400.

<sup>1</sup> Respecting the power to amend or repeal corporate grants, some troublesome questions are likely to arise which have only as yet been hinted at in the decided cases. Corporations usually acquire property under their grants; and any property or any rights which



become vested under a legitimate exercise of the powers granted, no legislative act can take away. *Commonwealth v. Essex Co.*, 13 Gray, 239; *Railroad Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836; *Sinking Fund Cases*, 99 U. S. 700, 25 L. ed. 496; *Attorney-General v. Railroad Companies*, 35 Wis. 425; *Detroit v. Detroit & Howell P. R. Co.*, 43 Mich. 140, 5 N. W. 275; *Stanislaus County v. San Joaquin, etc., Co.*, 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; *New York, etc., R. Co. v. Williams*, 199 N. Y. 108, 92 N. E. 404, 139 Am. St. Rep. 850, 35 L. R. A. (N. S.) 549; *State v. Bancroft*, 148 Wis. 124, 134 N. W. 330, 38 L. R. A. (N. S.) 526. See *post*, pp. 1240-1242. But a legislature may grant to another corporation the franchises of an existing one, and may authorize the taking of its property upon compensation made. *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. ed. 961; *People v. Calder*, 153 Mich. 724, 117 N. W. 314, 126 Am. St. Rep. 550.

Where under the rights reserved in a State Constitution, a water company's franchise is subject to alteration, a new Constitution may allow water rates to be fixed by a public board, although the company had under the law of its organization the right of representation upon the board. *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48.

In many cases the property itself becomes valueless unless its employment in the manner contemplated in the corporate grant may be continued; as in the case, for instance, of railroad property; and whatever individual owners of such property might do without corporate powers, it must be competent for the stockholders to do after their franchises are taken away. Without speculating on the difficulties likely to arise, reference is made to the following cases, in which the reserved power to alter or repeal corporate grants has been considered or touched upon; *Worcester v. Norwich, &c. R. R. Co.*, 109 Mass. 103; *Railroad Commissioners v. Portland, &c. R. R. Co.*, 63 Me. 269, 18 Am. Rep. 208; *State v. Maine Cent. R. R. Co.*, 66 Me. 488;

*Ames v. Lake Superior R. R. Co.*, 21 Minn. 201; *Sprigg v. Telegraph Co.*, 46 Md. 67; *State v. Com'rs of R. R. Taxation*, 37 N. J. L. 228; *State v. Mayor of Newark*, 35 N. J. L. 157; *West Wis. R. R. Co. v. Supervisors*, 35 Wis. 257; *Union Improvement Co. v. Commonwealth*, 69 Pa. St. 140; *Ill. Cent. R. R. Co. v. People*, 95 Ill. 313, 1 Am. & Eng. R. R. Cas. 188; *Rodemacher v. Milwaukee, &c. R. R. Co.*, 41 Iowa, 297, 20 Am. Rep. 592; *Gorman v. Pacific R. R. Co.*, 26 Mo. 441; *Gardner v. Hope Ins. Co.*, 9 R. I. 194, 11 Am. Rep. 238; *Yeaton v. Bank of Old Dom.*, 21 Gratt. 593; *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. ed. 204; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. ed. 189; *Miller v. State*, 15 Wall. 478, 21 L. ed. 101; *Holyoke Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133; *Detroit v. Detroit & H. P. R. Co.*, 43 Mich. 140, 5 N. W. 275; *Ashuelot R. R. Co. v. Elliott*, 58 N. H. 451; *Hamilton Gaslight & Coke Co. v. Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Stanislaus County v. San Joaquin, etc., Co.*, 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; *Fair Haven, etc., R. Co. v. New Haven*, 203 U. S. 379, 51 L. ed. 237, 27 Sup. Ct. Rep. 74; *Berea College v. Kentucky*, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645; *Missouri Pacific R. Co. v. Kansas*, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330; *Chicago, etc., R. Co. v. Wisconsin*, 238 U. S. 491, 59 L. ed. 1423, 35 Sup. Ct. Rep. 869, L. R. A. 1916 A, 1133; *International Bridge Co. v. New York*, 254 U. S. 126, 65 L. ed. 176, 41 Sup. Ct. Rep. 56; *Omaha Water Co. v. Omaha*, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614; *Randle v. Winona Coal Co.*, 206 Ala. 254, 89 So. 790, 19 A. L. R. 118; *Arkansas Stove Co. v. State*, 94 Ark. 27, 125 S. W. 1001, 140 Am. St. Rep. 103, 27 L. R. A. (N. S.) 255; *Southington v. Southington Water Co.*, 80 Conn. 646, 69 Atl. 1023, 13 Ann. Cas. 411; *Venner v. Chicago City R. Co.*, 246 Ill. 170, 92 N. E. 643, 138 Am. St. Rep. 229, 20 Ann. Cas. 607; *Webster v.*

hibit special charters, and all corporations are formed by the voluntary association of individuals under general laws.<sup>1</sup>

Perhaps the most interesting question which arises in this discussion is, whether it is competent for the legislature to so bind up its own hands by a grant as to preclude it from exercising for the future any of the essential attributes of sovereignty in regard to any of the subjects within its jurisdiction; whether, for instance, it can agree that it will not exercise the power of taxation, or the police power of the State, or the right of eminent domain, as to certain specified property or persons; and whether, if it shall undertake to do so, the agreement is not void on the general principle that the legislature cannot diminish the power of its successors by irrepealable legislation, and that any other rule might cripple and eventually destroy the government itself. If the legislature has power to do this, it is certainly a very dangerous power, exceedingly liable to abuse, and may possibly come in time to make the constitutional provision in question as prolific of evil as it ever has been, or is likely to be, of good.

Susquehanna Pole Line Co., 112 Md. 416, 76 Atl. 254, 21 Ann. Cas. 357; *People v. Calder*, 153 Mich. 724, 117 N. W. 314, 126 Am. St. Rep. 550; *State v. Louisville, etc., R. Co.*, 97 Miss. 35, 51 So. 918, 53 So. 454, Ann. Cas. 1912 C, 1150; *Somerville v. St. Louis Min., etc., Co.*, 46 Mont. 268, 127 Pac. 464, L. R. A. 1915 B, 811; *McCarter v. Hudson County Water Co.*, 70 N. J. Eq. 695, 65 Atl. 489, 118 Am. St. Rep. 754, 14 L. R. A. (N. S.) 197, 10 Ann. Cas. 116; *Shelton v. Erie R. Co.*, 73 N. J. L. 558, 66 Atl. 403, 118 Am. St. Rep. 704, 9 L. R. A. (N. S.) 727, 9 Ann. Cas. 883; *People v. Gass*, 190 N. Y. 323, 83 N. E. 64, 123 Am. St. Rep. 549, 13 Ann. Cas. 678; *Lord v. Equitable Life Assur. Soc. of U. S.*, 194 N. Y. 212, 87 N. E. 443, 22 L. R. A. (N. S.) 420; *New York, etc., R. Co. v. Williams*, 199 N. Y. 108, 92 N. E. 404, 139 Am. St. Rep. 850, 35 L. R. A. (N. S.) 549; *People v. Beakes Dairy Co.*, 222 N. Y. 416, 119 N. E. 115, 3 A. L. R. 1260; *Dallas Ry. Co. v. Galler*, 114 Tex. 484, 271 S. W. 1106; *affirming*, (Tex. Civ. App.) 245 S. W. 254; *Lawrence v. Rutland R. Co.*, 80 Vt. 370, 67 Atl. 1091, 15 L. R. A. (N. S.) 350, 13 Ann. Cas. 475; *Huber v. Martin*, 127 Wis. 412, 105 N. W. 1031,

115 Am. St. Rep. 1023, 3 L. R. A. (N. S.) 653, 7 Ann. Cas. 400; *State v. Bancroft*, 148 Wis. 124, 134 N. W. 330, 38 L. R. A. (N. S.) 526.

After subscribers to stock have paid for it in full, the legislature cannot increase their liabilities. *Enterprise Ditch Co. v. Moffit*, 58 Neb. 642, 79 N. W. 560, 45 L. R. A. 647.

Where no power to amend a charter has been reserved, amendments may nevertheless be made with the consent of the corporation, but the corporation cannot bind its shareholders by the acceptance of amendments which effect fundamental changes in its character or purpose. See *Gray v. Navigation Co.*, 2 W. & S. 156, 37 Am. Dec. 500; *Stevens v. Rutland, &c. R. R. Co.*, 29 Vt. 545; *Perkins v. Coffin*, 84 Conn. 275, 79 Atl. 1070, Ann. Cas. 1912 C, 1188. Where such power has been reserved, the mode of electing directors may be so modified as to permit cumulative voting in order to secure proportional representation on the board of directors. *Looker v. Maynard*, 179 U. S. 46, 45 L. ed. 79, 21 Sup. Ct. Rep. 21.

<sup>1</sup> Where corporations are thus formed, the articles of association, taken in connection with the General

So far as the power of taxation is concerned, it has been so often decided by the Supreme Court of the United States, though not without remonstrance on the part of State courts,<sup>1</sup> that an agreement by a State, for a consideration received or supposed to be received, that certain property, rights, or franchises shall be exempt from taxation, or to be taxed only at a certain agreed rate, is a contract protected by the Constitution, that the question can no longer be considered an open one.<sup>2</sup> In any case, however, there must be

Statute under which they are entered into, constitute the charter.

<sup>1</sup> *Mechanics' & Traders' Bank v. Debolt*, 1 Ohio St. 591; *Toledo Bank v. Bond*, 1 Ohio St. 622; *Knoop v. Piqua Bank*, 1 Ohio St. 603; *Milan & R. Plank Road Co. v. Husted*, 3 Ohio St. 578; *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35; *Brewster v. Hough*, 10 N. H. 138; *Backus v. Lebanon*, 11 N. H. 19; *Thorpe v. R. & B. R. R. Co.*, 27 Vt. 140; *Brainard v. Colchester*, 31 Conn. 407; *Mott v. Pennsylvania R. R. Co.*, 30 Pa. St. 9; *East Saginaw Salt Manuf. Co. v. East Saginaw*, 19 Mich. 259; *West Wis. R. Co. v. Supervisor of Trempeleau Co.*, 35 Wis. 257, 265; *Attorney-General v. Chicago, &c. R. R. Co.*, 35 Wis. 425, 572. See also the dissenting opinion of Mr. Justice *Miller*, in *Washington University v. Rouse*, 8 Wall. 439, 441, 19 L. ed. 498, in which the Chief Justice and Justice *Field* concurred. Also *Raleigh, &c. R. R. Co. v. Reid*, 64 N. C. 155.

The right of a State legislature to grant away the right of taxation, which is one of the essential attributes of sovereignty, has been strenuously denied. See *Debolt v. Ohio Life Ins. and Trust Co.*, 1 Ohio St. 563; *Mechanics' and Traders' Bank v. Debolt*, 1 Ohio St. 591; *Brewster v. Hough*, 10 N. H. 138; *Mott v. Pennsylvania Railroad Co.*, 30 Pa. St. 9. And see *Thorpe v. Rutland and B. Railroad Co.*, 27 Vt. 140; *ante*, p. 570 and note.

<sup>2</sup> *New Jersey v. Wilson*, 7 Cranch, 164, 3 L. ed. 303; *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. ed. 529; *Piqua Bank v. Knoop*, 16 How. 369, 14 L. ed. 977; *Ohio Life & Trust Co. v. Debolt*, 16 How. 416, 14 L. ed. 997; *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *Mechanics' & Traders' Bank*

*v. Debolt*, 18 How. 380, 15 L. ed. 458; *Mechanics' & Traders' Bank v. Thomas*, 18 How. 384, 15 L. ed. 460; *McGee v. Mathis*, 4 Wall. 143, 18 L. ed. 314; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. ed. 495; *Washington University v. Rouse*, 8 Wall. 439, 19 L. ed. 498; *Wilmington R. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568; *Raleigh & Gaston R. R. Co. v. Reid*, 13 Wall. 269, 20 L. ed. 570; *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326; *Pacific R. R. Co. v. Maguire*, 20 Wall. 36, 22 L. ed. 282; *New Jersey v. Yard*, 95 U. S. 104; 24 L. ed. 352; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; *University v. Illinois*, 99 U. S. 309, 25 L. ed. 387; *New Orleans v. Houston*, 119 U. S. 265, 30 L. ed. 411, 7 Sup. Ct. Rep. 198; *Choate v. Trapp*, 224 U. S. 665, 56 L. ed. 941, 32 Sup. Ct. Rep. 565. See also *Atwater v. Woodbridge*, 6 Conn. 223; *Osborne v. Humphrey*, 7 Conn. 335; *Parker v. Redfield*, 10 Conn. 490; *Landon v. Litchfield*, 11 Conn. 251; *Herrick v. Randolph*, 13 Vt. 525; *Armington v. Barnet*, 15 Vt. 745; *O'Donnell v. Bailey*, 24 Miss. 386; *St. Paul, &c. R. R. Co. v. Parcher*, 14 Minn. 297; *Grand Gulf R. R. Co. v. Buck*, 53 Miss. 246; *Central R. R. Co. v. State*, 54 Ga. 401; *St. Louis, &c. R. Co. v. Loftin*, 30 Ark. 693; *Prop'rs Mt. Auburn Cem. v. Cambridge*, 150 Mass. 12, 22 N. E. 66 (where an exemption from all public taxes was held to cover a sewer assessment); *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968; *Stearns v. Minnesota*, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73; *Berger v. United States Steel Corp.*, (N. J. L.), 53 Atl. 68.

Where the legislature has reserved the right to amend, alter, or repeal any

a consideration, so that the State can be supposed to have received a beneficial equivalent; for it is conceded on all sides that, if the exemption is made as a privilege only, it may be revoked at any time.<sup>1</sup> And it is but reasonable that the exemption be construed with strictness.<sup>2</sup>

and all corporate charters, the withdrawal of an exemption from taxation does not impair the obligation of any contract. *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346. See also *Pratt Institute v. New York*, 183 N. Y. 151, 75 N. E. 1119, 5 Ann. Cas. 198. But taxes cannot, after revocation of an exemption, be levied for any part of the time prior to such revocation. *Louisville Water Co. v. Kentucky*, 170 U. S. 127, 42 L. ed. 975, 18 Sup. Ct. Rep. 571, rev. 18 Ky. L. Rep. 620, 37 S. W. 576.

<sup>1</sup> *Christ Church v. Philadelphia*, 24 How. 300, 16 L. ed. 602; *Brainard v. Colchester*, 31 Conn. 407; *Wisconsin, etc., R. Co. v. Powers*, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107; *Seton Hall College v. South Orange*, 242 U. S. 100, 61 L. ed. 170, 37 Sup. Ct. Rep. 54; *Monaghan v. Lewis*, 5 Penn. (Del.) 218, 59 Atl. 948, 10 Ann. Cas. 1048; *Rochester v. Rochester R. Co.*, 182 N. Y. 99, 74 N. E. 953, 70 L. R. A. 773. See also *Commonwealth v. Bird*, 12 Mass. 442; *Dale v. The Governor*, 3 Stew. 387; *Com'rs Calhoun Co. v. Woodstock Iron Co.*, 82 Ala. 151, 2 So. 132; *Grand Lodge of Louisiana v. New Orleans*, 166 U. S. 143, 41 L. ed. 951, 17 Sup. Ct. Rep. 523. But see *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558, and *Bk. of Commerce v. Tennessee*, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456, both of which seem to overlook the necessity for a consideration.

In *Banning Co. v. California*, 240 U. S. 142, 60 L. ed. 569, 36 Sup. Ct. Rep. 338, the court said: "It was pointed out in *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 379, 386, 48 L. ed. 229, 231, 24 Sup. Ct. Rep. 107, that the offer of a State does not necessarily imply a contract. It may be of encouragement merely, 'holding out a hope, but not amounting to a covenant.' The offer of the State

was an exemption from taxation, and the asserted acceptance of the offer which was said to consummate a contract was the building of a railroad, and it was observed that the 'building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise, if the other half is wanting.' The 'offer' and 'acceptance' we held not to constitute a contract."

<sup>2</sup> See *Cooley on Taxation*, 146, and cases cited; *Hoge v. Railroad Co.*, 99 U. S. 348, 25 L. ed. 303; *Railway Co. v. Philadelphia*, 101 U. S. 528, 25 L. ed. 912; *Vicksburg, S. & P. R. R. Co. v. Dennis*, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625; *Chicago, B. & K. C. Ry. Co. v. Guffey*, 120 U. S. 569, 30 L. ed. 732, 7 Sup. Ct. Rep. 693; *Yazoo & M. R. R. Co. v. Thomas*, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68; *Bk. of Commerce v. Tennessee*, 163 U. S. 416, 41 L. ed. 211, 16 Sup. Ct. Rep. 1113, mod. s. c. 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456; *St. Paul, M. & M. R. Co. v. Todd County*, 142 U. S. 282, 35 L. ed. 1014, 12 Sup. Ct. Rep. 281, aff. 38 Minn. 163, 36 N. W. 109; *Chicago Theological Seminary v. Illinois*, 188 U. S. 662, 47 L. ed. 641, 23 Sup. Ct. Rep. 386; *New York v. State Board of Tax Commissioners*, 199 U. S. 11, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 Ann. Cas. 381, affirming 174 N. Y. 417, 67 N. E. 69, 63 L. R. A. 884; *St. Louis*

*v. United Railways Co.*, 210 U. S. 266, 52 L. ed. 1054, 28 Sup. Ct. Rep. 630; *New York v. Sohmer*, 237 U. S. 276, 59 L. ed. 951, 35 Sup. Ct. Rep. 549; *Robinson v. Indiana, etc., Lumber, etc., Co.*, 128 Ark. 550, 194 S. W. 870, 3 A. L. R. 1426; *People v. Bennett Medical College*, 248 Ill. 608, 94 N. E. 110, 140 Am. St. Rep. 237; *Vogt v. Louisville*, 173 Ky. 119, 190 S. W. 695, Ann. Cas. 1918 E, 1040; *Sibley, etc., R. Co. v. Elliott*, 136 La. 793, 67 So. 884, Ann. Cas. 1916 D, 1228; *New Standard Club v. McGowen*, 111 Miss. 92, 71 So. 289, Ann. Cas. 1918 E, 274; *Scottish Rite Bldg. Co. v. Lancaster County*, 106 Neb. 95, 182 N. W. 574, 17 A. L. R. 1020; *St. Paul's Church v. Concord*, 75 N. H. 420, 75 Atl. 531, 27 L. R. A. (N. S.) 910, Ann. Cas. 1912 A, 350; *Northwest Auto Co. v. Hurlburt*, 104 Ore. 398, 207 Pac. 161; *Camas Stage Co. v. Kozier*, 104 Ore. 600, 209 Pac. 95, 25 A. L. R. 27; *Stillman v. Lynch*, 56 Utah, 540, 192 Pac. 272, 12 A. L. R. 552; *In re Ferrel*, 112 Wash. 231, 192 Pac. 10, 11 A. L. R. 820; *M. E. Church Baraca Club v. Madison*, 167 Wis. 207, 167 N. W. 258, L. R. A. 1918 D, 1124. See also *Wheeling & B. Bridge Co. v. Wheeling Bridge Co.*, 138 U. S. 287, 34 L. ed. 967, 11 Sup. Ct. Rep. 301; *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243, and *Freeport W. Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493.

Exemption will not be presumed. *New Orleans, etc., R. Co. v. New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406; *Northwest Auto Co. v. Hurlburt*, 104 Ore. 398, 207 Pac. 161. But the rule of strict construction as applied to exemption statutes will not be so strictly applied as to render the exempting language so narrow and restricted as to defeat the apparent legislative purpose. *St. Paul's Church v. Concord*, 75 N. H. 420, 75 Atl. 531, 27 L. R. A. (N. S.) 910, Ann. Cas. 1912 A, 350.

If an exemption from taxation exists in any case it must be the result of a deliberate intention to relinquish this prerogative of sovereignty, distinctly manifested. *Easton Bank v. Commonwealth*, 10 Pa. St. 450; *Providence*

*Bank v. Billings*, 4 Pet. 514, 7 L. ed. 939; *Christ Church v. Philadelphia*, 24 How. 300, 16 L. ed. 602; *Gilman v. Sheboygan*, 2 Black, 510, 17 L. ed. 305; *Louisville & N. R. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *Memphis Gaslight Co. v. Shelby Co.*, 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205; *Chicago, B. & K. C. Ry. Co. v. Guffey*, 120 U. S. 569, 30 L. ed. 732, 7 Sup. Ct. Rep. 693; *State v. Hilbert*, 72 Wis. 184, 39 N. W. 326; *Herrick v. Randolph*, 13 Vt. 525; *East Saginaw Salt Manuf. Co. v. East Saginaw*, 19 Mich. 259; in error, 13 Wall. 373, 20 L. ed. 611; *People v. Roper*, 35 N. Y. 629; *People v. Commissioners of Taxes*, 47 N. Y. 501; *People v. Davenport*, 91 N. Y. 574; *Lord v. Litchfield*, 36 Conn. 116, 4 Am. Rep. 41; *Erie Railway Co. v. Commonwealth*, 66 Pa. St. 84, 5 Am. Rep. 351; *Bradley v. McAtee*, 7 Bush, 667, 3 Am. Rep. 309; *North Missouri R. R. Co. v. Maguire*, 49 Mo. 490, 8 Am. Rep. 141; *Illinois Cent. R. R. Co. v. Irvin*, 72 Ill. 452; *Covington v. Kentucky*, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383; *Citizens' Sav. Bk. v. Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530, 571; *Louisville v. Bk. of Louisville*, 174 U. S. 439, 43 L. ed. 1039, 19 Sup. Ct. Rep. 753.

Grant of "powers, rights, and capacities" of old corporation to new does not include exemptions enjoyed by old. *Covington & L. Turnpike Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

An act giving a new corporation "all the . . . powers, rights, reservations, restrictions and liabilities given to and imposed upon" the old, does not convey to the new an exemption from taxation enjoyed by the old. *Home Ins. & T. Co. v. Tennessee*, 161 U. S. 198, 40 L. ed. 669, 16 Sup. Ct. Rep. 476, following *Phoenix F. & M. Ins. Co. v. Tennessee*, above; *People, &c. v. Cook*, 148 U. S. 397, 37 L. ed. 498, 13 Sup. Ct. Rep. 645, aff. 110 N. Y. 443, 18 N. E. 113, 47 Hun, 467. See also *Wilmington & W. R. Co. v. Alsbroom*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72.

In *Wright v. Georgia Railroad, etc., Co.*, 216 U. S. 420, 54 L. ed. 544, 30

Sup. Ct. Rep. 242, the court says: "Whatever doubt . . . may have existed as to the effect of the transfer to one company of the powers and privileges of another in conferring a tax exemption possessed by the latter is set at rest by *Rochester R. Co. v. Rochester*, 205 U. S. 236, 51 L. ed. 784, 791, 27 Sup. Ct. Rep. 469, 474. Mr. Justice *Moody* . . . sums the matter up by saying: 'We think it is now the rule, notwithstanding earlier decisions and *dicta* to the contrary, that a statute authorizing or directing the grant or transfer of the "privileges" of a corporation which enjoys immunity from taxation or regulation should not be interpreted as including that immunity.'" Compare *Memphis & L. R. R. Co. v. R. R. Com'rs*, 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299; *St. Louis Iron M. & S. Ry. Co. v. Berry*, 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529; *Tennessee v. Whitworth*, 117 U. S. 139, 29 L. ed. 833, 6 Sup. Ct. Rep. 645. See *Detroit St. Ry. Co. v. Guthard*, 51 Mich. 180, 16 N. W. 328.

Grant of "all the rights and privileges", omitting "and immunities", impliedly excludes the grant of exemption from taxation enjoyed by old company. *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471, aff. 91 Tenn. 566. And where a corporation is exempt from taxation and becomes insolvent and its charter is sold under judicial decree, but not the shares of stock of the stockholders, the purchasers acquire only the right to reorganize as a corporation, subject to all the laws then in force, including a constitutional amendment passed after the organization of the original corporation and prior to the sale of the charter. *Mercantile Bank v. Tennessee*, 161 U. S. 161, 40 L. ed. 656, 16 Sup. Ct. Rep. 466, aff. 95 Tenn. 212, 31 S. W. 989.

Delay in accepting a charter containing exemptions from taxation until after a constitutional provision prohibiting exemptions has been passed is fatal. *Planters' Ins. Co. v. Tennessee*, 161 U. S. 193, 40 L. ed. 667, 16 Sup. Ct. Rep. 466, aff. 95 Tenn. 203, 31 S. W. 992.

Where a corporation authorized to carry on an insurance business takes advantage, after the adoption of a constitutional provision prohibiting exemptions from taxation, of a statute permitting it to do a banking business, it so radically changes the character of its business as to lose its exemption from taxation. *Memphis City Bank v. Tennessee*, 161 U. S. 186, 40 L. ed. 664, 16 Sup. Ct. Rep. 468, aff. 91 Tenn. 574, 19 S. W. 1045. And when two corporations are consolidated, a new corporation is formed, and if before the consolidation takes place a constitutional prohibition of exemptions from taxation has been made, the legislative grant to the consolidated corporation of all the "rights, privileges, and immunities" of the old corporations is ineffective to exempt the new from taxation. *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592, aff. 99 Mo. 30, 12 S. W. 290; *Yazoo & M. V. R. R. Co. v. Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240, aff. 77 Miss. 302, 305, 315, 24 So. 200, 317, 28 So. 956. The new corporation is subject to all the laws existing at the time of its organization. *People, &c. v. Cook*, 148 U. S. 397, 37 L. ed. 498, 13 Sup. Ct. Rep. 645, aff. 110 N. Y. 443, 18 N. E. 113, 47 Hun, 467.

Exemption of shares of stock from taxation exempts the company unless the contrary expressly appears. *State v. Heppenheimer*, 58 N. J. L. 633, 34 Atl. 1061, 32 L. R. A. 643.

Exemption from taxation of lands granted by Congress until such lands are sold by railroad, extends only to time when equitable title is conveyed, although legal title may not be given until long after. *Winona & St. Peter Land Company v. Minnesota*, 159 U. S. 526, 40 L. ed. 247, 16 Sup. Ct. Rep. 83.

Exemption of the capital of a bank does not include property bought in on foreclosure of its stock and stock-loan mortgages. *Louisiana v. Bd. of Assessors*, 167 U. S. 407, 42 L. ed. 215, 17 Sup. Ct. Rep. 1000; *Bk. of Commerce v. Tennessee*, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456; *Shelby Co. v. Union & Planters' Bank*,

The power of the legislature to preclude itself in any case from exercising the power of eminent domain is not so plainly decided. It must be conceded, under the authorities, that the State may grant exclusive franchises, — like the right to construct the only railroad which shall be built between certain termini; or the only bridge which shall be permitted over a river between specified limits; or to own the only ferry which shall be allowed at a certain point,<sup>1</sup> — but the grant of an exclusive privilege will not prevent the legislature from exercising the power of eminent domain in respect thereto. Franchises, like every other thing of value, and in the nature of property, within the State, are subject to this power; and any of their incidents may be taken away, or themselves altogether annihilated, by means of its exercise.<sup>2</sup> And it is believed that an express agreement in the charter, that the power of eminent domain should not be so exercised as to impair or affect the franchise granted, if not void as an agreement beyond the power of the legislature to make, must be considered as only a valuable portion of the privilege secured by the grant, and as such liable to be appropriated under the power of eminent domain. The exclusiveness of the grant,

161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558.

A State statute provided that the property of a terminal company should be assessed, in conformity with an agreement between the company and the municipality, "at the amount of the capital stock of said company, and no more." It was held, in view of the general attitude of the courts toward claims of exemption, the fact that a subsequent agreement between the company and the municipality showed that the parties concerned did not suppose that they had an irrevocable grant, and the further fact that the Constitution of the State provided that all general laws and special acts, under which corporations were formed or by which they were created, might be altered or repealed, that the repeal of the statute did not impair the obligation of a contract. *New York v. Mealy*, 254 U. S. 47, 65 L. ed. 123, 41 Sup. Ct. Rep. 17.

<sup>1</sup> *West River Bridge Co. v. Dix*, 16 Vt. 446, and 6 How. 507, 12 L. ed. 535; *Binghamton Bridge Case*, 3 Wall. 51, 18 L. ed. 137; *Shorter v. Smith*, 9 Ga. 517; *Piscataqua Bridge v. N. H. Bridge*, 7 N. H. 35; *Boston*

*Water Power Co. v. Boston & Worcester R. R. Co.*, 23 Pick. 360; *Boston & Lowell R. R. v. Salem & Lowell R. R.*, 2 Gray, 1; *Costar v. Brush*, 25 Wend. 628; *California Telegraph Co. v. Alta Telegraph Co.*, 22 Cal. 398; *Williams v. Wingo*, 177 U. S. 601, 44 L. ed. 905, 20 Sup. Ct. Rep. 793; *Vallejo Ferry Co. v. Solano Aquatic Club*, 165 Cal. 255, 131 Pac. 864, Ann. Cas. 1914 C, 1197; *Warner v. Ford Lumber, etc., Co.*, 123 Ky. 103, 93 S. W. 650, 12 L. R. A. (N. S.) 667; *Muncy Elec., etc., Co. v. People's Elec., etc., Co.*, 218 Pa. St. 636, 67 Atl. 956; *Sistersville Ferry Co. v. Russell*, 52 W. Va. 356, 43 S. E. 107, 59 L. R. A. 513; *State v. Fandre*, 54 W. Va. 122, 46 S. E. 269, 102 Am. St. Rep. 927, 63 L. R. A. 877, 1 Ann. Cas. 104.

<sup>2</sup> *Matter of Kerr*, 42 Barb. 119; *Enfield Toll Bridge Co. v. Hartford & N. H. R. R. Co.*, 17 Conn. 40, 454; *West River Bridge Co. v. Dix*, 16 Vt. 446, and 6 How. 507, 12 L. ed. 535; *Philadelphia & Gray's Ferry Co.'s Appeal*, 102 Pa. St. 123; *Appleton Water Works Co. v. Railroad Commission*, 154 Wis. 121, 142 N. W. 476, 47 L. R. A. (N. S.) 770, Ann. Cas. 1915 B, 1160.

and the agreement against interference with it, if valid, constitute elements in its value to be taken into account in assessing compensation; but appropriating the franchise in such a case no more violates the obligation of the contract than does the appropriation of land which the State has granted under an express or implied agreement for quiet enjoyment by the grantee, but which nevertheless may be taken when the public need requires.<sup>1</sup> All grants are subject to this implied condition; and it may well be worthy of inquiry, whether the agreement that a franchise granted shall not afterwards be appropriated can have any other or greater force than words which would make it an exclusive franchise, but which, notwithstanding, would not preclude a subsequent grant on making compensation.<sup>2</sup> The words of the grant are as much in the way

<sup>1</sup> Alabama, &c. R. R. Co. v. Kenney, 39 Ala. 307; Baltimore, &c. Turnpike Co. v. Union R. R. Co., 35 Md. 224; Eastern R. R. Co. v. Boston, &c. R. R. Co., 111 Mass. 125, 15 Am. Rep. 13; Com. v. Broad St. R. Co., 219 Pa. St. 11, 67 Atl. 950.

A way may be condemned through a cemetery in spite of a contract to the contrary. *In re Twenty-second St.*, 15 Phila. 409, 102 Pa. St. 108.

The use of land held by the State under contract to redeliver possession may be condemned. *Tait's Exec. v. Central Lunatic Asylum*, 84 Va. 27, 4 S. E. 697.

That property has been acquired by a corporation under the right of eminent domain does not prevent further appropriation of it under the same right. *Chicago, &c. R. R. Co. v. Lake*, 71 Ill. 333; *Peoria, &c. R. R. Co. v. Peoria, &c. Co.*, 66 Ill. 174; *Eastern R. R. Co. v. Boston, &c. R. R. Co.*, 111 Mass. 125. See *post*, pp. 1115, note 4, 1190, note 2 and cases referred to.

<sup>2</sup> Mr. Greenleaf, in a note to his edition of *Cruise on Real Property*, Vol. II. p. 67, says upon this subject: "In regard to the position that the grant of the franchise of a ferry, bridge, turnpike, or railroad is in its nature exclusive, so that the State cannot interfere with it by the creation of another similar franchise tending materially to impair its value, it is with great deference submitted that an important distinction should be ob-

served between those powers of government which are essential attributes of sovereignty, indispensable to be always preserved in full vigor, such as the power to create revenues for public purposes, to provide for the common defense, to provide safe and convenient ways for the public necessity and convenience, and to take private property for public uses, and the like, and those powers which are not thus essential, such as the power to alienate the lands and other property of the State, and to make contracts of service, or of purchase and sale, or the like. Powers of the former class are essential to the constitution of society, as without them no political community can well exist; and necessity requires that they should continue unimpaired. They are intrusted to the legislature to be exercised, not to be bartered away; and it is indispensable that each legislature should assemble with the same measure of sovereign power which was held by its predecessors. Any act of the legislature disabling itself from the future exercise of powers intrusted to it for the public good must be void, being in effect a covenant to desert its paramount duty to the whole people. It is therefore deemed not competent for a legislature to covenant that it will not, under any circumstances, open another avenue for the public travel within certain limits, or in a certain term of time; such covenant being an alienation of sovereign powers, and



of the grant of a conflicting franchise in the one case as in the other.

It has also been intimated in a very able opinion that the police power of the State could not be alienated even by express grant.<sup>1</sup>

a violation of public duty." See also *Redfield on Railways* (3d ed.), Vol. I. p. 258.

That the intention to relinquish the right of eminent domain is not to be presumed in any legislative grant, see *People v. Mayor, &c. of New York*, 32 Barb. 102; *Illinois & Michigan Canal v. Chicago & Rock Island Railroad Co.*, 14 Ill. 314; *Eastern R. R. Co. v. Boston, &c. R. R. Co.*, 111 Mass. 125, 15 Am. Rep. 13; *Turnpike Co. v. Union R. R. Co.*, 35 Md. 224.

<sup>1</sup> "We think the power of the legislature to control existing railways in this respect may be found in the general control over the police of the country, which resides in the law-making power in all free States, and which is, by the fifth article of the Bill of Rights of this State, expressly declared to reside perpetually and inalienably in the legislature, which is perhaps no more than the enunciation of a general principle applicable to all free States; and which cannot therefore be violated so as to deprive the legislature of the power, even by express grant to any mere public or private corporation. And when the regulation of the policy of a city or town, by general ordinances, is given to such towns and cities, and the regulation of their own internal police is given to railroads, to be carried into effect by their by-laws and other regulations, it is, of course, always, in all such cases, subject to the superior control of the legislature. That is a responsibility which legislatures cannot divest themselves of, if they would." *Thorpe v. R. & B. R. R. Co.*, 27 Vt. 140, 149, per *Redfield*, Ch. J.

In *Northern Pacific R. Co. v. Minnesota*, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341, Mr. Justice Day, who delivered the opinion of the court, said: "There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to

exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power, and not in violation of the Constitutional inhibition against the impairment of the obligation of contracts. In *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556, 567, 38 L. ed. 269, 272, 14 Sup. Ct. Rep. 437, 440, the doctrine was thus laid down by Chief Justice *Fuller*, speaking for the court: 'It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligations of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury. *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 72 Sup. Ct. Rep. 468.'" See also *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; *Chicago, etc., R. Co. v. Tranbarger*, 238 U. S. 67, 59 L. ed.

And this opinion is supported by those cases where it has been held that licenses to make use of property in certain modes may be revoked by the State, notwithstanding they may be connected with grants and based upon a consideration.<sup>1</sup> But this subject we shall recur to hereafter.

1204, 35 Sup. Ct. Rep. 678; *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20, 62 L. ed. 124, 38 Sup. Ct. Rep. 35; *Ft. Smith v. Hunt*, 72 Ark. 556, 82 S. W. 163, 105 Am. St. Rep. 51, 66 L. R. A. 238; *Colorado, etc., R. Co. v. Fort Collins*, 52 Colo. 281, 121 Pac. 747, Ann. Cas. 1913 D, 646; *Blackman Health Resort v. Atlanta*, 151 Ga. 507, 107 S. E. 525, 17 A. L. R. 516; *Ohio, etc., R. Co. v. McClelland*, 25 Ill. 140; *Indianapolis, etc., R. Co. v. Kercheval*, 16 Ind. 84; *Hunter v. Colfax Consol. Coal Co.*, 175 Iowa, 245, 154 N. W. 1037, 157 N. W. 145, L. R. A. 1917 D, 15, Ann. Cas. 1917 E, 803; *Board of Education v. Phillips*, 67 Kan. 549, 73 Pac. 97, 100 Am. St. Rep. 475; *Dirken v. Great Northern Paper Co.*, 110 Me. 374, 86 Atl. 320, Ann. Cas. 1914 D, 396; *State v. Hyman*, 98 Md. 596, 57 Atl. 6, 64 L. R. A. 637, 1 Ann. Cas. 742; *Jones Hollow Ware Co. v. Crane*, 134 Md. 103, 106 Atl. 274, 3 A. L. R. 1658; *State v. New England Furniture, etc., Co.*, 126 Minn. 78, 147 N. W. 951, 52 L. R. A. (N. S.) 932, Ann. Cas. 1915 D, 549; *Oxford Bank v. Love*, 111 Miss. 699, 72 So. 133, 8 A. L. R. 894; *Wallace v. Reno*, 27 Nev. 71, 73 Pac. 528, 103 Am. St. Rep. 747, 63 L. R. A. 337; *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47, 1 Ann. Cas. 66; *Interurban R., etc., Co. v. Public Utilities Commission*, 98 Ohio St. 287, 120 N. E. 831, 3 A. L. R. 696; *Sabre v. Rutland R. Co.*, 86 Vt. 347, 85 Atl. 693, Ann. Cas. 1915 C, 1269; *In re Guerra*, 94 Vt. 1, 110 Atl. 224, 10 A. L. R. 1560; *Victoria v. Victoria Ice, etc., Co.*, 134 Va. 134, 114 S. E. 92, 28 A. L. R. 562.

The legislature cannot make an irrevocable contract as to that which affects public morals or public health, so as to limit the exercise of the police power over the subject-matter. *Butcher's Union Co. v. Crescent City Co.*, 111 U. S. 746, 28 L. ed. 585, 4 Sup.

Ct. Rep. 652. See *State v. Noyes*, 47 Me. 189, on the same subject.

In *Bradley v. McAtee*, 7 Bush, 667, 3 Am. Rep. 309, it was decided that a provision in a city charter that, after the first improvement of a street, repairs should be made at the expense of the city, was not a contract; and on its repeal a lot-owner, who had paid for the improvement, might have his lot assessed for the repairs. Compare *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615.

<sup>1</sup>See, upon this subject, *Brick Presbyterian Church v. Mayor, &c. of New York*, 5 Cow. 538; *Vanderbilt v. Adams*, 7 Cow. 349; *State v. Sterling*, 8 Mo. 697; *Hirn v. State*, 1 Ohio St. 15; *Calder v. Kurby*, 5 Gray, 597; *Brimmer v. Boston*, 102 Mass. 19.

A statute authorizing the suspension of a license to operate a motor vehicle pending the determination of a charge of driving while intoxicated is valid; *People v. Stryker*, 206 N. Y. Supp. 146.

The power of the State, after granting licenses for the sale of liquors and receiving fees therefor, to revoke the licenses by a general law forbidding sales, has been denied in some cases. See *State v. Phalen*, 3 Harr. 441; *Adams v. Hachett*, 27 N. H. 289; *Boyd v. State*, 36 Ala. 329. But there is no doubt this is entirely competent. *Freleigh v. State*, 8 Mo. 606; *State v. Sterling*, 8 Mo. 697; *Calder v. Kurby*, 5 Gray, 597; *Met. Board of Excise v. Barrie*, 34 N. Y. 657; *Baltimore v. Clunet*, 23 Md. 449; *Fell v. State*, 42 Md. 71, 20 Am. Rep. 83; *Commonwealth v. Brennan*, 103 Mass. 70; *McKinney v. Salem*, 77 Ind. 213; *Moore v. Indianapolis*, 120 Ind. 483, 22 N. E. 424; *La Croix v. Co. Com'rs*, 50 Conn. 321; *Brown v. State*, 82 Ga. 224, 7 S. E. 915; *Beer Company v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Ghera v. State*, 16 Ariz. 344, 146 Pac. 494, Ann. Cas. 1916 D, 94; *Sarlo v. Pulaski County*,

It would seem, therefore, to be the prevailing opinion, and one based upon sound reason, that the State cannot barter away, or in any manner abridge or weaken, any of those essential powers which are inherent in all governments, and the existence of which in full vigor is important to the well-being of organized society; and that any contracts to that end are void upon general principles, and cannot be saved from invalidity by the provision of the national Constitution now under consideration. If the tax cases are to be regarded as an exception to this statement, the exception is perhaps to be considered a nominal rather than a real one, since taxation is for the purpose of providing the State a revenue, and the State laws which have been enforced as contracts in these cases have been supposed to be based upon consideration, by which the State receives the benefit which would have accrued from an exercise of the relinquished power in the ordinary mode.

76 Ark. 336, 88 S. W. 953; *Cassidy v. Macon*, 133 Ga. 689, 66 S. E. 941; *Gillesby v. Canyon County*, 17 Idaho, 586, 107 Pac. 71; *Boerner v. Thompson*, 278 Ill. 153, 115 N. E. 866; *State v. Hill*, 177 Iowa, 270, 158 N. W. 518; *Newman v. Lake*, 70 Kan. 848, 79 Pac. 675; *Cassidy v. Drake*, 154 Ky. 25, 156 S. W. 1032; *Clark v. Tower*, 104 Md. 175, 65 Atl. 3; *George v. Travis*, 185 Mich. 597, 152 N. W. 207, L. R. A. 1915 E, 408; *Claussen v. Luverne*, 103 Minn. 491, 115 N. W. 643, 15 L. R. A. (n. s.) 698, 14 Ann. Cas. 673; *State v. Parker Distilling Co.*, 236 Mo. 219, 237 Mo. 103, 139 S. W. 453; *Dinuzzo v. State*, 85 Neb. 351, 123 N. W. 309, 29 L. R. A. (n. s.) 417; *Ex parte Deats*, 22 N. M. 536, 166 Pac. 913; *State v. De Silva*, 105 Tex. 95, 145 S. W. 330; *State v. Burlington Drug Co.*, 84 Vt. 243, 78 Atl. 882; *Krueger v. Colville*, 49 Wash. 295, 95 Pac. 81. Compare *State v. Coake*, 24 Minn. 247; *Pleuler v. State*, 11 Neb. 547, 10 N. W. 481.

An additional license may be required within the period covered by a former one. *Rowland v. State*, 12 Tex. App. 418.

A merchant's license may be revoked by a police regulation inconsistent with it. *State v. Burgoyne*, 7 Lea, 173. But a municipality cannot add to the statutory grounds for revocation. *Lantz v. Hightstown*, 46 N. J. L. 102.

Grants of the right to establish lotteries are mere privileges, and as such are revocable. *Bass v. Nashville*, Meigs, 421, 33 Am. Dec. 154; *State v. Morris*, 77 N. C. 512; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Justice v. Com.*, 81 Va. 209; *State v. Woodward*, 89 Ind. 110; *Douglas v. Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199. But if they are authorized by the constitution, they cannot be abolished by the legislature. *New Orleans v. Houston*, 119 U. S. 265, 30 L. ed. 411, 7 Sup. Ct. Rep. 198. In short, the State cannot by any legislation irrevocably hamper itself in the exercise of its police power. *Toledo, &c. R. R. Co. v. Jacksonville*, 67 Ill. 37; *Chicago Packing Co. v. Chicago*, 88 Ill. 221; *Beer Company v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *People v. Commissioners*, 59 N. Y. 92.

An act requiring all underground electric lines to be laid under the orders of a commission violates no contract rights of their owners. *People v. Squire*, 107 N. Y. 593, 14 N. E. 820.

No doubt if a license is revoked for which the State has collected money, good faith would require that the money be returned. *Hirn v. State*, 1 Ohio St. 15.

*Exclusive Privileges.* Under the rulings of the Federal Supreme Court, the grant of any exclusive privilege by a State, if lawfully made, is a contract, and not subject to be recalled.<sup>1</sup> As every exclusive privilege is in the nature of a monopoly, it may at some time become a question of interest, whether there are any, and if so what, limits to the power of the State to grant them. In former times, such grants were a favorite resort in England, not only to raise money for the personal uses of the monarch, but to reward favorites; and the abuse grew to such enormous magnitude that Parliament in the time of Elizabeth, and again in the times of James I., interfered and prohibited them. What is more important to us is, that in 1602 they were judicially declared to be illegal.<sup>2</sup> These, however, were monopolies in the ordinary occupations of life; and the decision upon them would not affect the special privileges most commonly granted. Where the grant is of a franchise which would not otherwise exist, no question can be made of the right of the State to make it exclusive, unless the constitution of the State forbids it; because, in contemplation of law, no one is wronged when he is only excluded from that to which he never had any right. An exclusive right to build and maintain a toll bridge or to set up a ferry may therefore be granted; and the State may doubtless limit, by the requirement of a license, the number of persons who shall be allowed to engage in employments the entering upon which is not a matter of common right, and which, because of their liability to abuse, may require special and extraordinary police supervision. The business of selling intoxicating drinks and of setting up a lottery are illustrations of such employments. But the grant of a monopoly in one of the ordinary and necessary occupations of life must be as clearly illegal in this country as in England; and it would be impossible to defend and sustain it, except upon the broad ground that the legislature may control and regulate the ordinary employments, even to the extent of fixing the prices of labor and of commodities. As no one pretends that the legislature possesses such a power, and as its existence would be wholly inconsistent with regulated liberty, it must follow that lawful grants of special privileges must be confined to cases where they will take from citizens generally nothing which before pertained to them as of common right.<sup>3</sup>

*Changes in the General Laws.* We have said in another place that citizens have no vested right in the existing general laws of the

<sup>1</sup> *Ante*, p. 570, and cases cited; Slaughter-House Cases, 16 Wall. 36, 74, 21 L. ed. 394, 408.

<sup>2</sup> *Darcy v. Allain*, 11 Rep. 84.

<sup>3</sup> *In re Lowe*, 54 Kan. 757, 39 Pac.

710, 27 L. R. A. 545; *White v. Holman*, 44 Oreg. 180, 74 Pac. 933, 1 Ann. Cas. 843.

The grant of an exclusive privilege in slaughtering cattle in the vicinity

State which can preclude their amendment or repeal, and that there is no implied promise on the part of the State to protect its citizens against incidental injury occasioned by changes in the law.<sup>1</sup> Nevertheless there may be laws which amount to propositions on the part of the State, which, if accepted by individuals, will become binding contracts. Of this class are perhaps to be considered bounty laws, by which the State promises the payment of a gratuity to any one who will do any particular act supposed to be for the State interest. Unquestionably the State may repeal such a law at any time;<sup>2</sup> but when the proposition has been accepted by the performance of the act before the law is repealed, the contract would seem to be complete, and the promised gratuity becomes a legal debt.<sup>3</sup> And where a State was owner of the stock of a bank, and by the law its bills and notes were to be received in payment of all debts due to the State, it was properly held that this law constituted a contract with those who should receive the bills before its repeal and that a repeal of the law could not deprive these holders of the right which it assured. Such a law, with the acceptance of the bills under it, "comes within the definition of a contract. It is a contract founded upon a good and valuable consideration, — a consideration bene-

of New Orleans was upheld as an exercise of the police power, in the *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394. See also *White v. Holman*, 44 Oreg. 180, 74 Pac. 933, 1 Ann. Cas. 843. But the legislature could not by a grant of this kind make an irrevocable contract. In regard to public health and public morals a legislature cannot by any contract limit the exercise of the police power to the prejudice of the general welfare. *Butcher's Union Co. v. Crescent City Co.*, 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652.

An irrevocable contract giving exclusive privileges with reference to lighting a city, may be made. *New Orleans Gaslight Co. v. Louisiana Light Co.*, 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265. So as to the privilege of furnishing water. *New Orleans Water Works v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64, 30 L. ed. 563, 7 Sup. Ct.

Rep. 405; *Citizens' Water Co. v. Bridgeport, &c. Co.*, 55 Conn. 1, 10 Atl. 170.

<sup>1</sup> Quoted in *Graves v. Howard*, 159 N. C. 594, 601, 75 S. E. 998, Ann. Cas. 1914 C, 565.

<sup>2</sup> *Christ Church v. Philadelphia*, 24 How. 300, 16 L. ed. 602; *East Saginaw Salt Manuf. Co. v. East Saginaw*, 19 Mich. 259, 2 Am. Rep. 82, and 13 Wall. 373, 20 L. ed. 611.

The repeal of a statute granting an annuity or pension for past services or providing a system of pensions or annuities for public officers does not violate the obligation of a contract. *Pennie v. Reis*, 132 U. S. 464, 33 L. ed. 426, 10 Sup. Ct. Rep. 149, affirming 80 Cal. 266, 22 Pac. 176; *Dale v. Governor*, 3 Stew. (Ala.) 387; *People v. Coler*, 173 N. Y. 103, 65 N. E. 956; *State v. Policemen's Pension Fund*, 121 Wis. 44, 98 N. W. 954.

<sup>3</sup> *People v. Auditor-General*, 9 Mich. 327; *Smith v. Auditor-General*, 80 Mich. 205, 45 N. W. 136. See *Montgomery v. Kasson*, 16 Cal. 189; *Adams v. Palmer*, 51 Me. 480.

ficial to the State; as its profits are increased by sustaining the credit, and consequently extending the circulation, of the paper of the bank.”<sup>1</sup> [So a law which makes coupons on State bonds receivable for all taxes and dues is a contract, the obligation of which no subsequent law can impair;<sup>2</sup> and an act, changing after issue the place of payment of municipal bonds, is invalid.<sup>3</sup>]

That laws permitting the dissolution of the contract of marriage are not within the intention of the clause of the Constitution under discussion, has been many times affirmed.<sup>4</sup> It has been intimated, however, that, so far as property rights are concerned, the contract must stand on the same footing as any other, and that a law passed after the marriage, vesting the property in the wife for her sole use, would be void, as impairing the obligation of contracts.<sup>5</sup> But certainly there is no such contract embraced in the marriage as would prevent the legislature changing the law, and vesting in the wife solely all property which she should acquire thereafter; and if the property had already become vested in the husband, it would be protected in him, against legislative transfer to the wife, on other grounds than the one here indicated.

“*The obligation of a contract*,” it is said, “consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate,

<sup>1</sup> Woodruff v. Trapnall, 10 How. 190, 13 L. ed. 383. See Winter v. Jones, 10 Ga. 190; Furman v. Nichol, 8 Wall. 44, 19 L. ed. 370; South Carolina v. Stall, 17 Wall. 425, 21 L. ed. 650; Keith v. Clark, 97 U. S. 454, 24 L. ed. 1071; State v. Sneed, 9 Baxt. (Tenn.) 472; Clark v. Keith, 8 Lea (Tenn.) 703.

<sup>2</sup> Antoni v. Wright, 22 Gratt. 833; Hartman v. Greenhow, 102 U. S. 672, 26 L. ed. 271, Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134, and many cases therein cited. Compare Cornwall v. Com., 82 Va. 644; Com. v. Jones, 82 Va. 789; Ellett v. Com., 85 Va. 517, 8 S. E. 246. So of county warrants. People v. Hall, 8 Col. 485, 9 Pac. 34.

State cannot lower the rate of

interest upon its warrants already issued. State v. Barrett, 25 Mont. 112, 63 Pac. 1030.

<sup>3</sup> Dillingham v. Hook, 32 Kan. 185, 4 Pac. 166. So it has been held, is one requiring bonds payable to bearer to be registered. Priestly v. Watkins, 62 Miss. 798. See People v. Otis, 90 N. Y. 48. But compare Gurnee v. Speer, 68 Ga. 711.

<sup>4</sup> Per Marshall, Ch. J., Dartmouth College v. Woodward, 4 Wheat. 518, 629, 4 L. ed. 629; Maynard v. Hill, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723; Maguire v. Maguire, 7 Dana, 181; Clark v. Clark, 10 N. H. 380; Cronise v. Cronise, 54 Pa. St. 255; Carson v. Carson, 40 Miss. 349; Adams v. Palmer, 51 Me. 480; Worthington v. District Court, 37 Nev. 212, 142 Pac. 230, L. R. A. 1916 A, 696.

<sup>5</sup> Holmes v. Holmes, 4 Barb. 295.

according to their settled legal meaning; when it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law which in its operations amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."<sup>1</sup> "It is

<sup>1</sup> *McCracken v. Hayward*, 2 How. 608, 612, 11 L. ed. 397. See also *Myers v. Knickerbocker Trust Co.*, 139 Fed. 111, 71 C. C. A. 199, 1 L. R. A. (N. S.) 1171; *Board of Education v. Littrell*, 173 Ky. 78, 190 S. W. 465; *Graves v. Howard*, 159 N. C. 594, 601, 75 S. E. 998, Ann. Cas. 1914 C, 565; *Blakemore v. Cooper*, 15 N. D. 5, 106 N. W. 566, 125 Am. St. Rep. 574, 4 L. R. A. (N. S.) 1074; *Milwaukee Mechanics' Insurance Co. v. Russell*, 65 Ohio St. 230, 62 N. E. 338, 56 L. R. A. 159; *Cincinnati v. Public Utilities Commission*, 98 Ohio St. 320, 121 N. E. 688, 3 A. L. R. 705; *Barton v. Wichita River Oil Co.* (Tex. Civ. App.), 187 S. W. 1043.

"The obligation of a contract . . . is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation must govern and control the contract, in every shape in which it is intended to bear upon it, whether it affects its validity, construction, or discharge. It is, then, the municipal law of the State whether that be written or unwritten, which is emphatically the law of the contract made within the State, and must govern it throughout, whenever its performance is sought to be enforced." *Washington, J.*, in *Ogden v. Saunders*, 12 Wheat. 213, 257, 259. "As I understand it, the law of the contract forms its obligation." *Thompson, J.*, *ibid.* 302. "The obligation of the contract consists in the power and efficacy of the law which applies to, and enforces performance of, the contract, or the payment of an equivalent for non-performance. The obligation does not inhere and subsist

in the contract itself, *proprio vigore*, but in the law applicable to the contract. This is the sense, I think, in which the Constitution uses the term 'obligation.'" *Trimble, J.*, *ibid.* 318. And see *Van Baumbach v. Bade*, 9 Wis. 559; *Johnson v. Higgins*, 3 Met. (Ky.) 566; *People v. Ingersoll*, 58 N. Y. 1.

A law does not impair the obligation of a contract within the meaning of the Constitution, if neither party is relieved thereby from performing anything of that which he obligated himself to do. But if either party is absolved from performing any of these things, such obligation is impaired, whether absolution is affected directly and expressly or indirectly, and only as the result of some modification of the legal proceedings for enforcement. *State ex rel. National Bond & Security Co. v. Krahmer*, 105 Minn. 422, 117 N. W. 780, 21 L. R. A. (N. S.) 157.

The assurance held out by the revenue laws of a State to purchasers at tax sales that the tax sale certificates and tax deeds issued to them would be *prima facie* evidence of the regularity of the tax proceedings, although relating to the remedy, was held to constitute a substantial inducement to the purchase, entering into the contract with the State, and so materially affecting its value that it could not be taken away by subsequent legislation without impairing its obligation. *Fisher v. Betts*, 12 N. D. 197, 96 N. W. 132; *Blakemore v. Cooper*, 15 N. D. 5, 106 N. W. 566, 125 Am. St. Rep. 574, 4 L. R. A. (N. S.) 1074.

Requirement of a license tax for

the civil obligation of contracts which [the Constitution] is designed to reach; that is, the obligation which is recognized by, and results from, the law of the State in which it is made.<sup>1</sup> If, therefore, a contract when made is by the law of the place declared to be illegal, or deemed to be a nullity, or a *nude pact*, it has no civil obligation; because the law in such cases forbids its having any binding efficacy or force. It confers no legal right on the one party, and no correspondent legal duty on the other. There is no means allowed or recognized to enforce it; for the maxim is *ex nudo pacto non oritur actio*.<sup>2</sup> But when it does not fall within the predicament of being either illegal or void, its obligatory force is coextensive with its

permission to do what a contract with the city gives authority to do, without "let, molestation, or hindrance", is void. *Stein v. Mobile*, 49 Ala. 362, 20 Am. Rep. 283. But licenses in general are subject to the taxing power. *Home Ins. Co. v. Augusta*, 93 U. S. 116, 23 L. ed. 825; *Reed v. Beall*, 42 Miss. 472; *Cooley on Taxation*, 386, and cases cited.

A law taxing a debt to the debtor and making him pay the tax and deduct the amount from the debt is valid. *Lehigh V. R. R. Co. v. Com.*, 129 Pa. St. 429, 18 Atl. 410. So where the debtor, a foreign corporation, has paid for the privilege of being exempt from taxation. *New York, L. E. & W. R. R. Co. v. Com.*, 129 Pa. St. 463, 18 Atl. 412.

A law giving interest on debts, which bore none when contracted, was held void in *Goggans v. Turnispeed*, 1 S. C. (N. S.) 40, 7 Am. Rep. 23.

The legislature cannot authorize the compulsory extinction of ground rents, on payment of a sum in gross. *Palairot's Appeal*, 67 Pa. St. 479, 5 Am. Rep. 450.

A State law, discontinuing a public work, does not impair the obligation of contracts, the contractor having his just claim for damages. *Lord v. Thomas*, 64 N. Y. 107.

A law giving an abutter a right to damages when a railroad is laid in the street is valid as to changes thereafter made by a railroad, though a city ordinance had given it the right to use the street. *Drady v. Des Moines, &c. Co.*, 57 Iowa, 393, 10 N. W. 754. See also *Mulholland v.*

*Des Moines, &c. Co.*, 60 Iowa, 740, 13 N. W. 726.

A statute providing for reversion of land condemned for railroad purposes if work on the road has ceased for eight years is valid. The property right does not attach to the land independent of its use for public purposes. *Skillman v. Chicago, &c. Ry. Co.*, 78 Iowa, 404, 43 N. W. 275.

Where at the time a contract was made a judgment for damages for breach thereof was renewable indefinitely, a later enacted statute limiting absolutely the life of the judgment is void with regard to this contract. *Bettman v. Cowley*, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815, and see also *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216.

Warrant of attorney to holder of note to enter judgment against maker upon default of payment, and issue execution, etc., valid when note was made cannot be invalidated by subsequent statute. *Second Ward Savings Bank v. Schranck*, 97 Wis. 250, 73 N. W. 31, 39 L. R. A. 569.

<sup>1</sup> Quoted in *Graves v. Howard*, 159 N. C. 594, 601, 75 S. E. 998, Ann. Cas. 1914 C, 565.

<sup>2</sup> *Zane v. Hamilton County*, 189 U. S. 370, 47 L. ed. 858, 23 Sup. Ct. Rep. 538; *Griffith v. Connecticut*, 218 U. S. 563, 54 L. ed. 1151, 31 Sup. Ct. Rep. 132; *Reynolds v. Lee*, 180 Ala. 76, 60 So. 101; *Hammond v. Clark*, 136 Ga. 313, 71 S. E. 479, 38 L. R. A. (N. S.) 77; *Hord v. State*, 167 Ind. 622, 79 N. E. 916; *Noble v. Davison*, 177 Ind. 19, 96 N. E. 325; *Westminster Water Co. v. Westminster*,



stipulations.”<sup>1</sup> [The settled judicial construction of a constitutional provision or a statute, so far as contract rights are thereunder acquired, is to be deemed a part of such provision or statute, and enters into and becomes a part of the obligation of the contract; and no subsequent change in construction can be suffered to defeat or impair the contract.<sup>2</sup>]

Such being the obligation of a contract, it is obvious that the rights of the parties in respect to it are liable to be affected in many ways by changes in the laws, which it could not have been the intention of the constitutional provision to preclude. “There are few laws which concern the general police of a State, or the government of its citizens, in their intercourse with each other or with strangers, which may not in some way or other affect the contracts which they have entered into or may thereafter form. For what are laws of evidence, or which concern remedies, frauds, and perjuries, laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which limit the fees of professional men, and the charges of tavern-keepers, and a multitude of others which crowd the codes of every State, but laws which may affect the validity, construction, or duration, or discharge of contracts?”<sup>3</sup> But the changes in these laws are not regarded as necessarily affecting the obligation of contracts. Whatever belongs

98 Md. 551, 56 Atl. 990, 103 Am. St. Rep. 424, 64 L. R. A. 630; *State v. Missouri Pac. R. Co.*, 242 Mo. 339, 147 S. W. 118; *Missouri, etc., R. Co. v. Bailey*, 53 Tex. Civ. App. 295, 115 S. W. 601; *State v. Superior Court*, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913 D, 78; *Baltimore, etc., R. Co. v. Public Service Commission*, 81 W. Va. 457, 94 S. E. 545, L. R. A. 1918 D, 268.

<sup>1</sup> Story on Const. § 1380.

Slave contracts, which were legal when made, are not rendered invalid by the abolition of slavery; nor can the States make them void by their constitutions, or deny remedies for their enforcement. *White v. Hart*, 13 Wall. 646, 20 L. ed. 685; *Osborn v. Nicholson*, 13 Wall. 654, 20 L. ed. 689; *Jacoway v. Denton*, 25 Ark. 641.

An act of indemnity held not to relieve a sheriff from his obligation on his official bond to account for moneys which had been paid away under military compulsion. *State v. Gatzweiler*, 49 Mo. 17, 8 Am. Rep. 119.

An ordinance which in effect denies any contract obligation is not a law impairing the obligation of contract though the obligation does exist. The contract may still be enforced if found to exist notwithstanding such denial. *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575, aff. 78 Minn. 39, 80 N. W. 774, 877.

<sup>2</sup> *Douglass v. Pike County*, 101 U. S. 677, 25 L. ed. 968, and cases cited; *Louisiana v. Pilsbury*, 105 U. S. 278, 26 L. ed. 1090; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Levy v. Hitsche*, 40 La. Ann. 500, 4 So. 472. But such construction is not “settled” by a single decision. *McLure v. Melton*, 24 S. C. 559.

<sup>3</sup> *Washington, J.*, in *Ogden v. Saunders*, 12 Wheat. 213, 259, 6 L. ed. 606, 621. As to the indirect modification of contracts by the operation of police laws, see *ante*, pp. 576–579, notes; *post*, pp. 1225–1270.

merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract;<sup>1</sup> and it does not impair it, provided it leaves the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made.<sup>2</sup>

<sup>1</sup> *Bronson v. Kinzie*, 1 How. 311, 316, 11 L. ed. 143, 145, per *Taney*, Ch. J. See also *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755, 11 Ann. Cas. 589; *Ettor v. Tacoma*, 228 U. S. 148, 57 L. ed. 773, 33 Sup. Ct. Rep. 428; *Myers v. Knickerbocker Trust Co.*, 139 Fed. 111, 71 C. C. A. 199, 1 L. R. A. (N. S.) 1171; *Boswell v. Security Mut. Life Ins. Co.*, 193 N. Y. 465, 86 N. E. 532, 19 L. R. A. (N. S.) 946; *Graves v. Howard*, 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914 C., 565; *Boggess v. Buxton*, 67 W. Va. 679, 69 S. E. 367, 21 Ann. Cas. 289. Whether impairing remedy impairs obligation of contract, see note to 26 L. ed. U. S. 132.

<sup>2</sup> *Stocking v. Hunt*, 3 Denio, 274; *Van Baumbach v. Bade*, 9 Wis. 559; *Bronson v. Kinzie*, 1 How. 316, 11 L. ed. 143; *McCracken v. Hayward*, 2 How. 608, 11 L. ed. 397; *Butler v. Palmer*, 1 Hill, 324; *Van Rensselaer v. Snyder*, 9 Barb. 302, and 13 N. Y. 299; *Conkey v. Hart*, 14 N. Y. 22; *Guild v. Rogers*, 8 Barb. 502; *Story v. Furman*, 25 N. Y. 214; *Coriell v. Ham*, 4 Greene (Iowa), 455; *Heyward v. Judd*, 4 Minn. 483; *Swift v. Fletcher*, 6 Minn. 550; *Maynes v. Moore*, 16 Ind. 116; *Smith v. Packard*, 12 Wis. 371; *Grosvenor v. Chesley*, 48 Me. 369; *Van Rensselaer v. Ball*, 19 N. Y. 100; *Van Rensselaer v. Hays*, 19 N. Y. 68; *Litchfield v. McComber*, 42 Barb. 288; *Paschal v. Perez*, 7 Tex. 348; *Auld v. Butcher*, 2 Kan. 135; *Kenyon v. Stewart*, 44 Pa. St. 179; *Clark v. Martin*, 49 Pa. St. 299; *Rison v. Farr*, 24 Ark. 161; *Oliver v. McClure*, 28 Ark. 555; *Holland v. Dickerson*, 41 Iowa, 367; *Chicago Life Ins. Co. v. Auditor*, 101 Ill. 82; *Wales v. Wales*, 119 Mass. 89; *Sanders v. Hillsborough Insurance Co.*, 44 N. H. 238; *Huntzinger v. Brock*, 44 Grant's Cases, 243; *Mechanics', &c. Bank Appeal*, 31 Conn. 63; *Garland v. Brown's Adm'r*,

23 Gratt. 173; *Chattaroi Ry. Co. v. Kinner*, 81 Ky. 221; *Myers v. Knickerbocker Trust Co.*, 139 Fed. 111, 71 C. C. A. 199, 1 L. R. A. (N. S.) 1171; *Baltimore Sav. Bank v. Weeks*, 110 Md. 78, 72 Atl. 475, 22 L. R. A. (N. S.) 221; *Andrews v. Grand Lodge of Masons*, 189 N. C. 697, 128 S. E. 4; *Graves v. Howard*, 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914 C., 565; *Klein v. Hutton*, 49 N. D. 248, 191 N. W. 485; *Flagg v. Locke*, 74 Vt. 320, 52 Atl. 424.

"Statutes concerning remedies are such as relate to the course and mode of procedure to enforce or defend a substantive right. Matters which belong to the remedy are subject to change and alteration, and even repeal provided the legislation does not operate to impair a contract or deprive one of a vested property right. If the changing or repealing statute leaves the parties a substantial remedy, the legislature does not exceed its authority. Rights and remedies shade one into the other so that it is sometimes difficult to say that a particular act creates a right or merely gives a remedy. So, also, a statute, under the form of taking away or changing a particular remedy, may take away an existing property right, or impair the obligation of a contract." *Ettor v. Tacoma*, 228 U. S. 148, 57 L. ed. 773, 33 Sup. Ct. Rep. 428.

An act declaring that the power of sale contained in a mortgage shall be inoperative when the note it secures is barred by the statute of limitations, which is applicable to contracts which existed at the time of its becoming operative, affects, as to such contracts, only an existing remedy, and does not impair the obligation of the contract, when a reasonable time has elapsed thereafter within which the action could have been instituted. *Graves v. Howard*, 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914 C., 565.

*Changes in Remedies.* It has accordingly been held that laws changing remedies for the enforcement of legal contracts, or abolishing one remedy where two or more existed, may be perfectly valid, even though the new or the remaining remedy be less convenient than that which was abolished, or less prompt and speedy.<sup>1</sup>

A requirement that before a mandamus shall issue to compel the receipt in accordance with contract of coupons for taxes, the petitioner shall pay the tax, and on proving the genuineness of the coupons shall have it refunded, is valid, though adopted after the formation of the contract. *Antoni v. Greenhow*, 107 U. S. 769, 27 L. ed. 468, 2 Sup. Ct. Rep. 91; *Moore v. Greenhow*, 114 U. S. 338, 29 L. ed. 240, 5 Sup. Ct. Rep. 1020. See *Rousseau v. New Orleans*, 35 La. Ann. 557.

A statute providing for a review of judgments does not enter into contracts so that it may not be changed. *Rupert v. Martz*, 116 Ind. 72, 18 N. E. 381. See *United Co's v. Weldon*, 47 N. J. L. 59; *State v. Slevin*, 16 Mo. App. 541. But the collection of a special tax cannot be hindered by requiring, after it is voted, a special collection bond with local sureties: *Edwards v. Williamson*, 70 Ala. 145; or a new and cumbrous mode of collection. *Seibert v. Lewis*, 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190.

<sup>1</sup> *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Beers v. Haughton*, 9 Pet. 329, 9 L. ed. 145; *Tennessee v. Sneed*, 96 U. S. 69, 24 L. ed. 610; *Bumgardner v. Circuit Court*, 4 Mo. 50; *Tarpley v. Hamer*, 17 Miss. 310; *Danks v. Quackenbush*, 1 Denio, 128, 3 Denio, 594, and 1 N. Y. 129; *Bronson v. Newberry*, 2 Doug. (Mich.) 38; *Rockwell v. Hubbell's Adm'rs*, 2 Doug. (Mich.) 197; *Evans v. Montgomery*, 4 W. & S. 218; *Holloway v. Sherman*, 12 Iowa, 282; *Sprecker v. Wakeley*, 11 Wis. 432; *Smith v. Packard*, 12 Wis. 371; *Porter v. Mariner*, 50 Mo. 364; *Morse v. Goold*, 11 N. Y. 281; *Penrose v. Erie Canal Co.*, 56 Pa. St. 46; *Smith v. Van Gilder*, 26 Ark. 527; *Coosa River St. B. Co. v. Barclay*, 30 Ala. 120; *Baldwin v. Newark*, 38 N. J. L. 158; *Moore v. State*, 43 N. J. L. 203; *Newark*

*Savings Bank v. Forman*, 33 N. J. Eq. 436; *Simpson v. Savings Bank*, 56 N. H. 466; *Wilson v. Standefer*, 184 U. S. 399, 46 L. ed. 612, 22 Sup. Ct. Rep. 384; *Waggoner v. Flack*, 188 U. S. 595, 47 L. ed. 609, 23 Sup. Ct. Rep. 345; *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755, 11 Ann. Cas. 589; *Graves v. Howard*, 159 N. C. 594, 75 S. E. 998, Ann. Cas. 1914 C, 565; *Slover v. Union Bank*, 115 Tenn. 347, 89 S. W. 399, 1 L. R. A. (N. S.) 528; *Kirkman v. Bird*, 22 Utah, 100, 61 Pac. 338, 83 Am. St. Rep. 774, 58 L. R. A. 669; *Smith v. Northern Neck Mut. Fire Asso. of Virginia*, 112 Va. 192, 70 S. E. 482, 38 L. R. A. (N. S.) 1016; *Boggess v. Buxton*, 67 W. Va. 679, 69 S. E. 367, 21 Ann. Cas. 289.

"It is true that the remedy for the enforcement of a contract sometimes enters into the contract itself, but that is where an endeavor has been made to so change the existing remedy that there is no effective and enforceable one left, or the remedy is so far impaired that the party desirous of enforcing the contract is left practically without any efficient means of doing so; but in the case of an alteration of a remedy, if one is left or provided which is fairly sufficient, the obligations of a contract are not impaired, although the remedies existing at the time it was entered into are taken away." *Waggoner v. Flack*, 188 U. S. 595, 47 L. ed. 609, 23 Sup. Ct. Rep. 345.

In Nebraska it is held that "a legislative act does not impair the obligation of a contract, entered into before the act became operative, merely because such act abrogates or holds in abeyance an existing remedy for the collection of debts, provided another equally adequate remedy is substituted that does not lessen the value of the contract." *In re Davis*, 103 Neb. 703, 173 N. W. 695.

"Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."<sup>1</sup> To take a strong instance: although the law at the time the contract is made permits the creditor to take the body of his debtor in execution, there can be no doubt of the right to abolish all laws for this

<sup>1</sup> *Sturges v. Crowninshield*, 4 Wheat. 122, 200, 4 L. ed. 529, 549, per *Marshall*, Ch. J.; *Ward v. Farwell*, 97 Ill. 593.

"There is a broad distinction between laws impairing the obligation of contracts and those which simply undertake to give a more efficient remedy to enforce a contract already made." *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755, 11 Ann. Cas. 589.

A statute allowing the defense of want of consideration in a sealed instrument previously given does not violate the obligation of contracts. *Williams v. Haines*, 27 Iowa, 251. See further *Parsons v. Casey*, 28 Iowa, 431; *Curtis v. Whitney*, 13 Wall. 68, 20 L. ed. 513; *Cook v. Gregg*, 46 N. Y. 439.

Right accruing under stipulation in a note to waive process and confess judgment may be taken away. *Worsham v. Stevens*, 66 Tex. 89, 17 S. W. 404. A statutory judgment lien may be taken away. *Watson v. New York Central R. R. Co.*, 47 N. Y. 157; *Woodbury v. Grimes*, 1 Col. 100. *Contra*, *Gunn v. Barry*, 15 Wall. 610, 21 L. ed. 212. The law may be so changed that a judgment lien shall not attach before a levy. *Moore v. Holland*, 16 S. C. 15. It may be extended before it has expired. *Ellis v. Jones*, 51 Mo. 180. The mode of perfecting a lien may be changed before it has actually attached. *Whitehead v. Latham*, 83 N. C. 232.

The value of a mechanic's lien may not be materially affected by a statute making consummate a previously inchoate right of dower. *Buser v. Shepard*, 107 Ind. 417, 8 N. E. 280.

The obligation of the contract is not impaired if a substantial remedy remains. *Richmond v. Richmond, & C. R. R. Co.*, 21 Gratt. 611. See *Mabry v. Baxter*, 11 Heisk. 682; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793;

*Baldwin v. Newark*, 38 N. J. L. 158; *Augusta Bank v. Augusta*, 49 Me. 507; *Thistle v. Frostbury Coal Co.*, 10 Md. 129.

It is competent to provide by law that all mortgages not recorded by a day specified shall be void. *Vance v. Vance*, 32 La. Ann. 186; aff. 108 U. S. 514, 27 L. ed. 808, 2 Sup. Ct. Rep. 854. See *Gilfillan v. Union Canal Co.*, 109 U. S. 401, 27 L. ed. 977, 3 Sup. Ct. Rep. 304; *Gurnee v. Speer*, 68 Ga. 711. But an act which postpones an existing valid mortgage lien and makes a subsequently created lien superior to the mortgage lien, impairs the obligation of the contract. *National Bank of Commerce v. Jones*, 18 Okla. 555, 91 Pac. 191, 12 L. R. A. (N. S.) 310, 11 Ann. Cas. 1041.

Where the individual liability of officers or stockholders in a corporation is a part of the contract itself, it cannot be changed or abrogated as to existing debts. *Hawthorne v. Calef*, 2 Wall. 10, 17 L. ed. 776; *Corning v. McCullough*, 1 N. Y. 47; *Story v. Furman*, 25 N. Y. 214; *Norris v. Wrenshall*, 34 Md. 494; *Brown v. Hitchcock*, 36 Ohio St. 667; *Providence Savings Institute v. Skating Rink*, 52 Mo. 452; *St. Louis, & C. Co. v. Harbine*, 2 Mo. App. 134; *Bernheimer v. Converse*, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755, 11 Ann. Cas. 589; *Myers v. Knickerbocker Trust Co.*, 139 Fed. 111, 71 C. C. A. 199, 1 L. R. A. (N. S.) 1171; *Pusey & Jones Co. v. Love*, 6 Penn. (Del.) 80, 66 Atl. 1013, 130 Am. St. Rep. 144, 11 L. R. A. (N. S.) 953. But where it is imposed as a penalty for failure to perform some corporate or statutory duty, it stands on the footing of all other penalties, and may be revoked in the discretion of the legislature. *Union Iron Co. v. Pierce*, 4 Biss. 327; *Bay City, & C. Co. v. Austin*, 21 Mich. 390; *Breitung v. Lindauer*, 37 Mich. 217; *Gregory v.*

purpose, leaving the creditor to his remedy against property alone. "Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the State may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair the obligation."<sup>1</sup> Nor is there any constitutional objection to such a modification of those laws which exempt certain portions of a debtor's property from execution as shall increase the exemptions to any such extent as shall not take away or substantially impair the remedy, nor to the modifications being made applicable to contracts previously entered into. The State "may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing-apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not, by every sovereignty, according to its own views of policy and humanity. It must reside in every State to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well-being of every community."<sup>2</sup>

Denver Bank, 3 Col. 332. See Coffin v. Rich, 45 Me. 507; Weidenger v. Spruance, 101 Ill. 278. And the legislature may give additional remedies to make the obligation of the stockholder effectual, so long as his original undertaking is not enlarged. Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755, 11 Ann. Cas. 589.

Where formerly when building subject to mechanic's lien stood upon mortgaged premises, it had upon foreclosure of lien to be sold and removed from premises, provision may be made by statute that the court when deeming it to be for best interests of parties may order land and building sold at the same time, giving mortgagee priority of claim upon proceeds of land and lien or priority upon those of buildings. Red Riv. V. Nat. Bk. v. Craig, 181 U. S. 548, 45 L. ed. 994, 21 Sup. Ct. Rep. 703.

<sup>1</sup> Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529, per Marshall, Ch. J.; Mason v. Haile, 12 Wheat. 370, 6 L. ed.

660; Beers v. Haughton, 9 Pet. 329, 9 L. ed. 145; Penniman's Case, 103 U. S. 714, 26 L. ed. 602; Sommers v. Johnson, 4 Vt. 278, 24 Am. Dec. 604; Ware v. Miller, 9 S. C. 13; Bronson v. Newberry, 2 Doug. (Mich.) 38; Maxey v. Loyal, 38 Ga. 531; Kirkman v. Bird, 22 Utah, 100, 61 Pac. 338, 83 Am. St. Rep. 774, 58 L. R. A. 669. A special act admitting a party imprisoned on a judgment for tort to take the poor debtor's oath was sustained in Matter of Nichols, 8 R. I. 50.

<sup>2</sup> Bronson v. Kinzie, 1 How. 311, 315, per Taney, Ch. J.; Rockwell v. Hubbell's Adm'rs, 2 Doug. (Mich.) 197; Quackenbush v. Danks, 1 Denio, 128, 3 Denio, 594, and 1 N. Y. 129; Morse v. Goold, 11 N. Y. 281; Sprecker v. Wakeley, 11 Wis. 432; Cusic v. Douglas, 3 Kan. 123; Maxey v. Loyal, 38 Ga. 531; Hardeman v. Downer, 39 Ga. 425; Hill v. Kessler, 63 N. C. 437; Farley v. Dowe, 45 Ala. 324; Sneider v. Heidelberger, 45 Ala. 126; In re Kennedy, 2 S. C. 216; Mar-

But a homestead exemption law, where none existed before, cannot be applied to contracts entered into before its enactment;<sup>1</sup> and in several recent cases the authority to increase exemptions and make them applicable to existing contracts has been altogether denied,<sup>2</sup> on the ground that, while professedly operating upon the remedy only, they in effect impair the obligation of the contract.<sup>3</sup> [A statute providing that a general assignment for the benefit of creditors shall dissolve all attachments made within ten days prior thereto, is invalid as applied to contracts made when the right of attachment was absolute.<sup>4</sup>] Laws which change the rules of evidence relate to the remedy only; and while, as we have elsewhere shown, such laws may, on general principles, be applied to existing causes of action, so, too, it is plain that they are not precluded from such application by the constitutional clause we are considering.<sup>5</sup> And it has been held that the legislature may even take away a

tin v. Hughes, 67 N. C. 293; Maull v. Vaughn, 45 Ala. 134; Breitung v. Lindauer, 37 Mich. 217; Coleman v. Ballandi, 22 Minn. 144.

Assignments for purpose of evading exemption laws may be prohibited. Sweeney v. Hunter, 145 Pa. 363, 22 Atl. 653, 14 L. R. A. 594.

<sup>1</sup> Gunn v. Barry, 15 Wall. 610, 21 L. ed. 212; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793; Homestead Cases, 22 Gratt. 266; Lessley v. Phipps, 49 Miss. 790; Foster v. Byrne, 76 Iowa, 295, 35 N. W. 513, 41 N. W. 22; Squire v. Mudgett, 61 N. H. 149; Brearley School v. Ward, 201 N. Y. 358, 94 N. E. 1001, 40 L. R. A. (N. S.) 1215, Ann. Cas. 1912 B, 251; Davidson v. Richardson, 50 Oreg. 323, 89 Pac. 742, 91 Pac. 1060, 126 Am. St. Rep. 738, 17 L. R. A. (N. S.) 319. It may, however, be made applicable to previous rights of action for torts. Parker v. Savage, 6 Lea, 406; McAfee v. Covington, 71 Ga. 272.

<sup>2</sup> Johnson v. Fletcher, 54 Miss. 628, 28 Am. Rep. 388; Wilson v. Brown, 58 Ala. 62, 29 Am. Rep. 727; Duncan v. Barnett, 11 S. C. 333, 32 Am. Rep. 476; Harris v. Austell, 2 Bax. 148; Wright v. Straub, 64 Tex. 64; Cochran v. Miller, 74 Ala. 50; Cohn v. Hoffman, 45 Ark. 376; *Re* Estate of Heilbron, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602. See also Canadian

& A. M. & Trust Co. v. Blake, 24 Wash. 102, 63 Pac. 1100.

<sup>3</sup> "Statutes pertaining to the remedy are merely such as relate to the course and form of proceedings, but do not affect the substance of a judgment when pronounced." Per Merrick, Ch. J., in Mortun v. Valentine, 15 La. Ann. 150. See Watson v. N. Y. Central R. R. Co., 47 N. Y. 157; Edwards v. Kearzey, 96 U. S. 595, 24 L. ed. 793.

The Supreme Court of the United States has held that a statute which undertook to exempt from the antecedent debts of an insured policies on his life and their proceeds payable to his estate, was a violation of the constitutional prohibition. Bank of Minden, v. Clement, 256 U. S. 126, 65 L. ed. 857, 41 Sup. Ct. Rep. 408. But if after the debt is contracted and before judgment upon it, the debtor marries, it is held in Tennessee that he is thereby entitled to the exemption in land owned by him before. Dye v. Cook, 88 Tenn. 275, 12 S. W. 631.

<sup>4</sup> Peninsular Lead, etc. Works v. Union Oil, etc., Co., 100 Wis. 488, 76 N. W. 359, 69 Am. St. Rep. 934, 42 L. R. A. 331.

<sup>5</sup> Neass v. Mercer, 15 Barb. 318; Rich v. Flanders, 39 N. H. 304; Howard v. Moot, 64 N. Y. 262; Henry v. Henry, 31 S. C. 1, 9 S. E. 726; Reitler v. Harris, 223 U. S. 437, 56 L. ed. 497,

common-law remedy altogether, without substituting any in its place, if another and efficient remedy remains. Thus, a law abolishing distress for rent has been sustained as applicable to leases in force at its passage;<sup>1</sup> and it was also held that an express stipulation in the lease, that the lessor should have this remedy, would not prevent the legislature from abolishing it, because this was a subject concerning which it was not competent for the parties to contract in such manner as to bind the hands of the State. In the language of the court: "If this is a subject on which parties can contract, and if their contracts when made become by virtue of the Constitution of the United States superior to the power of the legislature, then it follows that whatever at any time exists as part of the machinery for the administration of justice may be perpetuated, if parties choose so to agree. That this can scarcely have been within the contemplation of the makers of the Constitution, and that if it prevail as law it will give rise to grave inconveniences, is quite obvious. Every such stipulation is in its own nature conditional upon the lawful continuance of the process. The State is no party to their contract. It is bound to afford adequate process for the enforcement of rights; but it has not tied its own hands as to the modes by which it will administer justice. Those from necessity belong to the supreme power to prescribe; and their continuance is not the

32 Sup. Ct. Rep. 248; *post*, pp. 777-782. On this subject see the discussions in the Federal courts. *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143; *McCracken v. Hayward*, 2 How. 608, 11 L. ed. 397; *Curtis v. Whitney*, 13 Wall. 68, 20 L. ed. 513.

"So far as the Federal Constitution is concerned, it is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government." *State v. Lapointe*, 81 N. H. 227, 123 Atl. 692, 31 A. L. R. 1212.

A statute making the entry upon the official record of the forfeiture of school land for default in payment of the purchase price *prima facie*, but not conclusive, evidence that all preliminary steps essential to a valid forfeiture were properly taken, and that the forfeiture was duly declared,

does not offend against the contract clause of the Constitution, even where the change is made applicable to pending causes. *Reitler v. Harris*, 223 U. S. 437, 56 L. ed. 497, 32 Sup. Ct. Rep. 248.

An act declaring that no policy of life insurance shall be received in evidence, when the application is referred to in it, unless a copy thereof is attached to it, is valid. *New Era Life Ass. v. Musser*, 120 Pa. St. 384, 14 Atl. 155. But the rule that failure to register evidences of titles shall not render them inadmissible in evidence, cannot be changed by a new constitution. This is put on the ground that the only means to establish and enforce the contract would be thus destroyed. *Texas Mex. Ry. Co. v. Locke*, 74 Tex. 370, 12 S. W. 80.

<sup>1</sup> *Van Rensselaer v. Snyder*, 9 Barb. 302, and 13 N. Y. 299; *Guild v. Rogers*, 8 Barb. 502; *Conkey v. Hart*, 14 N. Y. 22.

subject of contract between private parties. In truth, it is not at all probable that the parties made their agreement with reference to the possible abolition of distress for rent. The first clause of this special provision is, that the lessor may distrain, sue, re-enter, or resort to any other legal remedy, and the second is, that in cases of distress the lessee waives the exemption of certain property from the process, which by law was exempted. This waiver of exemption was undoubtedly the substantial thing which the parties had in view; but yet perhaps their language cannot be confined to this object, and it may therefore be proper to consider the contract as if it had been their clear purpose to preserve their legal remedy, even if the legislature should think fit to abolish it. In that aspect of it the contract was a subject over which they had no control.”<sup>1</sup>

But a law which deprives a party of all legal remedy must necessarily be void. “If the legislature of any State were to undertake to make a law preventing the legal remedy upon a contract lawfully made and binding on the party to it, there is no question that such legislature would, by such act, exceed its legitimate powers. Such an act must necessarily impair the obligation of the contract within the meaning of the Constitution.”<sup>2</sup> This has been held in regard to those cases in which it was sought to deprive certain classes of persons of the right to maintain suits because of their having par-

<sup>1</sup> *Conkey v. Hart*, 14 N. Y. 22, 30; citing *Handy v. Chatfield*, 23 Wend. 35; *Mason v. Haile*, 12 Wheat. 370, 6 L. ed. 660; *Stocking v. Hunt*, 3 Denio, 274; and *Van Rensselaer v. Snyder*, 13 N. Y. 299. See *Briscoe v. Anketell*, 28 Miss. 361; *Manteleone v. Seaboard, etc., Ins. Co.*, 126 La. 807, 52 So. 1032; *Scott v. Barnes County*, 15 N. D. 259, 107 N. W. 61.

<sup>2</sup> *Call v. Hagger*, 8 Mass. 430. See *Osborn v. Nicholson*, 13 Wall. 662, 20 L. ed. 695; *U. S. v. Conway*, Hempst. 313; *Johnson v. Bond*, Hempst. 533; *West v. Sansom*, 44 Ga. 295; *Griffin v. Wilcox*, 21 Ind. 370; *Penrose v. Erie Canal Co.*, 56 Pa. St. 46; *Thompson v. Commonwealth*, 81 Pa. St. 314; *Oshkosh Waterworks Co. v. Oshkosh*, 187 U. S. 437, 47 L. ed. 249, 23 Sup. Ct. Rep. 234; *Waggoner v. Flock*, 188 U. S. 595, 47 L. ed. 609, 23 Sup. Ct. Rep. 345; *National Surety Co. v. Architectural Decorating Co.*, 226 U. S. 276, 57 L. ed. 221, 33 Sup. Ct. Rep. 17; *ante*, p. 517.

An act withdrawing all the property of a debtor from the operation of legal process, leaving only a barren right to sue, is void. *State v. Bank of South Carolina*, 1 S. C. 63.

As the States are not suable except at their own option, the laws which they may pass for the purpose they may repeal at discretion. *Railroad Co. v. Tennessee*, 101 U. S. 337, 25 L. ed. 960; *Railroad Co. v. Alabama*, 101 U. S. 832, 25 L. ed. 973; *State v. Bank*, 3 Bax. 395; *In re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Baltzer v. North Carolina*, 161 U. S. 240, 40 L. ed. 684, 16 Sup. Ct. Rep. 500, and this even after suit has been instituted. *Horne v. State*, 84 N. C. 362; *Railroad Co. v. Tennessee*, *supra*. The more so where the judgment of the court is only recommendatory. *Baltzer v. North Carolina*, 161 U. S. 240, 40 L. ed. 684, 16 Sup. Ct. Rep. 500.



ticipated in rebellion against the government.<sup>1</sup> And where a statute does not leave a party a substantial remedy according to the course of justice as it existed at the time the contract was made, but shows upon its face an intention to clog, hamper, or embarrass the proceedings to enforce the remedy, so as to destroy it entirely, and thus impair the contract so far as it is in the power of the legislature to do it, such statute cannot be regarded as a mere regulation of the remedy, but is void, because a substantial denial of right.<sup>2</sup> But a judgment for a tort is not a contract, since it is not based upon the assent of parties.<sup>3</sup>

<sup>1</sup> *Rison v. Farr*, 24 Ark. 611; *McFarland v. Butler*, 8 Minn. 116; *Jackson v. Butler*, 8 Minn. 117.

But there is nothing to preclude the people of a State, in an amendment to their constitution, taking away rights of action, or other rights, so long as they abstain from impairing the obligation of contracts, and from imposing punishments. The power to do so has been exercised with a view to the quieting of controversies and the restoration of domestic peace after the late civil war. Thus, in Missouri and some other States, all rights of action for anything done by the State or Federal military authorities during the war were taken away by constitutional provision; and the authority to do this was fully supported. *Drehman v. Stifle*, 41 Mo. 184, in error, 8 Wall. 595, 19 L. ed. 508. And see *Hess v. Johnson*, 3 W. Va. 645. A remedy also may be denied to a party until he has performed his duty to the State in respect to the demand in suit; *e.g.* paid the tax upon the debt sued for. *Walker v. Whitehead*, 43 Ga. 538; *Garrett v. Cordell*, 43 Ga. 366; *Welborn v. Akin*, 44 Ga. 420. But this is denied as regards contracts entered into before the passage of the law. *Walker v. Whitehead*, 16 Wall. 314, 21 L. ed. 357; *Lathrop v. Brown*, 14 Fed. Cas. No. 8, 108, 1 Woods, 474; *Macon, etc., R. Co. v. Little*, 45 Ga. 370; *Vanduzer v. Heard*, 47 Ga. 624; *Mitchell v. Cothrans*, 49 Ga. 125; *Gardner v. Jeter*, 49 Ga. 195; *Kimbro v. Fulton Bank*, 49 Ga. 419; *Shaw v. Robinson*, 111 Ky. 715, 64 S. W. 620.

<sup>2</sup> *Oatman v. Bond*, 15 Wis. 20. See

also *Hendrickson v. Apperson*, 245 U. S. 105, 62 L. ed. 178, 38 Sup. Ct. Rep. 44. As to control of remedies, see *post*, p. 754.

The remedy to enforce a contract is a part of the contract, and any subsequent law of the State which so affects the remedy as to substantially impair and lessen the value of the contract is such an impairment of the obligation of the contract as to bring it within the inhibition of the Constitution. *Re Fidelity State Bank*, 35 Idaho, 797, 209 Pac. 449, 31 A. L. R. 781. See also *Myers v. Knickerbocker Trust Co.*, 139 Fed. 111, 71 C. C. A. 199, 1 L. R. A. (N. S.) 1171; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; *Blakemore v. Cooper*, 15 N. D. 5, 106 N. W. 566, 125 Am. St. Rep. 574, 4 L. R. A. (N. S.) 1074.

<sup>3</sup> *Louisiana v. New Orleans*, 109 U. S. 285, 27 L. ed. 936, 3 Sup. Ct. Rep. 211; *Freeland v. Williams*, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. Rep. 763; *Peerce v. Kitzmiller*, 19 W. Va. 564. In the former case a judgment for injury done by a mob became uncollectible by the diminution by legislation of the taxing power of the city. In the two latter, recovery for a tort committed as an act of war was forbidden after judgment by constitutional amendment. Both the enactment and the amendment were upheld. See also *Douglass v. Loftus*, 85 Kan. 720, 119 Pac. 74, Ann. Cas. 1913 A, 378, L. R. A. 1915 B, 797; *State v. New Orleans*, 38 La. Ann. 119, and cases *post*, p. 757, note 1.

A judgment for damages for a

It has also been held where a statute dividing a town and incorporating a new one enacted that the new town should pay its proportion towards the support of paupers then constituting a charge against the old town, that a subsequent statute exonerating the new town from this liability was void, as impairing the contract created by the first-mentioned statute;<sup>1</sup> but there are cases which have reached a different conclusion, reasoning from the general and almost unlimited control which the State retains over its municipalities.<sup>2</sup> In any case the lawful repeal of a statute cannot constitutionally be made to destroy contracts which have been entered into under it; these being legal when made, they remain valid notwithstanding the repeal.<sup>3</sup>

So where, by its terms, a contract provides for the payment of money by one party to another, and, by the law then in force, property would be liable to be seized, and sold on execution to the highest bidder, to satisfy any judgment recovered on such contract, a subsequent law, forbidding property from being sold on execution for less than two-thirds the valuation made by appraisers, pursuant to the directions contained in the law, though professing to act only on the remedy, amounts to a denial or obstruction of the rights accruing by the contract, and is directly obnoxious to the prohibition of the Constitution.<sup>4</sup> So a law which takes away from mort-

trespass to real estate, where the tort benefited the tortfeasor's estate to the full extent of the actual damages recovered by the injured party, is not a judgment upon a tort, pure and simple, but upon a cause of action so far contractual as to bring the judgment within the protection of the provisions of the Federal Constitution against legislation impairing the obligation of a contract. *Douglass v. Loftus*, 85 Kan. 720, 119 Pac. 74, L. R. A. 1915 B, 797, Ann. Cas. 1913 A, 378.

<sup>1</sup> *Bowdoinham v. Richmond*, 6 Me. 112.

<sup>2</sup> See *ante*, pp. 395-399, and cases cited in notes.

<sup>3</sup> *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515; *McCauley v. Brooks*, 16 Cal. 11; *Commonwealth v. New Bedford Bridge*, 2 Gray, 339; *State v. Phalen*, 3 Harr. 441; *State v. Hawthorn*, 9 Mo. 389.

<sup>4</sup> *McCracken v. Hayward*, 2 How. 608, 11 L. ed. 397; *Willard v. Longstreet*, 2 Doug. (Mich.) 172; *Rawley v. Hooker*, 21 Ind. 144.

So a law which, as to existing mortgages forecloseable by sale, prohibits the sale for less than half the appraised value of the land, is void for the same reason. *Gantly's Lessee v. Ewing*, 3 How. 707, 11 L. ed. 794; *Bronson v. Kinzie*, 1 How. 311, 11 L. ed. 143. See to like effect, *Robards v. Brown*, 40 Ark. 423; *Collins v. Collins*, 79 Ky. 88. So one which takes away the power of sale. *O'Brien v. Krenz*, 36 Minn. 136, 30 N. W. 458. And a law authorizing property to be given up in satisfaction of a contract is void. *Abercrombie v. Baxter*, 44 Ga. 36.

The "scaling laws", so called, under which contracts made while Confederate notes were the only currency, are allowed to be satisfied on payment of a sum equal to what the sum called for by them in Confederate notes was worth when they were made, have been sustained, but this is on the assumption that the contracts are enforced as near as possible according to the actual intent. *Harmon v. Wallace*, 2 S. C. 208; *Robeson v.*

gagees the right to possession under their mortgages until after foreclosure, is void, because depriving them of the right to the rents and profits, which was a valuable portion of the right secured by the contract. "By this act the mortgagee is required to incur the additional expense of a foreclosure, before obtaining possession, and is deprived of the right to add to his security, by the perception of the rents and profits of the premises, during the time required to accomplish this and the time of redemption, and during that time the rents and profits are given to another, who may or may not appropriate them to the payment of the debt, as he chooses, and the mortgagee in the meantime is subjected to the risk, often considerable, of the depreciation in the value of the security."<sup>1</sup> So a law is void which extends the time for the redemp-

Brown, 63 N. C. 554; Hillard v. Moore, 65 N. C. 540; Pharis v. Dice, 21 Gratt. 303; Thorington v. Smith, 8 Wall. 1, 19 L. ed. 361.

A statute is bad which permits in such case a recovery of what a jury may think is the fair value of the property sold. Effinger v. Kenney, 115 U. S. 566, 29 L. ed. 495, 6 Sup. Ct. Rep. 179.

<sup>1</sup> Mundy v. Monroe, 1 Mich. 68, 76; Blackwood v. Vanvleet, 11 Mich. 252. Compare Dikeman v. Dikeman, 11 Paige, 484; James v. Stull, 9 Barb. 482; Cook v. Gray, 2 Houst. 455.

A statute relative to mortgage foreclosure sales is unconstitutional as to existing mortgages as impairing the obligation of the contract, in so far as it requires the sheriff to postpone the sale for one year and gives the mortgagor possession of the premises during that time, when the former law gave the mortgagee the right to an immediate sale with the right of possession during the period of redemption. Strand v. Griffith, 63 Wash. 334, 115 Pac. 512. But in Berthold v. Fox, 13 Minn. 501, it was decided that in the case of a mortgage given while the law allowed the mortgagee possession during the period allowed for redemption after foreclosure, such law might be so changed as to take away this right.

A redemption law cannot take from the mortgagee the right to recover rents from the owner in possession after foreclosure sale. Travelers Ins.

Co. v. Brouse, 83 Ind. 62. But the debtor's tenant in possession may be made primarily liable to the mortgagee instead of to the debtor. Edwards v. Johnson, 105 Ind. 594, 5 N. E. 716.

In Baldwin v. Flagg, 43 N. J. L. 495, it was held that where bond and mortgage had been given, it was not competent to provide by subsequent legislation that the mortgage should be first foreclosed, and resort to the bond only had in case of deficiency. Nor that the foreclosure sale should be opened if a judgment is had upon the bond. Coddington v. Bispham, 36 N. J. Eq. 574. See Morris v. Carter, 46 N. J. L. 260; Toffey v. Atcheson, 42 N. J. Eq. 182, 6 Atl. 885.

A stipulation in a chattel mortgage that the mortgagee may take possession whenever he deems himself insecure, is not to be impaired by subsequent legislation forbidding him to do so without just cause. Boice v. Boice, 27 Minn. 371, 7 N. W. 687. Reducing the rate of interest payable on redemption to the foreclosure purchaser violates no contract with the mortgagee. Conn. Mut. Ins. Co. v. Cushman, 108 U. S. 51, 27 L. ed. 648, 2 Sup. Ct. Rep. 236.

A statute which provides that mortgages and deeds of trust shall, notwithstanding any provision therein, be foreclosed by action is remedial and does not violate the prohibition against impairing the obligation of a contract. Schwertner v. Provident

tion of lands sold on execution, or for delinquent taxes, after the sales have been made; for in such a case the contract with the purchaser, and for which he has paid his money, is, that he shall have title at the time then provided by the law; and to extend the time for redemption is to alter the substance of the contract, as much as would be the extension of the time for payment of a promissory note.<sup>1</sup> So a law which shortens the time for redemption from a mortgage, after a foreclosure sale has taken place, is void; the rights of the party being fixed by the foreclosure and the law then in force, and the mortgagor being entitled, under the law, to possession of the land until the time for redemption expires.<sup>2</sup> And where by statute a purchaser of lands from the State had the right, upon the

Mut. Building-Loan. Assoc., 17 Ariz. 93, 148 Pac. 910. See also *Scott v. District Court*, 15 N. D. 259, 107 N. W. 61.

A law changing the requirements as to the notices of a mortgage foreclosure sale is valid, since it merely affects the remedy and not the obligation of the contract. *Strand v. Griffith*, 63 Wash. 334, 115 Pac. 512. In *Cook v. Gray*, 2 Houst. 455, it was held that a statute shortening the notice to be given on foreclosure of a mortgage under the power of sale, from twenty-four to twelve weeks, was valid as affecting the remedy only; and that a stipulation in a mortgage that on default being made in payment the mortgagee might sell "according to law", meant according to the law as it should be when sale was made. But see *Ashuelot R. R. Co. v. Eliot*, 52 N. H. 387, and what is said on the general subject in *Cochran v. Darcy*, 5 Rich. 125.

<sup>1</sup> *Robinson v. Howe*, 13 Wis. 341; *Dikeman v. Dikeman*, 11 Paige, 484; *Goenen v. Schroeder*, 8 Minn. 387; *January v. January*, 7 T. B. Monr. 542, 18 Am. Dec. 211; *Greenfield v. Dorris*, 1 Sneed, 550; *Barnitz v. Beverly*, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042, rev. 55 Kan. 466, 42 Pac. 725, 31 L. R. A. 74; *Rott v. Steffins*, 229 Mich. 241, 201 N. W. 227, 38 A. L. R. 224; *Pace v. Wight*, 25 N. W. 276, 181 Pac. 430. See also *Welsh v. Cross*, 146 Cal. 621, 81 Pac. 229, 106 Am. St. Rep. 63, 2 Ann. Cas. 796. But see

*Stone v. Basset*, 4 Minn. 298; *Heyward v. Judd*, 4 Minn. 483; *Freborn v. Pettibone*, 5 Minn. 277; *Davis v. Rupe*, 114 Ind. 588, 17 N. E. 163.

A provision that the right to redeem from a pre-existing mortgage shall not expire if a creditor of the mortgagor comes into equity and gets a decree to enable him to fulfill the conditions of the mortgage and hold the property, is void as against the mortgagee. *Phinney v. Phinney*, 81 Me. 450. So, on the other hand, a law is void which takes away an existing right of a creditor of the mortgagor to redeem from the sale. *O'Brien v. Krenz*, 36 Minn. 136, 30 N. W. 458.

<sup>2</sup> *Cargill v. Power*, 1 Mich. 369; *Turk v. Mayberry*, 32 Okla. 66, 121 Pac. 665. The contrary ruling was made in *Butler v. Palmer*, 1 Hill, 324, by analogy to the Statute of Limitations. The statute, it was said, was no more in effect than saying: "Unless you redeem within the shorter time prescribed, you shall have no action for a recovery of the land, nor shall your defense against an action be allowed, provided you get possession." And in *Robinson v. Howe*, 13 Wis. 341, 346, the court, speaking of a similar right in a party, say: "So far as his right of redemption was concerned, it was not derived from any contract, but was given by the law only; and the time within which he might exercise it might be shortened by the legislature, provided a reasonable time was left in which to

forfeiture of his contract of purchase for the non-payment of the sum due upon it, to revive it at any time before a public sale of the lands, by the payment of all sums due upon the contract, with a penalty of five per cent, it was held that this right could not be taken away by a subsequent change in the law which subjected the forfeited lands to private entry and sale.<sup>1</sup> And a statute which authorizes stay of execution, for an unreasonable or indefinite period, on judgments rendered on pre-existing contracts, is void, as postponing payment, and taking away all remedy during the continuance of the stay.<sup>2</sup> And a law is void on this ground which declares a forfeiture of the charter of a corporation for acts or omissions

exercise it, without impairing the obligation of any contract." And see *Smith v. Packard*, 12 Wis. 371, to the same effect.

An increase of the rate of interest to be paid on redemption of a pre-existing mortgage is bad. *Hillebert v. Porter*, 28 Minn. 496, 11 N. W. 84.

<sup>1</sup> *State v. Commissioners of School and University Lands*, 4 Wis. 414.

A right to reimbursement if a tax purchase is set aside cannot by subsequent legislation be taken away from the purchaser of a tax title. *State v. Foley*, 30 Minn. 350, 15 N. W. 375.

<sup>2</sup> *Chadwick v. Moore*, 8 W. & S. 49; *Bunn v. Gorgas*, 41 Pa. St. 441; *Townsend v. Townsend*, Peck, 1, 14 Am. Dec. 722; *Stevens v. Andrews*, 31 Mo. 205. *Hasbrouck v. Shipman*, 16 Wis. 296; *Jacobs v. Smallwood*, 63 N. C. 112; *Webster v. Rose*, 6 Heisk. 93; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793.

A law permitting a year's stay upon judgments where security is given was held valid in *Farnsworth v. Vance*. 2 Cold. 108; but this decision was overruled in *Webster v. Rose*, 6 Heisk. 93, 19 Am. Rep. 583.

A statute was held void which stayed all proceedings against volunteers who had enlisted "during the war", this period being indefinite. *Clark v. Martin*, 3 Grant's Cas. 393. But in *Breitenbach v. Bush*, 44 Pa. St. 313, and *Coxe v. Martin*, 44 Pa. St. 322, it was held that an act staying all civil process against volunteers who had enlisted in the national service for three years or during the

war was valid, — "during the war" being construed to mean unless the war should sooner terminate. See also *State v. Carew*, 13 Rich. 498.

A general law that all suits pending should be continued until peace between the Confederate States and the United States was held void in *Burt v. Williams*, 24 Ark. 94. See also *Taylor v. Stearns*, 18 Gratt. 244; *Hudspeth v. Davis*, 41 Ala. 389; *Aycock v. Martin*, 37 Ga. 124; *Coffman v. Bank of Kentucky*, 40 Miss. 29; *Jacobs v. Smallwood*, 63 N. C. 112; *Cutts v. Hardee*, 38 Ga. 350; *Sequestration Cases*, 30 Tex. 688. In *Johnson v. Higgins*, 3 Met. (Ky.) 566, it was held that the act of the Kentucky legislature of May 24, 1861, which forbade the rendition in all the courts of the State, of any judgment from date till January 1st, 1862, was valid. It related, it was said, not to the remedy for enforcing a contract, but to the courts which administer the remedy; and those courts, in a legal sense, constitute no part of the remedy. A law exempting soldiers from civil process until thirty days after their discharge from military service was held valid as to all contracts subsequently entered into, in *Burns v. Crawford*, 34 Mo. 330. And see *McCormick v. Rusch*, 15 Iowa, 127. A statute suspending limitation laws during the existence of civil war, and until the State was restored to her proper relations to the Union, was sustained in *Bender v. Crawford*, 33 Tex. 745. Compare *Bradford v. Shine*, 13 Fla. 393.

which constituted no cause of forfeiture at the time they occurred.<sup>1</sup> And it has been held that where a statute authorized a municipal corporation to issue bonds, and to exercise the power of local taxation in order to pay them, and persons bought and paid value for bonds issued accordingly, this power of taxation is part of the contract, and cannot be withdrawn until the bonds are satisfied; that an attempt to repeal or restrict it by statute is void; and that unless the corporation imposes and collects the tax in all respects as if the subsequent statute had not been passed, it will be compelled to do so by *mandamus*.<sup>2</sup> And it has also been held that a statute repealing a former statute, which made the stock of stockholders in a corporation liable for its debts, was, in respect to creditors existing at the time of the repeal, a law impairing the obligation of contracts.<sup>3</sup> In each of these cases it is evident that substantial rights were affected; and so far as the laws which were held void operated upon the remedy, they either had an effect equivalent to importing some new stipulation into the contract, or they failed to leave the party a substantial remedy such as was assured to him by the law in force when the contract was made. In Pennsylvania it has been held that a statute authorizing a stay of execution on contracts in which the debtor had waived the right was unconstitutional;<sup>4</sup> but it seems to

<sup>1</sup> *People v. Jackson & Michigan Plank Road Co.*, 9 Mich. 285, per *Christiancy, J.*; *State v. Tombeckbee Bank*, 2 Stew. 30. See *Ireland v. Turnpike Co.*, 19 Ohio St. 369.

<sup>2</sup> *Von Hoffman v. Quincy*, 4 Wall. 535, 18 L. ed. 403; *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760; *Loumand v. New Orleans*, 102 U. S. 203, 26 L. ed. 132; *Wolff v. New Orleans*, 103 U. S. 358, 26 L. ed. 395; *Nelson v. St. Martin's Parish*, 111 U. S. 716, 28 L. ed. 574, 4 Sup. Ct. Rep. 648; *Beckwith v. Racine*, 7 Biss. 142; *Folsom v. Greenwood County*, 137 Fed. 449, 69 C. C. A. 473; *People ex rel. O'Connell v. Chicago, etc., R. Co.*, 256 Ill. 388, 100 N. E. 35; *Gibbons v. Hood River Irr. Dist.*, 66 Oreg. 208, 133 Pac. 772; *Fremont, etc., R. Co. v. Pennington County*, 20 S. D. 270, 105 N. W. 929. See also *Louisiana ex rel. Hubert v. New Orleans*, 215 U. S. 170, 54 L. ed. 144, 30 Sup. Ct. Rep. 40; *Hendrickson v. Apperson*, 245 U. S. 105, 38 Sup. Ct. Rep. 44, 62 L. ed. 178; *Ft. Madison v. Ft. Madison Water Co.*, 134 Fed. 214,

67 C. C. A. 142; *Welch Water, etc., Co. v. Welch*, 64 W. Va. 373, 62 S. E. 497. Compare *Arkansas Southern R. Co. v. Louisiana, etc., R. Co.*, 218 U. S. 431, 54 L. ed. 1097, 31 Sup. Ct. Rep. 56; *People ex rel. Booth v. Opel*, 244 Ill. 317, 91 N. E. 458.

The liability cannot be escaped by turning a city into a mere taxing district. *Mobile v. Watson*, 116 U. S. 289, 29 L. ed. 620, 6 Sup. Ct. Rep. 398; *O'Connor v. Memphis*, 6 Lea, 730. See also *Soutter v. Madison*, 15 Wis. 30; *Smith v. Appleton*, 19 Wis. 468; *Rahway v. Munday*, 44 N. J. L. 395; *Seibert v. Lewis*, 122 U. S. 284, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190. For a similar principle, see *Sala v. New Orleans*, 2 Woods, 188.

<sup>3</sup> *Hawthorne v. Calef*, 2 Wall. 10, 17 L. ed. 776; *Knickerbocker Trust Co. v. Myers*, 133 Fed. 764, affirmed 139 Fed. 111, 71 C. C. A. 199, 1 L. R. A. (N. S.) 1171. Upon individual liability of stockholders for debts of corporation, see note to 40 L. ed. U. S. 751.

<sup>4</sup> *Billmeyer v. Evans*, 40 Pa. St.

us that an agreement to waive a legal privilege which the law gives as a matter of State policy cannot be binding upon a party, unless the law itself provides for the waiver.<sup>1</sup>

Where, however, by the operation of existing laws, a contract cannot be enforced without some new action of a party to fix his liability, it is as competent to prescribe by statute the requisites to the legal validity of such action as it would be in any case to prescribe the legal requisites of a contract to be thereafter made. Thus, though a verbal promise is sufficient to revive a debt barred by the Statute of Limitations or by bankruptcy, yet this rule may be changed by a statute making all such future promises void unless in writing.<sup>2</sup> It is also equally true that where a legal impediment exists to the enforcement of a contract which parties have entered into, the constitutional provision in question will not preclude the legislature from removing such impediment and validating the contract. A statute of that description would not impair the obligation of contracts, but would perfect and enforce it.<sup>3</sup> And for similar reasons the obligation of contracts is not impaired by continuing the charter of a corporation for a certain period, in order to the proper closing of its business.<sup>4</sup>

*State Insolvent Laws.* In this connection some notice may seem requisite of the power of the States to pass insolvent laws, and the classes of contracts to which they may be made to apply. As this whole subject has been gone over very often and very fully by the Supreme Court of the United States, and the important questions seem at last to be finally set at rest, and moreover as it is compara-

324; *Lewis v. Lewis*, 47 Pa. St. 127. See *Laucks' Appeal*, 24 Pa. St. 426; *Case v. Dunmore*, 23 Pa. St. 93; *Bowman v. Smiley*, 31 Pa. St. 225.

<sup>1</sup> See *Conkey v. Hart*, 14 N. Y. 22; *Handy v. Chatfield*, 23 Wend. 35.

<sup>2</sup> *Joy v. Thompson*, 1 Doug. (Mich.) 373; *Kingley v. Cousins*, 47 Me. 91.

<sup>3</sup> *Satterlee v. Matthewson*, 2 Pet. 380, 7 L. ed. 458; *Randall v. Kreiger*, 23 Wall. 137, 23 L. ed. 124; *Courtner v. Etheredge*, 149 Ala. 78, 43 So. 368; *Swartz v. Andrews*, 137 Iowa, 261, 114 N. W. 888, 126 Am. St. Rep. 285; *Provident Bank, etc., Co. v. Saxon*, 123 La. 243, 48 So. 922; *Wingert v. Zeigler*, 91 Md. 318, 46 Atl. 1074, 80 Am. St. Rep. 453, 51 L. R. A. 316; *Chestnut v. Shane*, 16 Ohio, 599, 47 Am. Dec. 387; *Hurley v. Hurley*, 110 Va. 31, 65 S. E. 472, 18 Ann. Cas.

968. As where the defense of usury to a contract is taken away by statute. *Welsh v. Wadsworth*, 30 Conn. 149; *Curtis v. Leavitt*, 15 N. Y. 9; *Ewell v. Daggs*, 108 U. S. 143, 27 L. ed. 682, 2 Sup. Ct. Rep. 408; *Peterson v. Berry*, 125 Fed. 902, 60 C. C. A. 610; *Hurley v. Hurley*, 110 Va. 31, 65 S. E. 472, 18 Ann. Cas. 968. And see *Wood v. Kennedy*, 19 Ind. 68, and the cases cited, *post*, pp. 779-782. But the validation of an invalid contract cannot be made to relate back so as to take precedence of a lien which attached after the invalid contract was created, but before it was validated. *Merchants' Bank of Danville v. Ballou*, 98 Va. 112, 32 S. E. 481, 44 L. R. A. 306.

<sup>4</sup> *Foster v. Essex Bank*, 16 Mass. 245.

tively unimportant whenever a federal bankrupt law exists, we content ourselves with giving what we understand to be the conclusions of the court.

1. The several States have power to legislate on the subject of bankrupt and insolvent laws, subject, however, to the authority conferred upon Congress by the Constitution to adopt a uniform system of bankruptcy, which authority, when exercised, is paramount, and State enactments in conflict with those of Congress upon the subject must give way.<sup>1</sup>

2. Such State laws, however, discharging the person or the property of the debtor, and thereby terminating the legal obligation of the debts, cannot constitutionally be made to apply to contracts entered into before they were passed, but they may be made appli-

<sup>1</sup> *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529; *Farmers' & Mechanics' Bank v. Smith*, 6 Wheat. 131, 5 L. ed. 224; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Baldwin v. Hale*, 1 Wall. 223, 17 L. ed. 531; *Brown v. Smart*, 145 U. S. 454, 36 L. ed. 773, 12 Sup. Ct. Rep. 958, aff. 69 Md. 320, 17 Atl. 1101; *Ketcham v. McNamara*, 72 Conn. 709, 46 Atl. 146, 50 L. R. A. 641; *In re Watts*, 190 U. S. 1, 47 L. ed. 933, 23 Sup. Ct. Rep. 718; *Stellwagen v. Clum*, 245 U. S. 605, 62 L. ed. 507, 38 Sup. Ct. Rep. 215; *In re Macon Sash, etc., Co.*, 112 Fed. 323; *Carling v. Seymour Lumber Co.*, 113 Fed. 483, 51 C. C. A. 1; *In re Stork Lumber Co.*, 114 Fed. 360; *In re Rogers*, 116 Fed. 435; *In re F. A. Hall Co.*, 121 Fed. 992; *In re Mertens*, 131 Fed. 507; *In re Salmon*, 143 Fed. 395; *In re Sage*, 224 Fed. 525; *In re Clothing Co.*, 238 Fed. 58, 151 C. C. A. 134; *In re Brinn*, 262 Fed. 527; *Baxter County Bank v. Copeland*, 114 Ark. 316, 169 S. W. 1180; *Rockville National Bank v. Latham*, 88 Conn. 70, 89 Atl. 1117; *Boston Mercantile Co. v. Ould-Carter Co.*, 123 Ga. 458, 51 S. E. 466; *Capital Lumber Co. v. Saunders*, 26 Idaho, 408, 143 Pac. 1178; *Pogue v. Rowe*, 236 Ill. 157, 86 N. E. 207; *Duffy v. Creditors*, 122 La. 600, 48 So. 120; *Littlefield v. Gay*, 96 Me. 422, 52 Atl. 925; *Rogers v. Boston Club*, 205 Mass. 261, 91 N. E. 321, 28 L. R. A. (N. S.) 743; *Singer v. National Bedstead Mfg. Co.*,

65 N. J. Eq. 290, 55 Atl. 868; *Sabin v. Chrisman*, 79 Ore. 191, 154 Pac. 908; *Hasbrouck v. La Febre*, 23 Wyo. 367, 152 Pac. 168.

"After an adjudication in bankruptcy, an action in replevin in a State court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of that adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun;" and if under such attempted action in replevin, any such property is seized, "the district court sitting in bankruptcy" has "jurisdiction by summary proceedings to compel the return of the property seized." Per *Gray, J.*, in *White v. Schloerb*, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007. Bankruptcy law merely *suspends* State insolvency laws, so that when it is repealed they revive. *Butler v. Gorely*, 146 U. S. 303, 36 L. ed. 981, 13 Sup. Ct. Rep. 84, aff. 147 Mass. 8, 16 N. E. 734. And upon effect of removal of a Federal bar to operation of a State statute, see *Blair v. Ostrander*, 109 Iowa, 204, 80 N. W. 330, 47 L. R. A. 469. That supersession of State insolvency law may be only partial, see *State v. Superior Court for King Co.*, 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177, and upon relation of bankruptcy law to State laws upon insolvency and assignments, see note to this case in L. R. A.



cable to such future contracts as can be considered as having been made in reference to them.<sup>1</sup>

3. Contracts made within a State where an insolvent law exists, between citizens of that State, are to be considered as made in reference to the law, and are subject to its provisions. But the law cannot apply to a contract made in one State between a citizen thereof and a citizen of another State,<sup>2</sup> nor to contracts not made within the State, even though made between citizens of the same State,<sup>3</sup> except, perhaps, where they are citizens of the State passing the law.<sup>4</sup> And where the contract is made between a citizen of one State and a citizen of another, the circumstance that the contract is made payable in the State where the insolvent law exists will not render such contract subject to be discharged under the law.<sup>5</sup> If, however, the creditor in any of these cases makes himself a party to proceedings under the insolvent law, he will be bound thereby like any other party to judicial proceedings, and is not to be heard afterwards to object that his debt was protected by the Constitution from the reach of the law.<sup>6</sup>

*The New Amendments to the Federal Constitution.* New provisions for personal liberty, and for the protection of the right to life, liberty, and property, are made by the thirteenth and fourteenth amendments to the Constitution of the United States; and these will be referred to in the two succeeding chapters.<sup>7</sup> The most important clause in the fourteenth amendment is that part of section one which declares that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.<sup>8</sup> This provision very properly puts an end to any question of the title of the freed-

<sup>1</sup> Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606; Brown v. Smart, 145 U. S. 454, 36 L. ed. 773, 12 Sup. Ct. Rep. 958, aff. 69 Md. 320, 17 Atl. 1101; Hans v. Louisiana, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504; Lace v. Smith, 34 R. I. 1, 82 Atl. 268, Ann. Cas. 1913 E, 945.

<sup>2</sup> Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606; Springer v. Foster, 2 Story, 383; Boyle v. Zacharie, 6 Pet. 348, 8 L. ed. 423; Woodhull v. Wagner, Baldw. 296; Suydam v. Broadnax, 14 Pet. 67 10 L. ed. 357; Cook v. Moffat, 5 How. 295, 12 L. ed. 160; Baldwin v. Hale, 1 Wall. 223, 17 L. ed. 531; Hammond Beef & P. Co. v. Best, 91 Me. 431, 40 Atl. 338, 42 L. R. A. 528.

<sup>3</sup> McMillan v. McNeill, 4 Wheat. 209, 4 L. ed. 552.

<sup>4</sup> Marsh v. Putnam, 3 Gray, 551.

<sup>5</sup> Baldwin v. Hale, 1 Wall. 223, 17 L. ed. 531; Baldwin v. Bank of Newbury, 1 Wall. 234, 17 L. ed. 534; Gilman v. Lockwood, 4 Wall. 409, 18 L. ed. 432. See also Norris v. Atkinson, 64 N. H. 87, 5 Atl. 710.

<sup>6</sup> Clay v. Smith, 3 Pet. 411, 7 L. ed. 723; Baldwin v. Hale, 1 Wall. 223, 17 L. ed. 531; Gilman v. Lockwood, 4 Wall. 409, 18 L. ed. 432; Perley v. Mason, 64 N. H. 6, 3 Atl. 629.

<sup>7</sup> See ante, pp. 15-17; post, pp. 607, 821.

<sup>8</sup> The complete text of this section is as follows: "Section 1. All persons born or naturalized in the United

men and others of their race to the rights of citizenship; but it may be doubtful whether the further provisions of the same section surround the citizen with any protections additional to those before possessed under the State constitutions; though, as a principle of State constitutional law has now been made a part of the Constitution of the United States, the effect will be to make the Supreme Court of the United States the final arbiter of cases in which a violation of this principle by State laws is complained of, inasmuch as the decisions of the State courts upon laws which are supposed to violate it will be subject to review in that court on appeal.<sup>1</sup>

States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

A child of alien parentage born in this country is a citizen. *Wong Kim Ark's Case*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456. See *Fong Yue Ting v. U. S.*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016.

<sup>1</sup> See *ante*, pp. 24-46. Notwithstanding this section, the protection of all citizens in their privileges and immunities, and in their right to an impartial administration of the laws, is just as much the business of the individual State as it was before.

This amendment of the Constitution does not concentrate power in the general government for any purpose of police government within the States; its object is to preclude legislation by any State which shall "abridge the privileges or immunities of citizens of the United States", or "deprive any person of life, liberty, or property without due process of law", or "deny to any person within its jurisdiction the equal protection of the laws"; and Congress is empowered to pass all laws necessary to render such unconstitutional State legislation ineffectual. This amendment has received a very full examination at the hands of the Supreme Court of the United States in the *Slaughter-House Case*, 16 Wall. 36, 21 L. ed. 394, and in *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588, with the conclusion above stated. See *Story on Const.* (4th ed.) App. to Vol. II.

## CHAPTER X

### OF THE CONSTITUTIONAL PROTECTIONS TO PERSONAL LIBERTY

ALTHOUGH the people from whom we derive our laws now possess a larger share of civil and political liberty than any other in Europe, there was a period in their history when a considerable proportion were in a condition of servitude. Of the servile classes one portion were *villeins regardant*, or serfs attached to the soil, and transferable with it, but not otherwise,<sup>1</sup> while the other portion were *villeins in gross*, whose condition resembled that of the slaves known to modern law in America.<sup>2</sup> How these people became reduced to this unhappy condition, it may not be possible to determine at this distance of time with entire accuracy ;<sup>3</sup> but in regard to the first class, we may suppose that when a conqueror seized the territory upon which he found them living, he seized also the people as a part of the lawful prize of war, granting them life on condition of their cultivating the soil for his use ; and that the second were often persons whose lives had been spared on the field of battle, and whose ownership, in accordance with the custom of barbarous times, would pertain to the persons of their captors. Many other causes also contributed to reduce persons to this condition.<sup>4</sup> At the beginning of the reign of

<sup>1</sup> Litt. § 181 ; 2 Bl. Com. 92.

"They originally held lands of their lords on condition of agricultural service, which in a certain sense was servile, but in reality was not so, as the actual work was done by the theows, or slaves. . . . They did not pay rent, and were not removable at pleasure ; they went with the land and rendered services, uncertain in their nature, and therefore opposed to rent. They were the originals of copyholders." Note to Reeves, History of English Law, Pt. I. c. 1.

<sup>2</sup> Litt. § 181 ; 2 Bl. Com. 92.

"These are the persons who are described by Sir William Temple as 'a sort of people who were in a condition of downright servitude, used and employed in the most servile

works ; and belonging, they and their children and effects, to the lord of the soil, like the rest of the stock or cattle upon it.' " Reeves, History of English Law, Pt. I. c. 1. See also Holdsworth's History of English Law, Vol. II. pp. 41-43, 264, Vol. III. p. 491, *et seq.*

<sup>3</sup> As to slavery among the Anglo-Saxons, see Stubbs, Const. Hist. of England, ch. V ; Holdsworth's History of English Law, Vol. II. pp. 40-43.

<sup>4</sup> For a view of the condition of the servile classes, see Wright, Domestic Manners and Sentiments, 101, 102 ; Crabbe, History of English Law (ed. of 1829), 8, 78, 365 ; Hallam, Middle Ages, Pt. II. c. 2 ; Vaughan, Revolutions in English History, Book 2, c. 8 ; Broom, Const. Law, 74 *et seq.*

John it has been estimated that one-half of the Anglo-Saxons were in a condition of servitude, and if we go back to the time of the Conquest, we find a still larger proportion of the people held as the property of their lords, and incapable of acquiring and holding any property as their own.<sup>1</sup> Their treatment was such as might have been expected from masters trained to war and violence, accustomed to think lightly of human life and human suffering, and who knew little of and cared less for any doctrine of human rights which embraced within its scope others besides the governing classes.

It would be idle to attempt to follow the imperceptible steps by which involuntary servitude at length came to an end in England. It was never abolished by statute,<sup>2</sup> and the time when slavery ceased altogether cannot be accurately determined.<sup>3</sup> The causes were at work silently for centuries; the historian did not at the time note

<sup>1</sup> Hume, *History of England*, Vol. I. App. 1.

<sup>2</sup> Barrington on the Statutes (3d ed.), 272.

<sup>3</sup> Mr. Hargrave says, at the commencement of the seventeenth century. 20 State Trials, 40; May, *Const. Hist.* c. 11. And Mr. Barrington (on the Statutes, 3d ed. p. 278) cites from Rymer a commission from Queen Elizabeth in the year 1574, directed to Lord Burghley and Sir Walter Mildmay, for inquiring into the lands, tenements, and other goods of all her bondmen and bondwomen in the counties of Cornwall, Devonshire, Somerset, and Gloucester, such as were by blood in a slavish condition, by being born in any of her manors, and to compound with any or all of such bondmen or bondwomen for their manumission and freedom. And this commission, he says, in connection with other circumstances, explains why we hear no more of this kind of servitude. And see Crabbe, *History of English Law* (ed. of 1829), 574. This author says that villeinage had disappeared by the time of Charles II. Hurd says in 1661. *Law of Freedom and Bondage*, Vol. I. p. 136. And see 2 Bl. Com. 96. Lord Campbell's *Lives of the Chief Justices*, c. 5. Macaulay says there were traces of slavery under the Stuarts. *History of England*, c. 1. Hume (*History of England*, c. 23) thinks there was no law recognizing it

after the time of Henry VII., and that it had ceased before the death of Elizabeth. Froude (*History of England*, c. 1) says in the reign of Henry VIII. it had practically ceased. Mr. Christian says the last claim of villeinage which we find recorded in our courts was in 15th James I. Noy, 27; 11 State Trials, 342. Note to Blackstone, Book 2, p. 96.

Mr. Holdsworth says: "Villein status, then, had become merely a survival of an older social and economic order by the middle of the fifteenth century. Its life had been prolonged to the end of the sixteenth century because it served the purposes of the lawless, and because it sometimes gave to lords valuable rights over persons who prospered either on the land or in some other pursuits which afforded careers to the ambitious. When the Tudor dynasty had fulfilled its mission by restoring peace and good government to the country, when lords had made what they could out of their prosperous villeins by selling charters of manumission, this status, always frowned upon by the law, after a long and dishonorable old age, at length died a natural death. The law of villein status was never repealed. It simply fell into disuse because the persons to whom it applied had ceased to exist." Holdsworth's *History of English Law*, Vol. III, p. 508.

them; the statesman did not observe them; they were not the subject of agitation or controversy; but the time arrived when the philanthropist could examine the laws and institutions of his country, and declare that slavery had ceased to be recognized, though at what precise point in legal history the condition became unlawful he might not with certainty specify. Among the causes of its abrogation he might be able to enumerate: 1. That the slaves were of the same race with their masters. There was therefore not only an absence of that antipathy which is often found existing when the ruling and the ruled are of different races, and especially of different color, but instead thereof an active sympathy might often be supposed to exist, which would lead to frequent emancipations. 2. The common law presumed every man to be free until proved to be otherwise; and this presumption, when the slave was of the same race as his master, and had no natural badge of servitude, must often have rendered it extremely difficult to recover the fugitive who denied his thralldom. 3. A residence for a year and a day in a corporate town rendered the villein legally free;<sup>1</sup> so that to him the towns constituted cities of refuge. 4. The lord treating him as a freeman — as by receiving homage from him as tenant, or entering into a contract with him under seal — thereby emancipated him, by recognizing in him a capacity to perform those acts which only a freeman could perform. 5. Even the lax morals of the times were favorable to liberty, since the condition of the child followed that of the father;<sup>2</sup> and in law the illegitimate child was *nullius filius*, — had no father. And, 6. The influence of the priesthood was generally against slavery, and must often have shielded the fugitive and influenced emancipations by appeals to the conscience, especially when the master was near the close of life and the conscience naturally most sensitive.<sup>3</sup> And with all these influences there should be

<sup>1</sup> Crabbe, History of English Law (ed. of 1829), 79. But this was only as to third persons. The claim of the lord might be made within three years. *Ibid.* And see Mackintosh, History of England, c. 4.

<sup>2</sup> Barrington on Statutes (3d ed.), 276, note; 2 Bl. Com. 93. But in the very quaint account of "Villeinage and Niefy", in Mirror of Justices, § 28, it is said, among other things, that "those are villeins who are begotten of a freeman and a nief, and born out of matrimony." The ancient rule appears to have been that the condition of the child followed that

of the mother; but this was changed in the time of Henry I. Crabbe, History of English Law (ed. of 1829), 78; Hallam, Middle Ages, Pt. II. c. 2.

<sup>3</sup> In 1514, Henry VIII. manumitted two of his villeins in the following words: "Whereas God created all men free, but afterwards the laws and customs of nations subjected some under the yoke of servitude, we think it *pious and meritorious with God* to manumit Henry Knight, a tailor, and John Herle, a husbandman, our natives, as being born within the manor of Stoke Clymercysland, in our county of Cornwall, together with all

noted the further circumstance, that a class of freemen was always near to the slaves in condition and suffering, with whom they were in association, and between whom and themselves there were frequent intermarriages,<sup>1</sup> and that from these to the highest order in the State there were successive grades; the children of the highest gradually finding their way into those below them, and ways being open by which the children of the lowest might advance themselves, by intelligence, energy, or thrift, through the successive grades above them, until the descendants of dukes and earls were found cultivating the soil, and the man of obscure descent winning a place among the aristocracy of the realm, through his successful exertions at the bar or his services to the State. Inevitably these influences must at length overthrow the slavery of white men which existed in England,<sup>2</sup> and no other ever became established within the realm. Slavery was permitted, and indeed fostered, in the colonies; in part because a profit was made of the trade, and in part also because it was supposed that the peculiar products of some of them could not be profitably cultivated with free labor;<sup>3</sup> and at times masters brought their slaves with them to England and removed them again without question, until in *Sommersett's Case*, in 1771, it was ruled by Lord *Mansfield* that slavery was repugnant to the common law, and to bring a slave into England was to emancipate him.<sup>4</sup>

their issue born or to be born, and all their goods, lands, and chattels acquired, so as the said persons and their issue shall from henceforth by us be free and of free condition." Barrington on Statutes (3d ed.), 275. See Mackintosh, *History of England*, c. 4. Compare this with a deed of manumission in Massachusetts, to be found in Sumner's *Speeches*, II. 289; *Memoir of Chief Justice Parsons*, by his son, 176, note.

<sup>1</sup> Wright, *Domestic Manners and Sentiments*, 112.

<sup>2</sup> Macaulay (*History of England*, c. 1) says the chief instrument of emancipation was the Christian religion. Mackintosh (*History of England*, c. 4), also, attributes to the priesthood great influence in this reform, not only by their direct appeals to the conscience, but by the judges, who were ecclesiastics, multiplying presumptions and rules of evidence consonant to the equal and humane spirit which breathes throughout the morality of the Gospel. Hume (*History of Eng-*

land, c. 23) seems to think emancipation was brought about by selfish considerations on the part of the barons, and from a conviction that the returns from their lands would be increased by changing villeinage into socage tenures.

<sup>3</sup> Robertson, *America*, Book 9; Bancroft, *United States*, Vol. I, c. 5.

<sup>4</sup> Lofft, 18; 20 Howell *State Trials*, 1; *Life of Granville Sharp*, by Hoare, c. 4; Hurd, *Law of Freedom and Bondage*, Vol. I. p. 189. The judgment of Lord Mansfield is said to have been delivered with evident reluctance. 20 *State Trials*, 79; per Lord *Stowell*, 2 Hagg. Adm. 105, 110; Broom, *Const. Law*, 105. Of the practice prior to the decision Lord *Stowell* said: "The personal traffic in slaves resident in England had been as public and as authorized in London as in any of our West India Islands. They were sold on the Exchange, and other places of public resort, by parties themselves resident in London, and with as little reserve as they would have been in any of our West India possessions."

The same opinion had been previously expressed by Lord *Holt* but without authoritative decision.<sup>1</sup>

In Scotland a condition of servitude continued to a later period. The holding of negroes in slavery was indeed held to be illegal soon after the *Sommersett Case*; but the salters and colliers did not acquire their freedom until 1799, nor without an act of Parliament.<sup>2</sup> A previous statute for their enfranchisement through judicial proceedings had proved ineffectual.<sup>3</sup>

The history of slavery in this country pertains rather to general history than to a work upon State constitutional law. Throughout the land involuntary servitude is abolished by constitutional amendment, except as it may be imposed in the punishment of crime.<sup>4</sup>

Such a state of things continued without impeachment from a very early period up to nearly the end of the last century." The *Slave Grace*, 2 Hagg. Adm. 105. In this case it was decided that if a slave, carried by his master into a free country, voluntarily returned with him to a country where slavery was allowed by the local law, the *status* of slave would still attach to him, and the master's right to his service be resumed. Mr. Broom collects the authorities on this subject in general, in the notes to *Sommersett's Case*, Const. Law, 105. Upon this subject see also Holdsworth's *History of English Law*, Vol. VI. pp. 264, 265.

<sup>1</sup> "As soon as a slave comes into England, he becomes free; one may be a villein in England, but not a slave." *Holt*, Ch. J., in *Smith v. Brown*, 2 Salk. 666. See also *Smith v. Gould*, *Ld. Raym.* 1274; s. c. *Salk.* 666. There is a learned note in *Quincy's Rep.* 94, collecting the English authorities on the subject of slavery.

<sup>2</sup> 39 Geo. III. c. 56.

<sup>3</sup> *May's Const. Hist.* c. 11.

<sup>4</sup> Amendments to Const. of U. S. art. 13. See *Story on the Constitution* (4th ed.), c. 46, for the history of this article, and the decisions bearing upon it.

"The words involuntary servitude have a larger meaning than slavery. . . . The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by pro-

hibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude." Mr. Justice *Hughes* in delivering the opinion of the court in *Bailey v. Alabama*, 219 U. S. 219, 31 Sup. Ct. Rep. 145, 55 L. ed. 191, reversing 161 Ala. 75, 49 So. 886. See also *Shaw v. Fisher*, 113 S. C. 287, 102 S. E. 325.

The Maryland act for the apprenticing of colored children, which made important and invidious distinctions between them and white children, and gave the master property rights in their services not given in other cases, was held void under this article. *Matter of Turner*, 1 Abb. U. S. 84.

A law authorizing the hiring out of a vagrant to the highest bidder for a specified term is void. *Thompson v. Bunton*, 117 Mo. 83, 22 S. W. 863, 20 L. R. A. 462.

Contracts for personal services cannot, as a general rule, be enforced, and application to be discharged from service under them on *habeas corpus* is evidence that the service is involuntary. Cases of apprenticeship and cases of military and naval service are exceptional. A person over twenty-one years of age cannot bind himself as apprentice. *Clark's Case*, 1 Blackf. 122, 12 Am. Dec. 213.

When the state, as *parens patriae*, in a proper case, through its constituted officers or agencies, takes under its control an infant, the law authorizing such child to be bound to service un-

der proper instructions is not a violation of the constitutional prohibition against slavery and involuntary servitude. *Kennedy v. Meara*, 127 Ga. 68, 56 S. E. 243, 9 Ann. Cas. 396.

The protection of the Thirteenth Amendment does not extend to the case of seamen compelled to serve in fulfillment of their contracts. *Robertson v. Baldwin*, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326. Dissent by *Harlan, J.*

“ ‘Peonage’ is a status or condition of compulsory service based upon the indebtedness of the peon to the master. The service is enforced unless the debt be paid, and, however created, it is ‘involuntary servitude’ within the prohibition of the 13th Amendment.” *Goode v. Nelson*, 73 Fla. 29, 74 So. 17. See also *Clyatt v. United States*, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; *United States v. Reynolds*, 235 U. S. 133, 59 L. ed. 162, 35 Sup. Ct. Rep. 86; *United States v. McClellan*, 127 Fed. 971; *In re Peonage Charge*, 138 Fed. 686. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case, the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the services. *Clyatt v. United States*, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; *United States v. Reynolds*, 235 U. S. 133, 59 L. ed. 162, 35 Sup. Ct. Rep. 86.

Under the 13th Amendment a crime to be punished by imprisonment cannot lawfully be predicated upon the breach of a promise to perform labor or service. *Goode v. Nelson*, 73 Fla. 29, 74 So. 17.

Although the purpose of a statute in terms is to punish fraud, yet if its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt, and it seeks in this way to provide the means of

compulsion through which performance of such service may be secured it is unconstitutional. *Bailey v. Alabama*, 219 U. S. 219, 55 L. ed. 191, 31 Sup. Ct. Rep. 145, reversing 161 Ala. 75, 49 So. 886. See also *Clyatt v. United States*, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; *Peonage Cases*, 123 Fed. 671; *Ex parte Drayton*, 153 Fed. 986; *Toney v. State*, 141 Ala. 120, 37 So. 332, 109 Am. St. Rep. 23, 67 L. R. A. 286, 3 Ann. Cas. 319; *State v. Armstead*, 103 Miss. 790, 60 So. 778, Ann. Cas. 1915 B, 495; *Ex parte Hollman*, 79 S. C. 22, 60 S. E. 19, 21 L. R. A. (N. S.) 249, 14 Ann. Cas. 1109. Compare *Phillips v. Bell*, 84 Fla. 225, 94 So. 699. But a statute of a state requiring every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation and making his failure to do so punishable by fine or imprisonment does not violate the 13th Amendment. *Butler v. Perry*, 240 U. S. 328, 60 L. ed. 672, 36 Sup. Ct. Rep. 258, affirming 67 Fla. 405, 66 So. 150. Mr. Justice *McReynolds*, who delivered the opinion of the Court, speaking of the 13th Amendment, said: “It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers.” See also *Angelus v. Sullivan*, 246 Fed. 54; *Claudius v. Davie*, 175 Cal. 208, 165 Pac. 689. This thirteenth amendment conferred no political rights, and left the negro under all his political disabilities. *Marshall v. Donovan*, 10 Bush, 681. See also *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

It is not open to doubt that Congress may enforce the 13th Amendment by direct legislation, punishing the holding of a person in slavery or in involuntary servitude except as a punishment for crime. *Clyatt v. United States*, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct.



Nor do we suppose the exception will permit the convict to be subjected to other servitude than such as is under the control and direction of the public authorities, in the manner heretofore customary. The laws of the several States allow the letting of the services of the convicts, either singly or in numbers, to contractors who are to employ them in mechanical trades in or near the prison, and under the surveillance of its officers; but it might well be doubted if a regulation which should suffer the convict to be placed upon the auction block and sold to the highest bidder, either for life or for a term of years, would be in harmony with the constitutional prohibition. It is certain that it would be open to very grave abuses, and it is so inconsistent with the general sentiment in countries where slavery does not exist, that it may well be believed not to have been within the understanding of the people in incorporating the exception with the prohibitory amendment.<sup>1</sup>

The common law of England permits the impressment of seafaring men to man the royal navy; <sup>2</sup> but this species of servitude was never

Rep. 429; *United States v. Reynolds*, 235 U. S. 133, 59 L. ed. 162, 35 Sup. Ct. Rep. 86; *United States v. McClellan*, 127 Fed. 971.

<sup>1</sup> The State has no power to imprison a child in a house of correction who has committed no crime, on a mere allegation that he is "destitute of proper parental care, and is growing up in mendicancy, ignorance, idleness, and vice." *People v. Turner*, 55 Ill. 280, 8 Am. Rep. 645. But a female child who begs in public or has no proper parental care, may be confined in an industrial school. *County of McLean v. Humphrey*, 104 Ill. 378; citing *Milwaukee Industrial School v. Supervisors*, 40 Wis. 328; *Roth v. House of Refuge*, 31 Md. 329. See, further, that under proper safeguards vagrant children may be so committed. *House of Refuge v. Ryan*, 37 Ohio St. 197; *Prescott v. State*, 19 Ohio St. 184, 2 Am. Rep. 388; *Farnham v. Pierce*, 141 Mass. 203, 6 N. E. 830; *People v. N. Y. Catholic Protectory*, 101 N. Y. 195, 4 N. E. 177. That in cases of commitment of vicious and incorrigible youth to reform schools jury trial is unnecessary, see *State v. Brown*, 50 Minn. 353, 52 N. W. 935, 16 L. R. A. 691, and note; also *Lee v. McClelland*, 157 Ind. 84, 60 N. E. 692.

Court has no power in civil action for damages to person to compel plaintiff to submit her body to inspection by defendant's physicians outside of court for purpose of obtaining evidence. All such inspection must be made in court. *U. P. Ry. Co. v. Botsford*, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000. *Contra*, *Lane v. Spokane Falls & N. R. Co.*, 21 Wash. 119, 57 Pac. 367, 46 L. R. A. 153; *Wanek v. Winona*, 78 Minn. 98, 80 N. W. 851, 46 L. R. A. 448; *Ala. G. S. R. Co. v. Hill*, 90 Ala. 71, 8 So. 90, 9 L. R. A. 442, 24 Am. St. 764. See in this connection *Lyon v. Manhattan R. Co.*, 142 N. Y. 298, 37 N. E. 113, 25 L. R. A. 402; *McQuigan v. Delaware, L. & W. R. Co.*, 129 N. Y. 50, 29 N. E. 235, 14 L. R. A. 466, and note, 26 Am. St. 507; *Camden & S. R. Co. v. Stetson*, 177 U. S. 172, 44 L. ed. 721, 20 Sup. Ct. Rep. 617. But sheriff may lawfully photograph his prisoner and take physical measurements of him, etc., for purposes of future identification. *State v. Clausmeier*, 154 Ind. 599, 57 N. E. 541, 50 L. R. A. 73.

<sup>2</sup> *Broadfoot's Case*, 18 State Trials, 1323; *Fost. Cr. Law*, 178; *Rex v. Tubbs*, Cowp. 512; *Ex parte Fox*, 5 State Trials, 276; 1 Bl. Com. 419; *Broom, Const. Law*, 116.

recognized in the law of America.<sup>1</sup> The citizen may doubtless be compelled to serve his country in her wars; but the common law as adopted by us has never allowed arbitrary discriminations for this purpose between persons of different avocations.

### *Unreasonable Searches and Seizures.*

Near in importance to exemption from any arbitrary control of the person is that maxim of the common law which secures to the citizen immunity in his home against the prying eyes of the government, and protection in person,<sup>2</sup> property, and papers against even

<sup>1</sup> There were cases of impressment in America before the Revolution, but they were never peaceably acquiesced in by the people. See *Life and Times of Warren*, 55.

<sup>2</sup> Sheriff may take photographs, measurements, etc., of his prisoner for purposes of future identification. *State v. Clausmeier*, 154 Ind. 599, 57 N. E. 541, 50 L. R. A. 73. But a person cannot be lawfully arrested merely because he is a "suspicious person", and any statute which attempts to authorize such arrest is void under the clause prohibiting unreasonable seizures. *Stoutenburgh v. Frazier*, 16 D. C. App. 229, 48 L. R. A. 220. Prisoner discharged upon parole may be summarily arrested and recommitted. *Fuller v. State*, 122 Ala. 32, 26 So. 146, 45 L. R. A. 502. Arrest under warrant not supported by oath or affirmation is illegal. *State v. Higgins*, 51 S. C. 51, 28 S. E. 15, 38 L. R. A. 561. But witness refusing to testify before grand jury may be summarily imprisoned by a justice of the peace upon complaint of the grand jury. *Re Clark*, 65 Conn. 17, 31 Atl. 522, 28 L. R. A. 242. Such power to imprison is judicial, however, and cannot be conferred upon a county attorney. *Re Sims*, 54 Kan. 1, 37 Pac. 135, 25 L. R. A. 110, 45 Am. St. 261; nor upon a board of tax commissioners. *Langenberg v. Decker*, 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108.

A peace officer, who upon statements made to him by others has reasonable grounds to suspect and does suspect that a felony has been committed and that a certain person was

guilty of it, lawfully may arrest such person without a warrant. *Com. v. Phelps*, 209 Mass. 396, 95 N. E. 868, Ann. Cas. 1912 B, 566. "A peace officer may, without a warrant therefor, arrest one who, in his presence, breaches the peace or threatens so to do." *Pavish v. Meyers*, 129 Wash. 605, 225 Pac. 633. Statute may authorize arrest without warrant in case of misdemeanor committed in presence of officer, as well as in case of breach of peace. *Burroughs v. Eastman*, 101 Mich. 419, 59 N. W. 817, 24 L. R. A. 859, 45 Am. St. 419.

"The government may search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime." *People v. Chaigles*, 237 N. Y. 193, 142 N. E. 583, 32 A. L. R. 676. With regard to inspection of person to procure evidence, see note 1, page 648, *post*.

Person cannot be surrendered to foreign government except in accordance with treaty stipulations. *Ex parte McCabe*, 46 Fed. Rep. 363, 12 L. R. A. 589.

Chairman of board of county commissioners may be authorized by statute to remove summarily to the pauper's place of legal settlement any pauper who applies for public support. *Lovell v. Seebach*, 45 Minn. 465, 48 N. W. 23, 11 L. R. A. 667.

Person arrested without extradition process in sister State is illegally detained and is entitled to be discharged upon *habeas corpus*. *Re Robinson*, 29 Neb. 135, 45 N. W. 267, 8 L. R. A. 398, 26 Am. St. 378; but see cases cited in note. Person brought

the process of the law, except in a few specified cases. The maxim that "every man's house is his castle",<sup>1</sup> is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.<sup>2</sup>

into State by extradition proceedings and there tried or discharged cannot be arrested upon civil process until a reasonable time has elapsed in which he might have returned to the State from which he was brought. *Moletor v. Sinnen*, 76 Wis. 308, 44 N. W. 1099, 7 L. R. A. 817, 20 Am. St. 71. Person arrested without warrant can be detained only so long as is reasonably necessary to obtain a legal warrant. *Leger v. Warren*, 62 Ohio St. 500, 57 N. E. 506, 51 L. R. A. 193.

<sup>1</sup> *Broom's Maxims*, 321; *Ilsley v. Nichols*, 12 Pick. 270; *Swain v. Mizner*, 8 Gray, 182; *People v. Hubbard*, 24 Wend. 369, 35 Am. Dec. 628; *Curtis v. Hubbard*, 4 Hill, 437; *Bailey v. Wright*, 39 Mich. 96.

The eloquent passage in Chatham's speech on General Warrants is familiar: "The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement." And see *Lieber on Civil Liberty and Self-Government*, c. 6.

That officer may not break and enter to serve a writ of replevin, see *Kelly v. Schuyler*, 20 R. I. 432, 39 Atl. 893, 4 L. R. A. 435. Householder may kill in defending his house against attack. *Wilson v. State*, 30 Fla. 234, 11 So. 556, 17 L. R. A. 654. As to when officer may enter without warrant, see *Delafoile v. State*, 54 N. J. L. 381, 24 Atl. 557, 16 L. R. A. 500, and note. See also *Voorhees on Arrest*, Ch. VII.

<sup>2</sup> *Weeks v. United States*, 232 U. S. 383, 58 L. ed. 652, 34 Sup. Ct. Rep. 341, L. R. A. 1915 B, 834; *Shall v. Minneapolis, etc., R. Co.*, 156 Wis. 195, 145 N. W. 649, 50 L. R. A. (N. S.) 1151.

All unlawful searches and seizures

are "unreasonable", within the meaning of the constitutional provision forbidding unreasonable searches and seizures. *State v. Wills*, 91 W. Va. 659, 114 S. E. 261, 24 A. L. R. 1398.

Search made by permission of agent or servant in possession is not unreasonable, nor is the taking away of an article there found, the agent consenting thereto, a prohibited seizure. *State v. Griswold*, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227.

Where a boiler exploded, killing several persons and wounding many others, and the person in charge was prosecuted for criminal negligence, the property owner may object to an order of court delivering the wreck and premises into the custody of a police officer, charged to keep them unmolested until the time of trial, although it is probable that in the absence of such custody, much valuable real evidence will be lost. *Newberry v. Carpenter*, 107 Mich. 567, 65 N. W. 530, 31 L. R. A. 163, 61 Am. St. 346.

The court cannot compel a plaintiff to submit a horse, over whose condition the controversy arises, to the inspection of a veterinary surgeon, even though the inspection is to be made in the presence of the plaintiff or his agent. *Martin v. Elliott*, 106 Mich. 130, 63 N. W. 998, 31 L. R. A. 169; but a statute requiring one person to submit his property to inspection of another for purpose of procuring evidence to aid that other in enforcing his rights is valid. *Montana Co. v. St. Louis Mining and M. Co.*, 152 U. S. 160, 38 L. ed. 398, 14 Sup. Ct. Rep. 506.

In *Potter v. Beale*, 50 Fed. Rep. 860, the order of a court that a master should search the trunk of the president of an insolvent national bank and deliver to such president his private papers, and to the receiver all belonging to the bank, was held to be

If in English history we inquire into the original occasion for these constitutional provisions, we shall probably find it in the abuse of executive authority, and in the unwarrantable intrusion of executive agents into the houses and among the private papers of individuals, in order to obtain evidence of political offenses either committed or designed. The final overthrow of this practice is so clearly and succinctly stated in a recent work on the constitutional history of England, that we cannot refrain from copying the account in the note below.<sup>1</sup>

in violation of the prohibition against unreasonable searches and seizures. Money in possession of prisoner under arrest can be taken from him only when there are reasonable grounds for believing it to be connected with the crime charged or that it may be used as evidence. *Ex parte Hurn*, 92 Ala. 102, 9 So. 515, 13 L. R. A. 120, 25 Am. St. 23.

Pawnbroker may be compelled to take out license, and to keep list of property received and persons from whom received, and to exhibit such property and list to inspection of mayor and police officers. *Shuman v. Fort Wayne*, 127 Ind. 109, 26 N. E. 560, 11 L. R. A. 378, and note.

Statute authorizing vendors of liquors to sue out search warrants to secure bottles not returned by customers is unconstitutional. *Lippman v. People*, 175 Ill. 101, 51 N. E. 872.

<sup>1</sup> "Among the remnants of a jurisprudence which had favored prerogative at the expense of liberty was that of the arrest of persons under general warrants, without previous evidence of their guilt or identification of their persons. This practice survived the Revolution, and was continued without question, on the ground of usage, until the reign of George III., when it received its death-blow from the boldness of Wilkes and the wisdom of Lord Camden. This question was brought to an issue by No. 45 of the 'North Briton', already so often mentioned. There was a libel, but who was the libeller? Ministers knew not, nor waited to inquire, after the accustomed forms of law; but forthwith Lord Halifax, one of the secretaries of state, issued a warrant, directing four

messengers, taking with them a constable, to search for the authors, printers, and publishers; and to apprehend and seize them, together with their papers, and bring them in safe custody before him. No one having been charged or even suspected, — no evidence of crime having been offered, — no one was named in this dread instrument. The offense only was pointed at, not the offender. The magistrate who should have sought proofs of crime deputed this office to his messengers. Armed with their roving commission, they set forth in quest of unknown offenders; and, unable to take evidence, listened to rumors, idle tales, and curious guesses. They held in their hands the liberty of every man whom they were pleased to suspect. Nor were they triflers in their work. In three days they arrested no less than forty-nine persons on suspicion, — many as innocent as Lord Halifax himself. Among the number was Dryden Leach, a printer, whom they took from his bed at night. They seized his papers, and even apprehended his journeymen and servants. He had printed one number of the 'North Briton', and was then reprinting some other numbers; but as he happened not to have printed No. 45, he was released without being brought before Lord Halifax. They succeeded, however, in arresting Kearsley, the publisher, and Balfe, the printer, of the obnoxious number, with all their workmen. From them it was discovered that Wilkes was the culprit of whom they were in search; but the evidence was not on oath; and the messengers received verbal directions to apprehend Wilkes under the general

warrant. Wilkes, far keener than the crown lawyers, not seeing his own name there, declared it 'a ridiculous warrant against the whole English nation', and refused to obey it. But after being in custody of the messengers for some hours, in his own house, he was taken away in a chair, to appear before the secretaries of state. No sooner had he been removed than the messengers, returning to his house, proceeded to ransack his drawers, and carried off all his private papers, including even his will and his pocket-book. When brought into the presence of Lord Halifax and Lord Egremont, questions were put to Wilkes which he refused to answer; whereupon he was committed close prisoner to the Tower, denied the use of pen and paper, and interdicted from receiving the visits of his friends, or even of his professional advisers. From this imprisonment, however, he was shortly released on a writ of *habeas corpus*, by reason of his privilege as a member of the House of Commons.

"Wilkes and the printers, supported by Lord Temple's liberality, soon questioned the legality of the general warrant. First, several journeymen printers brought action against the messengers. On the first trial Lord Chief Justice *Pratt* — not allowing bad precedents to set aside the sound principles of English law — held that the general warrant was illegal; that it was illegally executed; and that the messengers were not indemnified by statute. The journeymen recovered three hundred pounds damages; and the other plaintiffs also obtained verdicts. In all these cases, however, bills of exceptions were tendered and allowed. Mr. Wilkes himself brought an action against Mr. Wood, under-secretary of state, who had personally superintended the execution of the warrant. At this trial it was proved that Mr. Wood and the messengers, after Wilkes's removal in custody, had taken entire possession of his house, refusing admission to his friends; had sent for a blacksmith, who opened the drawers of his bureau; and having taken out the papers, had carried them away in a sack, without taking any list or inventory. All his

private manuscripts were seized, and his pocket-book filled up the mouth of the sack. Lord Halifax was examined, and admitted that the warrant had been made out three days before he had received evidence that Wilkes was the author of the 'North Briton.' Lord Chief Justice *Pratt* thus spoke of the warrant: 'The defendant claimed a right, under precedents, to force persons' houses, break open escritaires, and seize their papers upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders' names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.' The jury found a verdict for the plaintiff, with one thousand pounds damages.

"Four days after Wilkes had obtained his verdict against Mr. Wood, Dryden Leach, the printer, gained another verdict, with four hundred pounds damages, against the messengers. A bill of exceptions, however, was tendered and received in this as in other cases, and came on for hearing before the Court of King's Bench in 1765. After much argument and the citing of precedents showing the practice of the secretary of state's office ever since the Revolution, Lord *Mansfield* pronounced the warrant illegal, saying: 'It is not fit that the judging of the information should be left to the discretion of the officer. The magistrate should judge, and give certain directions to the officer.' The other three judges agreed that the warrant was illegal and bad, 'believing that no degree of antiquity can give sanction to an usage bad in itself.' The judgment was therefore affirmed.

"Wilkes had also brought actions for false imprisonment against both the secretaries of state. Lord Egremont's death put an end to the action against him; and Lord Halifax, by pleading privilege, and interposing other delays

unworthy of his position and character, contrived to put off his appearance until after Wilkes had been outlawed, when he appeared and pleaded the outlawry. But at length, in 1769, no further postponement could be contrived; the action was tried, and Wilkes obtained no less than four thousand pounds damages. Not only in this action, but throughout the proceedings, in which persons aggrieved by the general warrant had sought redress, the government offered an obstinate and vexatious resistance. The defendants were harassed by every obstacle which the law permitted, and subjected to ruinous costs. The expenses which government itself incurred in these various actions were said to have amounted to one hundred thousand pounds.

"The liberty of the subject was further assured at this period by another remarkable judgment of Lord *Camden*. In November, 1762, the Earl of Halifax, as secretary of state, had issued a warrant directing certain messengers, taking a constable to their assistance, to search for John Entinck, clerk, the author or one concerned in the writing of several numbers of the 'Monitor, or British Freeholder', and to seize him, together with his books and papers, and bring him in safe custody before the secretary of state. In execution of this warrant, the messengers apprehended Mr. Entinck in his house, and seized the books and papers in his bureau, writing-desk, and drawers. This case differed from that of Wilkes, as the warrant specified the name of the person against whom it was directed. In respect of the person, it was not a general warrant, but as regards the papers, it was a general search-warrant, — not specifying any particular papers to be seized, but giving authority to the messengers to take all his books and papers according to their discretion.

"Mr. Entinck brought an action of trespass against the messengers for the seizure of his papers, upon which a jury found a special verdict, with three hundred pounds damages. This special verdict was twice learnedly argued before the Court of Common

Pleas, where, at length, in 1765, Lord *Camden* pronounced an elaborate judgment. He even doubted the right of the secretary of state to commit persons at all, except for high treason; but in deference to prior decisions, the court felt bound to acknowledge the right. The main question, however, was the legality of a search warrant for papers. 'If this point should be determined in favor of the jurisdiction', said Lord *Camden*, 'the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall see fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.' 'This power, so assumed by the secretary of state, is an execution upon all the party's papers in the first instance. His house is rifled; his most valuable papers are taken out of his possession, before the paper, for which he is charged, is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper.' It had been found by the special verdict that many such warrants had been issued since the Revolution; but he wholly denied their legality. He referred the origin of the practise to the Star Chamber, which, in pursuit of libels, had given search-warrants to their messenger of the press, — a practice which, after the abolition of the Star Chamber, had been revived and authorized by the licensing act of Charles II., in the person of the secretary of state. And he conjectured that this practice had been continued after the expiration of that act, — a conjecture shared by Lord Mansfield and the Court of King's Bench. With the unanimous concurrence of the other judges of his court, this eminent magistrate now finally condemned this dangerous and unconstitutional practice." May's Constitutional History of England, c. 11. See also *Semayne's Case*, 5 Coke, 91; 1 *Smith's Lead. Cas.* 183; *Entinck v. Carrington*, 2 Wils. 275, and 19 *State Trials*, 1030; note to same case in *Broom, Const. Law*, 613; *Money v.*

The history of this controversy should be read in connection with that in America immediately previous to the American Revolution, in regard to writs of assistance issued by the courts to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, and which Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book"; since they placed "the liberty of every man in the hands of every petty officer."<sup>1</sup> All these matters are now a long way in the past; but it has not been deemed unwise to repeat in the State constitutions,<sup>2</sup> as well as in the Constitution of the United States,<sup>3</sup> the principles already settled in the common law upon this vital point in civil liberty.<sup>4</sup> [The protection afforded by these

Leach, Burr. 1742; Wilkes's Case, 2 Wils. 151, and 19 State Trials, 1405. For debates in Parliament on the same subject, see Hansard's Debates, Vol. XV. pp. 1393-1418; Vol. XVI. pp. 6 and 209. In further illustration of the same subject, see De Lolme on the English Constitution, c. 18; Story on Const. §§ 1901, 1902; Bell v. Clapp, 10 Johns. 263, 6 Am. Dec. 339; Sailly v. Smith, 11 Johns. 500.

<sup>1</sup> Works of John Adams, Vol. II. pp. 523, 524; 2 Hildreth's U. S. 499; 4 Bancroft's U. S. 414; Quincy, Mass. Reports, 51. See also the appendix to these reports, p. 395, for a history of writs of assistance.

<sup>2</sup> Rose v. State, 171 Ind. 662, 87 N. E. 103, 17 Ann. Cas. 228; Buckley v. Beaulieu, 104 Me. 56, 71 Atl. 70, 22 L. R. A. (N. S.) 819; People v. Marxhausen, 204 Mich. 559, 171 N. W. 557, 3 A. L. R. 1505; Voorhies v. Faust, 220 Mich. 155, 189 N. W. 1006, 27 A. L. R. 706; People v. Case, 220 Mich. 379, 190 N. W. 289, 27 A. L. R. 686; State v. Anderson, 270 Mo. 533, 194 S. W. 268, L. R. A. 1917 E, 833; State v. Quinn, 111 S. C. 174, 97 S. E. 62, 3 A. L. R. 1500; State v. Wills, 91 W. Va. 659, 114 S. E. 261, 24 A. L. R. 1398; State v. Kees, 92 W. Va. 277, 114 S. E. 617, 27 A. L. R. 681; Hoyer v. State, 180 Wis. 407, 103 N. W. 89, 27 A. L. R. 673.

<sup>3</sup> U. S. Const. 4th Amendment.

The scope of this work does not call for any discussion of the searches of private premises, and seizures of books

and papers, which are made under the authority, or claim of authority, of the revenue laws of the United States. Perhaps, under no other laws are such liberties taken by ministerial officers; and it would be surprising to find oppressive action on their part so often submitted to without legal contest, if the facilities they possess to embarrass, annoy, and obstruct the merchant in his business were not borne in mind. The federal decisions, however, go very far to establish the doctrine that, in matters of revenue, the regulations Congress sees fit to establish, however unreasonable they may seem, must prevail. For a very striking case, see Henderson's Distilled Spirits, 14 Wall. 44, 20 L. ed. 815.

<sup>4</sup> The immunity from search and seizure is not from all search and seizure, but from search and seizure unreasonable in the light of common law traditions. Gouled v. United States, 255 U. S. 298, 65 L. ed. 647, 41 Sup. Ct. Rep. 261; People v. Castree, 311 Ill. 392, 143 N. E. 112, 32 A. L. R. 357; People v. Chaigles, 237 N. Y. 193, 142 N. E. 583, 32 A. L. R. 676.

The Fourth Amendment denounces only such searches or seizures as are unreasonable, and it is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individ-

ual citizens. It has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling-house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. *Carroll v. United States*, 267 U. S. 132, 69 L. ed. 543, 45 Sup. Ct. Rep. 280, 39 A. L. R. 790.

The provision in the Constitution of West Virginia was adopted for the purpose of guaranteeing to citizens the rights and immunities enjoyed under the common law. *State v. Kees*, 92 W. Va. 277, 114 S. E. 617, 27 A. L. R. 681.

"When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." *Carroll v. United States*, 267 U. S. 132, 69 L. ed. 543, 45 Sup. Ct. Rep. 280.

"An arresting officer has the right to search the person of a prisoner lawfully arrested, and take from his person and hold for the disposition of the court any property connected with the offense for which he is arrested that may be used as evidence against him, or any weapon or thing that might enable the prisoner to escape or do some act of violence." *Youman v. Com.*, 189 Ky. 152, 224 S. W. 860, 13 A. L. R. 1303. But the search and seizure in such case to be lawful must be incidental to the arrest, and it is not incidental if it is made in a building other than the one in which the arrest was made. *Agnello v. United States*, 269 U. S. 20, 46 Sup. Ct. Rep. 4, 70 L. ed. —. As to when the search and seizure is incidental to the arrest, see also *Paulas v. United States*, 8 Fed. (2d) 120; *Argetakis v. State*, 24 Ariz. 599, 212 Pac. 372; *People v. Cona*, 180 Mich.

641, 147 N. W. 525; *People v. Woodward*, 220 Mich. 525, 190 N. W. 721; *People v. Conway*, 225 Mich. 152, 195 N. W. 679; *People v. Manko*, 189 N. Y. Supp. 357; *People v. Kalnin*, 189 N. Y. Supp. 359; *Davis v. State*, (Okla. Crim.), 234 Pac. 787; *People v. Laundry*, 103 Oreg. 443, 204 Pac. 958; 206 Pac. 290; *Gamble v. Keyes*, 35 S. D. 644, 153 N. W. 888.

Search without a warrant of an automobile, and seizure therein of liquor subject to seizure and destruction under the Prohibition Act, do not violate the Fourth Amendment, if made upon probable cause, *i.e.*, upon a belief reasonably arising out of circumstances known to the officer, that the vehicle contains such contraband liquor. *Carroll v. United States*, 267 U. S. 132, 69 L. ed. 543, 45 Sup. Ct. Rep. 280, 39 A. L. R. 790.

The provision in section 26, Title II, of the National Prohibition Act, authorizing seizure by an officer when he "discovers" any one in the act of transporting liquor by automobile or other vehicle, when construed, as it has been, not to limit the officer to what he learns of the contents of a passing automobile by the use of his senses at the time, is consistent with the Fourth Amendment. *Carroll v. United States*, 267 U. S. 132, 69 L. ed. 543, 45 Sup. Ct. Rep. 280, 39 A. L. R. 790.

If an officer sees an article or implement that it is unlawful to have possession of in the possession of any person, or in felony cases, when the officer has reasonable grounds for believing that the person has committed a felony, he may without a warrant of arrest make the arrest and take possession of the unlawful things on the person arrested, but he has no lawful right to search on suspicion, either the person or baggage or personal belongings of a suspected person. *Youman v. Com.* 189 Ky. 152, 224 S. W. 860, 13 A. L. R. 1303.

Letters voluntarily written by the defendant in a criminal prosecution while in the penitentiary for a prior offense which came into the possession of the officials of the penitentiary under established practice, reasonably



provisions applies only to governmental action. It has no application to searches or seizures by individuals without governmental sanction.<sup>1</sup>

The provisions prohibiting unreasonable searches and seizures "should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned, but mistakenly overzealous, executive officers."<sup>2</sup> But they should

designed to promote the discipline of the institution, were not acquired by unreasonable search and seizure. *Stroud v. United States*, 251 U. S. 15, 64 L. ed. 103, 40 Sup. Ct. Rep. 50.

A safe deposit box is not within the protection of the constitutional prohibition. *Carples v. Cumberland Coal, etc., Co.*, 240 N. Y. 187, 148 N. E. 185.

An ordinance authorizing the summary seizure and destruction of milk not conforming to the standard fixed by law is not unconstitutional. *Nelson v. Minneapolis*, 112 Minn. 16, 127 N. W. 445, 29 L. R. A. (N. S.) 260.

The prohibition of the Constitution of the United States against unreasonable searches and seizures does not apply to the states. *National Safe Deposit Co. v. Stead*, 232 U. S. 58, 58 L. ed. 504, 34 Sup. Ct. Rep. 209; *Weeks v. United States*, 232 U. S. 383, 58 L. ed. 652, 34 Sup. Ct. Rep. 341, L. R. A. 1915 B, 834, Ann. Cas. 1915 C, 1177; *Banks v. State*, 207 Ala. 179, 93 So. 293, 24 A. L. R. 1359; *People v. Mayen*, 188 Cal. 237, 205 Pac. 435, 24 A. L. R. 1383; *Johnson v. State*, 152 Ga. 271, 109 S. E. 662, 19 A. L. R. 641; *Tucker v. State*, 128 Miss. 211, 90 So. 845, 24 A. L. R. 1377; *People v. Adams*, 176 N. Y. 351, 68 N. E. 636, 98 Am. St. Rep. 675, 63 L. R. A. 406; *Hoyer v. State*, 180 Wis. 407, 193 N. W. 89, 27 A. L. R. 673; *State v. Peterson*, 27 Wyo. 185, 194 Pac. 342, 13 A. L. R. 1284.

<sup>1</sup> *Weeks v. United States*, 232 U. S. 383, 58 L. ed. 652, 34 Sup. Ct. Rep. 341, L. R. A. 1915 B, 834, Ann. Cas. 1915 C, 1177; *Burdeau v. McDowell*, 256 U. S. 465, 65 L. ed. 1048, 41 Sup. Ct. Rep. 574, 13 A. L. R. 1159; *Cohn v. State*, 120 Tenn. 61, 109 S. W. 1149, 17 L. R. A. (N. S.) 451, 15 Ann.

Cas. 1201; *Hughes v. State*, 145 Tenn. 544, 238 S. W. 588, 20 A. L. R. 639; *State v. Peterson*, 27 Wyo. 185, 194 Pac. 342, 13 A. L. R. 1284.

The constitutional provision against unreasonable searches and seizures contemplates only searches and seizures made through governmental agencies and under statutes attempting to authorize it, and has no bearing upon the unauthorized acts of private persons, or petty officers of the law, and the evidence secured by the unlawful acts and trespasses of such persons is admissible against the accused. *Cohn v. State*, 120 Tenn. 61, 109 S. W. 1149, 17 L. R. A. (N. S.) 451, 15 Ann. Cas. 1201.

"The mere fact that a man is an officer, . . . gives him no more right than is possessed by the ordinary private citizen to break in upon the privacy of a home and subject its occupants to the indignity of a search for the evidences of crime, without a legal warrant procured for that purpose." *McClurg v. Brenton*, 123 Iowa 368, 98 N. W. 881, 101 Am. St. Rep. 323, 65 L. R. A. 519.

Subject to the exception that an arresting officer has the right to search the person of the prisoner lawfully arrested, and take from his possession property connected with the offense, or any weapon or thing that might enable the prisoner to escape or do violence, it is as great a violation of the Constitution for an officer to search a person or baggage carried about by him, without a warrant authorizing it, as it is to search his premises. *Youman v. Com.*, 189 Ky. 152, 224 S. W. 860, 13 A. L. R. 1303.

<sup>2</sup> *Gould v. United States*, 255 U. S. 298, 65 L. ed. 647, 41 Sup. Ct. Rep. 261.

be so construed as to conserve public as well as individual rights.<sup>1</sup>]

For the service of criminal process, the houses of private parties are subject to be broken and entered under circumstances which are fully explained in the works on criminal law, and need not be enumerated here. And there are also cases where search-warrants are allowed to be issued, under which an officer may be protected in the like action.<sup>2</sup> But as search-warrants are a species of process exceedingly arbitrary in character, and which ought not to be resorted to except for very urgent and satisfactory reasons, the rules of law which pertain to them are of more than ordinary strictness; and if the party acting under them expects legal protection, it is essential that these rules be carefully observed.

In the first place, they are only to be granted in the cases expressly authorized by law; and not generally in such cases until after a showing made before a judicial officer, under oath, that a crime has been committed, and that the party complaining has reasonable cause to suspect that the offender, or the property which was the subject or the instrument of the crime, is concealed in some specified house or place.<sup>3</sup> And the law, in requiring a showing of reasonable

<sup>1</sup> *Carroll v. United States*, 267 U. S. 132, 69 L. ed. 543, 45 Sup. Ct. Rep. 280.

<sup>2</sup> "The wording of the Fourth Amendment implies that search warrants were in familiar use when the Constitution was adopted and, plainly, that when issued 'upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized', searches and seizures made under them are to be regarded as not unreasonable and therefore not prohibited by the amendment." *Gould v. United States*, 255 U. S. 298, 65 L. ed. 647, 41 Sup. Ct. Rep. 261.

<sup>3</sup> 2 Hale, P. C. 142; Bishop, Cr. Pro. §§ 716-719; Archbold, Cr. Law, 147; *People v. Castree*, 311 Ill. 392, 143 N. E. 112, 32 A. L. R. 357; *State v. Derry*, 171 Ind. 18, 85 N. E. 765, 131 Am. St. Rep. 237; *Rose v. State*, 171 Ind. 662, 87 N. E. 103, 17 Ann. Cas. 228. See also *State v. Peterson*, 27 Wyo. 185, 194 Pac. 342, 13 A. L. R. 1284.

It is competent for the legislature to declare that a certain showing shall

constitute probable cause for the issuance of a search warrant, provided the complaint thus prescribed does not require less to be shown than was required for the issuance of such a warrant at common law. *State v. Kees*, 92 W. Va. 277, 114 S. E. 617, 27 A. L. R. 681.

A statute which directs the seizure and retention of property alleged to be used as a bawdyhouse, which seizure is without notice and without a hearing to determine whether such place be a nuisance in fact, is unconstitutional in that it violates the security of persons in their houses by directing an unreasonable seizure of the same. *State ex rel. Herigstad v. McCray*, 48 N. D. 625, 186 N. W. 280, 22 A. L. R. 530.

Though a statute does not expressly require a complaint for a search warrant to be sworn to, it is not violative of a constitutional provision providing that "no warrant shall issue but upon probable cause, supported by affidavit", where the statutes require all complaints for criminal offenses to be verified. *State v. Peterson*, 27 Wyo. 185, 194 Pac. 342, 13 A. L. R. 1284.

cause for suspicion, intends that evidence shall be given of such facts as shall satisfy the magistrate<sup>1</sup> that the suspicion is well founded; for the suspicion itself is no ground for the warrant except as the facts justify it.<sup>2</sup> [In a recent case, the Supreme Court of the United States has stated the rule thus: "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is suffi-

<sup>1</sup> The issuance of a search warrant is a matter for judicial determination and not within the much more limited field of the discretion vested in executive or administrative officers. *Hoyer v. State*, 180 Wis. 407, 193 N. W. 89, 27 A. L. R. 673; *State v. Peterson*, 27 Wyo. 185, 194 Pac. 342, 13 A. L. R. 1284.

"In the contemplation of the law the probable cause which must be supported by oath or affirmation must be submitted to the committing magistrate himself. The official accuser cannot be the judge. It is the magistrate who must exercise his own judgment on the sufficiency of the ground shown, and this must amount to probable cause of belief. . . . The rule results that it is beyond the power of a magistrate to authorize a search warrant to issue upon an affidavit based on mere belief." *Burtch v. Zeuch*, 200 Iowa 49, 202 N. W. 542, 39 A. L. R. 1349.

A statute which provides that the question of probable cause shall be determined by the prosecuting attorney or prohibition commissioner is invalid. *State v. Peterson*, 27 Wyo. 185, 194 Pac. 342, 13 A. L. R. 1284.

<sup>2</sup> *Commonwealth v. Lottery Tickets*, 5 Cush. 369; *Else v. Smith*, 1 D. & R. 97; *Giles v. United States*, 284 Fed. 208; *Atlantic Food Products Corporation v. McClure*, 288 Fed. 982; *United States v. Harnich*, 289 Fed. 256; *Colley v. Com.*, 195 Ky. 706, 243 S. W. 913; *Waltingly v. Com.*, 197 Ky. 583, 247 S. W. 938; *People v. Effelberg*, 220 Mich. 528, 190 N. W. 727; *People v. Knopka*, 220 Mich. 540, 190 N. W. 731; *People v. Thompson*, 221 Mich. 618, 192 N. W. 560; *State ex rel. Samlin v. District Ct.*, 59 Mont. 600, 198 Pac. 362; *In re Liquors seized at Auto Inn*, 204 App. Div. 185,

197 N. Y. Supp. 758; *State ex rel. Register v. McGahey*, 12 N. D. 535, 97 N. W. 865, 1 Ann. Cas. 650.

In *United States v. Lepper*, 288 Fed. 136, 138, the court said: "It is not required that the evidence should show that a crime was actually committed or that the facts should be alleged strong enough to convict the defendant. It is enough if probable cause exists, or a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves, to warrant a discreet and prudent man in believing that a crime is being committed."

The fact that the complainant, in the information upon which a search warrant is issued, shows that the reason for his belief that an offense is being committed upon certain premises is information conveyed to him, instead of facts known to him personally, will not invalidate the same. *State v. Kees*, 92 W. Va. 277, 114 S. E. 617, 27 A. L. R. 681. See also *United States v. Bookbinder*, 278 Fed. 216; *Collins v. Lean*, 68 Cal. 284, 9 Pac. 173.

A statute which provides that a complaint for a search warrant can be made upon information and belief, is violative of a constitutional provision that "no warrant shall issue but upon probable cause, supported by affidavit." *State v. Peterson*, 27 Wyo. 185, 194 Pac. 342, 13 A. L. R. 1284.

Where an experienced prohibition agent saw cases labeled "whisky", which looked to him like whisky cases, being unloaded at a building which, as he ascertained, had no permit to store whisky, there was probable cause for warrant and seizure. *Steele v. United States No. 1*, 267 U. S. 498, 69 L. ed. 761, 45 Sup. Ct. Rep. 414.

cient.”<sup>1</sup> But in some jurisdictions it has been held that an affidavit on information and belief is sufficient without setting out the facts upon which the belief is based.<sup>2]</sup>

In the next place, the warrant which the magistrate issues must particularly specify the place to be searched<sup>3</sup> and the object for which the search is to be made. If a building is to be searched, the name of the owner or occupant should be given;<sup>4</sup> or, if not occupied, it should be particularly described, so that the officer will be left to no discretion in respect to the place; and a misdescription in regard to the ownership,<sup>5</sup> or a description so general that it applies equally well

<sup>1</sup> *Carroll v. United States*, 267 U. S. 132, 69 L. ed. 543, 45 Sup. Ct. Rep. 280. See also *Steele v. United States* No. 1, 267 U. S. 498, 69 L. ed. 761, 45 Sup. Ct. Rep. 414; *Dumbra v. United States*, 268 U. S. 435, 69 L. ed. 1032, 45 Sup. Ct. Rep. 546.

<sup>2</sup> *Rose v. State*, 171 Ind. 662, 87 N. E. 103, 17 Ann. Cas. 228; *Watson v. State*, 109 Neb. 43, 189 N. W. 620; *Cochran v. State*, 105 Ohio St. 541, 138 N. E. 54.

In Ohio it has been held that a search warrant for the seizure of intoxicating liquors or property designed for the manufacture of intoxicating liquors may lawfully be issued upon complying with the statutory requirements by filing an affidavit with a magistrate particularly describing the house or place to be searched, the person to be seized, and the things to be searched for, and alleging substantially the offense in relation thereto and that affiant believes and has good cause to believe that such things are there concealed, without any supporting testimony of the truth of such affidavit and without any finding of probable cause on the part of the magistrate. *Rosanski v. State*, 106 Ohio St. 422, 140 N. E. 370.

In West Virginia it has been held that it is competent for the legislature to declare that a certain showing shall constitute probable cause for the issuance of a search warrant, provided the complaint thus prescribed does not require less to be shown than was required for the issuance of such a warrant at common law. *State v. Kees*, 92 W. Va. 277, 114 S. E. 617, 27 A. L. R. 681.

<sup>3</sup> *United States v. Borkowski*, 268 Fed. 408; *Toole v. State*, 170 Ala. 41, 54 So. 195; *Purkey v. Mabey*, 33 Idaho, 281, 193 Pac. 79; *People v. Castree*, 311 Ill. 392, 143 N. E. 112, 32 A. L. R. 357.

A search without a warrant is an unreasonable search, and a search of a place not described is without a warrant and is unreasonable. *People v. Castree*, 311 Ill. 392, 143 N. E. 112, 32 A. L. R. 357.

A search warrant sufficiently describes the place to be searched if it enables the officer, with reasonable effort, to identify it. *Steele v. United States* No. 1, 267 U. S. 498, 69 L. ed. 761, 45 Sup. Ct. Rep. 414.

<sup>4</sup> *Stone v. Dana*, 5 Met. 98. See *Bell v. Rice*, 2 J. J. Marsh. 44, 19 Am. Dec. 122; *Miller v. State*, 129 Miss. 774, 93 So. 2. But see *United States v. Camarota*, 278 Fed. 388, and *Barber's Petition* 281 Fed. 550.

<sup>5</sup> *Sandford v. Nichols*, 13 Mass. 286; s. c. 7 Am. Dec. 151; *Allen v. Staples*, 6 Gray, 491; *United States v. Innelli*, 286 Fed. 731.

In Nebraska it has been held that a search warrant provided for by a statute of that state, being primarily for the search of particular premises for intoxicating liquors and the bringing of the person found in charge thereof before the magistrate for examination, the same particularity in describing the owner and occupant of the premises, thought to be in possession of the liquor, is not required as is necessary in warrants solely for the apprehension of persons. *Watson v. State*, 109 Neb. 43, 189 N. W. 620.

to several buildings or places, would render the warrant void in law.<sup>1</sup> [Thus a warrant issued against an apartment house where many families reside is invalid where it is not claimed that the whole premises should be searched.<sup>2</sup>] Search-warrants are always obnoxious to very serious objections; and very great particularity is justly required in these cases before the privacy of a man's premises is allowed to be invaded by the minister of the law.<sup>3</sup> And therefore a designation of goods to be searched for as "goods, wares, and merchandises", without more particular description, has been regarded as insufficient, even in the case of goods supposed to be smuggled,<sup>4</sup>

<sup>1</sup> *Toole v. State*, 190 Ala. 41, 54 So. 195.

A search warrant is insufficient which fails to describe any houses, buildings or real property to be examined or to designate the county in which the writ is to be executed. *Smith v. McDuffee*, 72 Oreg. 276, 142 Pac. 558, 143 Pac. 929, Ann. Cas. 1916 D, 947.

A warrant to search the "houses and buildings of Hiram Ide and Henry Ide", is too general. *Humes v. Tabor*, 1 R. I. 464. See *McGlinchy v. Barrows*, 41 Me. 74; *Ashley v. Peterson*, 25 Wis. 621; *Com. v. Intox. Liquors*, 140 Mass. 287, 3 N. E. 4. So a warrant for the arrest of an unknown person under the designation of John Doe, without further description, is void. *Commonwealth v. Crotty*, 10 Allen, 403.

In *Steele v. United States* No. 1, 267 U. S. 498, 69 L. ed. 761, 45 Sup. Ct. Rep. 414, a description, in a search warrant, of a building as a garage used for business purposes, giving its street and one of its two house numbers, was held sufficiently definite, under the circumstances, for search of the whole building, which had three street entrances, and means of access between its parts on the ground and upper floors, and was used in conducting an automobile garage and storage business.

For descriptions held sufficient, see *Wright v. Dressel*, 140 Mass. 147, 3 N. E. 6; *Com. v. Certain Liquors*, 146 Mass. 509, 16 N. E. 298; *Barber's Petition*, 281 Fed. 550; *United States v. Boasberg*, 283 Fed. 305; *United States v. Lepper*, 288 Fed. 136; *Toole*

*v. State*, 170 Ala. 41, 54 So. 195; *People v. Flemming*, 221 Mich. 609, 192 N. W. 625; *State v. Hesse*, 154 Minn. 89, 191 N. W. 267; *In re Holcomb*, 117 Misc. (N. Y.) 356, 192 N. Y. Supp. 407; affirmed 202 App. Div. 784, 194 N. Y. Supp. 944; *State v. Montgomery*, 94 W. Va. 153, 117 S. E. 870.

For descriptions held insufficient, see *United States v. Alexander*, 278 Fed. 308; *Pressley v. United States*, 289 Fed. 477; *United States v. Rykowski*, 267 Fed. 866; *United States v. Innelli*, 286 Fed. 731; *In re Graham*, 203 App. Div. 172, 196 N. Y. Supp. 276.

<sup>2</sup> *United States v. Mitchell*, 274 Fed. 128.

<sup>3</sup> A warrant for searching a dwelling-house will not justify a forcible entry into a barn adjoining the dwelling house. *Jones v. Fletcher*, 41 Me. 254; *Downing v. Porter*, 8 Gray, 539; *Bishop, Cr. Pro.* §§ 716-719.

The search of a dwelling under a warrant particularly describing a store is unreasonable, and violative of the constitution. *People v. Castree*, 311 Ill. 392, 143 N. E. 112, 32 A. L. R. 357. As to necessity and sufficiency of statement of time of events described in affidavit, see *Baker v. Com.*, 204 Ky. 536, 264 S. W. 1091; *People v. Musk*, 231 Mich. 187, 203 N. W. 865; *Armstrong v. State*, 150 Tenn. 416, 265 S. W. 672.

<sup>4</sup> *Sandford v. Nichols*, 13 Mass. 286, 7 Am. Dec. 151; *Archbold, Cr. Law*, 143.

A description of the articles to be searched for as "cases of whisky" is specific enough. *Steele v. United*

where there is usually greater difficulty in giving description, and where, consequently, more latitude should be permitted than in the case of property stolen.

Lord *Hale* says: "It is fit that such warrants to search do express that search be made in the daytime; and though I do not say they are unlawful without such restriction, yet they are very inconvenient without it; for many times, under pretense of searches made in the night, robberies and burglaries have been committed, and at best it creates great disturbance."<sup>1</sup> And the statutes upon this subject will generally be found to provide for searches in the daytime only, except in very special cases.

The warrant should also be directed to the sheriff or other proper officer, and not to private persons; though the party complainant may be present for the purposes of identification,<sup>2</sup> and other assistance can lawfully be called in by the officer if necessary.

The warrant must also command that the goods or other articles to be searched for, if found, together with the party in whose custody they are found, be brought before the magistrate, to the end that, upon further examination into the facts, the goods, and the party in whose custody they were, may be disposed of according to law.<sup>3</sup> And it is a fatal objection to such a warrant that it leaves the disposition of the goods searched for to the ministerial officer, instead of requiring them to be brought before the magistrate, that he may pass his judgment upon the truth of the complaint made; and it would also be a fatal objection to a statute authorizing such a warrant if it permitted a condemnation or other final disposition of the

States No. 1, 267 U. S. 498, 69 L. ed. 761, 45 Sup. Ct. Rep. 414. "A certain quantity of rum being about and not exceeding 100 gallons" is sufficient. *State v. Fitzpatrick*, 16 R. I. 54, 11 Atl. Rep. 767.

Under a constitutional requirement that the affidavit for a search warrant must particularly describe the property sought an affidavit describing the property as "personal goods and property, to wit, certain paraphernalia", was held insufficient. *People v. Mayen*, 188 Cal. 237, 205 Pac. 435, 24 A. L. R. 1383. And under such a requirement a designation of the property as "intoxicating liquor", without description as to kind, quantity, etc., is insufficient. *State v. Peterson*, 27 Wyo. 185, 194 Pac. 342, 13 A. L. R. 1284. See *Giles v. United States*, 284 Fed. 208; *United States v. Lepper*, 288

Fed. 136; *Walters v. Com.*, 199 Ky. 182, 250 S. W. 839; *Voorhies v. Faust*, 220 Mich. 155, 189 N. W. 1006, 27 A. L. R. 706; *People v. Musczynski*, 220 Mich. 536, 19 N. W. 730.

<sup>1</sup> 2 Hale, P. C. 150. See Archbold, Cr. Law (7th ed.), 145; *Com. v. Hinds*, 145 Mass. 182, 13 N. E. 397.

<sup>2</sup> 2 Hale, P. C. 150; Archbold, Cr. Law (7th ed.), 145.

<sup>3</sup> 2 Hale, P. C. 150; *Bell v. Clapp*, 10 Johns. 263, 6 Am. Dec. 339; *Hibbard v. People*, 4 Mich. 126; *Fisher v. McGirr*, 1 Gray, 1.

If the statute ordains that the warrant shall require the officer to make an inventory, one omitting this command is no protection, though in fact an inventory is made by the officer. *Hussey v. Davis*, 58 N. H. 317.

goods, without notice to the claimant, and without an opportunity for a hearing being afforded him.<sup>1</sup>

The warrant is not allowed for the purpose of obtaining evidence of an intended crime; but only after lawful evidence of an offense actually committed.<sup>2</sup> Nor even then is it allowable to invade one's

<sup>1</sup> The "Search and Seizure" clause in some of the prohibitory liquor laws was held void on this ground. *Fisher v. McGirr*, 1 Gray, 1; *Greene v. Briggs*, 1 Curtis, 311; *Hibbard v. People*, 4 Mich. 126. See also *Matter of Morton*, 10 Mich. 208; *Sullivan v. Oneida*, 61 Ill. 242; *State v. Snow*, 3 R. I. 64, for a somewhat similar principle.

An act which declared that all nets, &c., used in catching fish in violation thereof should be forfeited, and might be seized and destroyed or sold by the peace officer, was declared void in *Hey Sing Jeck v. Anderson*, 57 Cal. 251. But in an Indiana case it is said: "By the fundamental law no one may be deprived of anything the law recognized as property without notice and an opportunity to defend it. There are, however, some things, having a commercial value, which from their very nature are under legal condemnation, or outlawry, and which the law pursues, rather than protects, because of their pernicious effect upon the public health and morals; for instance, counterfeit money, obscene pictures, vile books, and the like. Such things are regarded by the law as *mala per se*, because there is no condition or circumstances under which they may come to the possession or attention of the individual without tending to the corruption and prejudice of the public morals and welfare. Such articles cannot be kept, used or exhibited for any useful or innocent purpose. Burglar's tools and counterfeiting apparatus are generally put in the same class. Being inherently evil, no absolute dominion or property right can exist in them, and, outside the statute, courts have authority, under their police powers, to destroy them for the protection of society. *State v. Robins*, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438; *Spaulding v. Preston*, 21 Vt. 9, 50 Am. Dec. 68;

*Com. v. Coffee*, 9 Gray (Mass.) 140; *Police Com'rs v. Wagner*, 93 Md. 182, 48 Atl. 455, 52 L. R. A. 775, 86 Am. St. Rep. 423." But where articles are "capable of two uses — one lawful and the other unlawful — neither ministerial officers nor courts can upon mere view deprive them of their characteristics as property and put them under legal condemnation. Such a proceeding would be clearly unconstitutional. See *State v. Robins*, 124 Ind. 308, 24 N. E. 978, 8 L. R. A. 438; *Wagner v. Upshar*, 95 Md. 519, 52 Atl. 509, 93 Am. St. Rep. 412; *Lowrey v. Rainwater*, 70 Mo. 152, 35 Am. Rep. 420; *Sullivan v. Oneida*, 61 Ill. 242; *Daniels v. Homer*, 139 N. C. 219, 51 S. E. 992, 3 L. R. A. (N. S.) 997; *Woods v. Cottrell*, 55 W. Va. 476, 47 S. E. 275, 65 L. R. A. 616, 104 Am. St. Rep. 1004; 20 Cyc. p. 920." *State v. Derry*, 171 Ind. 18, 85 N. E. 765, 131 Am. St. Rep. 237. See also *McConnell v. McKillup*, 71 Neb. 712, 99 N. W. 505, 115 Am. St. Rep. 614, 65 L. R. A. 610, 8 Ann. Cas. 898. In a Missouri case it has been held that it is not competent by law to empower a magistrate on mere information, or on his own personal knowledge, to seize and destroy gaming-tables or devices without a hearing and trial. *Lowry v. Rainwater*, 70 Mo. 152, 35 Am. Rep. 420.

After seizure of money and acquittal of larceny, the money must be delivered to defendant. *State v. Williams*, 61 Iowa, 517, 16 N. W. 586.

<sup>2</sup> We do not say that it would be incompetent to authorize, by statute, the issue of search warrants for the prevention of offenses in some cases; but it is difficult to state any case in which it might be proper, except in such cases of attempts, or of preparations to commit crime, as are in themselves criminal.

Slot machine to be used as a gambling device. Its seizure justified to

privacy for the sole purpose of obtaining evidence against him,<sup>1</sup> except in a few special cases where that which is the subject of the crime is supposed to be concealed, and the public or the complainant has an interest in it or in its destruction.<sup>2</sup> Those special cases are familiar, and well understood in the law. Search warrants have heretofore been allowed to search for stolen goods, for goods supposed to have been smuggled into the country in violation of the revenue laws, for implements of gaming<sup>3</sup> or counterfeiting, for lottery tickets or prohibited liquors kept for sale contrary to law,<sup>4</sup> for obscene books and papers kept for sale or circulation, and for powder or other explosive and dangerous material so kept as to endanger the public

prevent the offense. *Board of Police Com'rs v. Wagner*, 93 Md. 182, 48 Atl. 455, 52 L. R. A. 775.

<sup>1</sup> *Gould v. United States*, 255 U. S. 298, 65 L. ed. 647, 41 Sup. Ct. Rep. 261.

The fourth amendment to the Constitution of the United States, found also in many State constitutions, would clearly preclude the seizure of one's papers in order to obtain evidence against him; and the spirit of the fifth amendment — that no person shall be compelled in a criminal case to give evidence against himself — would also forbid such seizure.

In *State v. Slamon*, 73 Vt. 212, 50 Atl. 1097, 87 Am. St. 711, it was held a violation of the constitutional right to take a letter while searching for stolen goods by virtue of a search warrant.

<sup>2</sup> *Gould v. United States*, 255 U. S. 298, 65 L. ed. 647, 41 Sup. Ct. Rep. 261.

The police authorities may be properly invested with power to seize and destroy public nuisances, and to seize such instruments and devices as are designed and intended for use in the commission of crime. *J. B. Mullen & Co. v. Mosley*, 13 Idaho, 457, 90 Pac. 986, 121 Am. St. Rep. 277, 12 L. R. A. (N. S.) 394, 13 Ann. Cas. 450.

<sup>3</sup> *J. B. Mullen & Co. v. Mosley*, 13 Idaho, 457, 90 Pac. 986, 121 Am. St. Rep. 277, 12 L. R. A. (N. S.) 394, 13 Ann. Cas. 450; *Frost v. People*, 193 Ill. 635, 61 N. E. 1054, 86 Am. St. Rep. 352; *Woods v. Cottrell*, 55 W. Va. 476, 47 S. E. 275, 104 Am. St.

Rep. 1004, 65 L. R. A. 616, 2 Ann. Cas. 933.

<sup>4</sup> *Kirkland v. State*, 72 Ark. 171, 78 S. W. 770, 105 Am. St. Rep. 25, 65 L. R. A. 76, 2 Ann. Cas. 242; *Delaney v. Plunkett*, 146 Ga. 547, 91 S. E. 561, L. R. A. 1917 D, 926, Ann. Cas. 1917 E, 685; *Himes v. Stahe*, 79 Kan. 88, 99 Pac. 273, 131 Am. St. Rep. 280, 20 L. R. A. (N. S.) 1118, 17 Ann. Cas. 298; *Youman v. Com.*, 189 Ky. 152, 224 S. W. 860, 13 A. L. R. 1303; *Ash v. Com.*, 193 Ky. 452, 236 S. W. 1032.

A search and seizure of intoxicating liquors possessed in violation of the provisions of the National Prohibition law upon a warrant satisfying the requirements of the Fourth Amendment and the Espionage Act and issued upon probable cause shown is not an unreasonable search and seizure within the constitutional provision and is in accordance with the Constitution and statutes of the United States. *Steele v. United States*, 267 U. S. 505, 69 L. ed. 761, 45 Sup. Ct. Rep. 414; *Dumbra v. United States*, 268 U. S. 435, 69 L. ed. 1032, 45 Sup. Ct. Rep. 546.

The fact that one has a permit, under the National Prohibition Act, to make and sell wines on his premises for non-beverage purposes, and is under bond, and the premises subject to inspection by internal revenue officers during business hours, does not preclude the issuance of a warrant, upon probable cause, to search the place for wines there possessed illegally for beverage purposes. *Dumbra v. United States*, 268 U. S. 435, 69 L. ed. 1032, 45 Sup. Ct. Rep. 546.



safety.<sup>1</sup> A statute which should permit the breaking and entering a man's house, and the examination of books and papers with a view to discover the evidence of crime, might possibly not be void on constitutional grounds in some other cases; but the power of the legislature to authorize a resort to this process is one which can properly be exercised only in extreme cases, and it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons, — and all this under the direction of a mere ministerial officer, who brings with him such assistants as he pleases, and who will select them more often with reference to physical strength and courage than to their sensitive regard to the rights and feelings of others. To incline against the enactment of such laws is to incline to the side of safety.<sup>2</sup>

<sup>1</sup> These are the most common cases, but in the following, search warrants are also sometimes provided for by statute: books and papers of a public character, retained from their proper custody; females supposed to be concealed in houses of ill-fame; children enticed or kept away from parents or guardians; concealed weapons; counterfeit money, and forged bills or papers. See cases under English statutes specified in 4 Broom and Hadley's Commentaries, 332.

<sup>2</sup> Instances sometimes occur in which ministerial officers take such liberties in endeavoring to detect and punish offenders, as are even more criminal than the offenses they seek to punish. The employment of spies and decoys to lead men on to the commission of crime, on the pretense of bringing criminals to justice, cannot be too often or too strongly condemned; and that prying into private correspondence by officers which has sometimes been permitted by post-masters, is directly in the face of the law, and cannot be excused. The importance of public confidence in the inviolability of correspondence through the post-office cannot well be overrated; and the proposition to permit letters to be opened at the discretion of a ministerial officer, would excite general indignation. See *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877.

In Maine it has been decided that a telegraph operator may be compelled to disclose the contents of a message sent by him for another party, and that no rule of public policy would forbid. *State v. Litchfield*, 58 Me. 267. The case is treated as if no other considerations were involved than those which arise in the ordinary case of a voluntary disclosure by one private person to another, without necessity. Such, however, is not the nature of the communication made to the operator of the telegraph. That instrument is used as a means of correspondence, and as a valuable, and in many cases an indispensable, substitute for the postal facilities; and the communication is made, not because the party desires to put the operator in possession of facts, but because transmission without it is impossible. It is not voluntary in any other sense than this, that the party makes it rather than deprive himself of the benefits of this great invention and improvement. The reasons of a public nature for maintaining the secrecy of telegraphic communication are the same with those which protect correspondence by mail; and though the operator is not a public officer, that circumstance appears to us immaterial. He fulfills an important public function, and the propriety of his preserving inviolable secrecy in

In principle they are objectionable; in the mode of execution they are necessarily odious; and they tend to invite abuse and to cover the commission of crime. We think it would generally be safe for the legislature to regard all those searches and seizures "unreasonable" which have hitherto been unknown to the law, and on that account to abstain from authorizing them, leaving parties and the public to the accustomed remedies.<sup>1</sup>

regard to communications is so obvious, that it is common to provide statutory penalties for disclosures. If on grounds of public policy the operator should not voluntarily disclose, why do not the same considerations forbid the courts compelling him to do so? Or if it be proper to make him testify to the correspondence by telegraph, what good reason can be given why the postmaster should not be made subject to the process of subpoena for a like purpose, and compelled to bring the correspondence which passes through his hands into court, and open it for the purposes of evidence? This decision has been followed in some other cases. *Henisler v. Freedman*, 2 Pars. Sel. Cas. (Pa.) 274; *First National Bank of Wheeling v. Merchants' National Bank*, 7 W. Va. 544; *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426; *Woods v. Miller*, 55 Iowa, 168, 7 N. W. 484; *U. S. v. Hunter*, 15 Fed. Rep. 712. See Gray, *Communication by Telegraph*, ch. v.

We should suppose, were it not for the opinions to the contrary by tribunals so eminent, that the public could not be entitled to a man's private correspondence, whether obtainable by seizing it in the mails, or by compelling the operator of the telegraph to testify to it, or by requiring his servants to take from his desks his private letters and journals, and bring them into court on *subpœna duces tecum*. Any such compulsory process to obtain it seems a most arbitrary and unjustifiable seizure of private papers; such an "unreasonable seizure" as is directly condemned by the Constitution. In England, the secretary of state sometimes issues his warrant for opening a particular letter, where he is possessed of such facts as he is satisfied would justify him with

the public; but no American officer or body possesses such authority, and its usurpation should not be tolerated. Letters and sealed packages subject to letter postage in the mail can be opened and examined only under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877. See this case for a construction of the law of Congress for excluding improper matter from the mails. For an account of the former and present English practice on opening letters in the mail, see May, *Constitutional History*, c. 11; Todd, *Parliamentary Government*, Vol. I. p. 272; Broom, *Const. Law*, 615.

<sup>1</sup> A search warrant for libels and other papers of a suspected party was illegal at the common law. See 11 *State Trials*, 313, 321; Archbold, *Cr. Law* (7th ed.), 141; *Wilkes v. Wood*, 19 *State Trials*, 1153.

In *Robinson v. Richardson*, 13 *Gray (Mass.)* 454, 456, *Merrick, J.*, said: "Search warrants were never recognized by the common law as processes which might be availed of by individuals in the course of civil proceedings or for the maintenance of any mere private right; but their use was confined to cases of public prosecutions, instituted and pursued for the suppression of crime or the detection and punishment of criminals. Even in those cases, if we may rely on the authority of Lord *Coke*, their legality was formerly doubted; and Lord *Camden* said that they crept into the law by imperceptible practice. But their legality has long been considered to be established on the ground of public necessity, because without them

felons and other malefactors would escape detection. *Entick v. Carrington*, 19 Howell's State Trials, 1067; 1 Chitty's Crim. Law, 64. . . . All searches, therefore, which are instituted and pursued upon the complaint or suggestion of one party into the house or possessions of another, in order to secure a personal advantage, and not with any design to afford aid in the administration of justice in reference to acts or offenses in violation of penal laws, must be held to be unreasonable, and consequently under our Constitution unwarrantable, illegal, and void." See also *People ex rel. Robert Simpson Co. v. Kempner*, 208 N. Y. 16, 101 N. E. 794, 46 L. R. A. (N. S.) 970, Ann. Cas. 1914 D, 169; *Cohn v. State*, 120 Tenn. 61, 109 S. W. 1149, 17 L. R. A. (N. S.) 451, 15 Ann. Cas. 1201.

"To enter a man's house," said Lord Camden, "by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition, — a law under which no Englishman would wish to live an hour." See his opinion in *Entick v. Carrington*, 19 State Trials, 1029; s. c. 2 Wils. 275, and *Broom*, Const. Law, 558; *Huckle v. Money*, 2 Wils. 205; *Leach v. Money*, 19 State Trials, 1001; s. c. 3 Burr. 1692; and 1 W. Bl. 555; note to *Entick v. Carrington*, *Broom*, Const. Law, 613.

An order compelling one to deliver his private papers to another who has no ownership in them is in violation of the constitutional provision against unwarrantable seizures. *Ex parte Clarke*, 126 Cal. 235, 58 Pac. 546, 77 Am. St. 176.

A search and seizure of one's private papers by a government officer who has obtained entrance to his house or office by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, is an "unreasonable" search and seizure within the prohibition of the Federal Constitution. *Gould v. United States*, 255 U. S. 298, 65 L. ed. 647, 41 Sup. Ct. Rep. 261.

A statute which, though no suit be pending, empowers a private person

in his own interest to demand of a corporation which has discharged him disclosure to him of its private correspondence is unconstitutional. *St. Louis, etc. R. Co. v. Griffin*, 106 Tex. 477, 171 S. W. 703, L. R. A. 1917 B, 1108.

As to right of parties litigant to inspect books and records of opposing parties, see *Federal Mining, etc., Co. v. Public Utilities Commission*, 26 Idaho, 391, 143 Pac. 1173, L. R. A. 1917 F, 1195; *Dalton v. Calhoun County Dist. Court*, 164 Iowa, 187, 145 N. W. 498, Ann. Cas. 1916 D, 695; *State ex rel. Boston, etc., Min. Co. v. District Court*, 27 Mont. 441, 71 Pac. 602, 94 Am. St. Rep. 831.

As to constitutionality of compulsory production of the books and papers of a corporation before a court or grand jury. See *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 48 L. ed. 860; 24 Sup. Ct. Rep. 563; *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178, 12 Ann. Cas. 658; *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 53 L. ed. 530, 29 Sup. Ct. Rep. 370, 15 Ann. Cas. 645; *Wilson v. United States*, 221 U. S. 361, 55 L. ed. 771, 31 Sup. Ct. Rep. 538, Ann. Cas. 1912 D, 558; *American Lithograph Co. v. Werckmeister*, 221 U. S. 603, 55 L. ed. 873, 31 Sup. Ct. Rep. 676; *Baltimore, etc., R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 55 L. ed. 878, 31 Sup. Ct. Rep. 621; *Wheeler v. United States*, 226 U. S. 478, 57 L. ed. 309, 33 Sup. Ct. Rep. 158; *Grant v. United States*, 227 U. S. 74, 57 L. ed. 423, 33 Sup. Ct. Rep. 190; *Ex parte Gould*, 60 Tex. Crim. Rep. 442, 132 S. W. 364, 31 L. R. A. (N. S.) 835; *In re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790, 11 Ann. Cas. 1069.

A statute making it a crime to have in possession for use or sale certain bottles or other vessels without the written consent of the owner, and providing for a search warrant to seize and restore such property to the owner, is unconstitutional. *State v. Schmuck*, 77 Ohio St. 438, 83 N. E. 797, 122

[But in a recent case the Supreme Court of the United States has held that there is no special sanctity in papers as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant; and that contracts may be so used as instruments or agencies for perpetrating frauds upon the government as to give the public an interest in them which will justify the search for and seizure of them, under a search warrant, for the purpose of preventing further frauds.<sup>1</sup> The mere fact that papers seized under a properly issued search warrant have no pecuniary value does not render their seizure invalid.<sup>2</sup>

Since the Eighteenth Amendment to the Federal Constitution became effective by the enactment of the Volstead Act, there have been a great number of cases in both the Federal and State courts in which it was necessary to interpret the constitutional prohibition against unreasonable searches and seizures and to determine under what exceptional circumstances a search for and seizure of intoxicating liquors may be made without a warrant. These cases hold that as a general rule a search of one's person or premises for this purpose, without a warrant, is illegal,<sup>3</sup> but that it is warranted under certain

Am. St. Rep. 527, 14 L. R. A. (N. S.) 1128.

A municipal officer, who has arrested an alleged violator of a municipal ordinance, has no power, without other authority than the warrant against the accused, to take and carry away the property of a third person from the latter's premises on the ground that the property of such third person so seized may contain evidence to be used against the defendant in the warrant. Such a seizure is a violation of the constitutional guaranty against unreasonable searches and seizures. *Owens v. Way*, 141 Ga. 796, 82 S. E. 132, L. R. A. 1915 E, 399, Ann. Cas. 1915 C, 963.

<sup>1</sup> *Gould v. United States*, 255 U. S. 298, 65 L. ed. 647, 41 Sup. Ct. Rep. 265. See also *People v. Chaigles*, 237 N. Y. 193, 142 N. E. 583, 32 A. L. R. 676.

<sup>2</sup> *Gould v. United States*, 255 U. S. 298, 65 L. ed. 647, 41 Sup. Ct. Rep. 261.

<sup>3</sup> *United States v. Kehih*, 272 Fed. 484; *United States v. Mitchell*, 274

Fed. 128; *Holmes v. United States*, 275 Fed. 49; *United States v. Armstrong*, 275 Fed. 506; *Connelly v. United States*, 275 Fed. 509; *Berry v. United States*, 275 Fed. 680; *United States v. Ray & Schultz*, 275 Fed. 1004; *O'Connor v. Potter*, 276 Fed. 32; *Central Consumers Co. v. James*, 278 Fed. 249; *United States v. Alexander*, 278 Fed. 308; *United States v. Boasberg*, 283 Fed. 305; *Giles v. United States*, 284 Fed. 208; *United States v. Jajeswiec*, 285 Fed. 789; *Salata v. United States*, 286 Fed. 125; *United States v. Innelli*, 286 Fed. 731; *United States v. Kaplan*, 286 Fed. 963; *United States v. Casino*, 286 Fed. 976; *Jozwich v. United States*, 288 Fed. 831; *Pressley v. United States*, 289 Fed. 477; *Tillman v. State*, 81 Fla. 558, 88 So. 377; *Youman v. Com.*, 189 Ky. 152, 224 S. W. 860, 13 A. L. R. 1303; *Mabry v. Com.*, 196 Ky. 626, 245 S. W. 129; *Mills v. Com.*, 195 Ky. 813, 243 S. W. 1022; *People v. Effelberg*, 220 Mich. 528, 190 N. W. 727; *People v. Knopka*, 220 Mich. 540, 190 N. W. 731; *Miller v. State*,

circumstances. Thus it has been held that where one is legally arrested his person may be searched without a warrant;<sup>1</sup> so where a business is carried on under a license or by permission of the government, the government may inspect it to determine whether the prohibition law is being violated.<sup>2</sup> And an automobile or other vehicle in transit may be searched for contraband liquors by officers without a warrant if they have probable cause for believing that such vehicle is carrying such liquors.<sup>3</sup>

A statute authorizing a seizure of property under a civil attach-

129 Miss. 774, 93 So. 2; *Butler v. State*, 129 Miss. 778, 93 So. 3; *State ex rel. Samlin v. District Ct.*, 59 Mont. 600, 198 Pac. 362; *In re Graham*, 203 App. Div. (N. Y.) 172, 196 N. Y. Supp. 276; *In re Liquors seized at Auto Inn*, 204 App. Div. (N. Y.) 185, 197 N. Y. Supp. 758; *State v. Gibbons*, 118 Wash. 171, 203 Pac. 390; *State v. Wills*, 91 W. Va. 659, 114 S. E. 261, 24 A. L. R. 1398; *Hoyer v. State*, 180 Wis. 407, 193 N. W. 89, 27 A. L. R. 673.

<sup>1</sup> *United States v. Kraus*, 270 Fed. 578; *Baron v. United States*, 286 Fed. 822; *Gatlin v. State*, 27 Ga. App. 627, 109 S. E. 522; *Youman v. Com.*, 189 Ky. 152, 224 S. W. 860, 13 A. L. R. 1303; *People v. Burt*, 224 Mich. 171, 194 N. W. 547; *Hughes v. State*, 145 Tenn. 544, 238 S. W. 588, 20 A. L. R. 639; *Gurski v. State*, 93 Tex. Crim. Rep. 612, 248 S. W. 353. See *ante*.

<sup>2</sup> *United States v. Hilsinger*, 284 Fed. 585; *Sufee v. Buffalo*, 204 App. Div. 561, 198 N. Y. Supp. 646; *Salt Lake City v. Wight*, 60 Utah, 108, 205 Pac. 900; *Finsky v. State*, 176 Wis. 481, 187 N. W. 201; *Silber v. Bloodgood*, 177 Wis. 608, 188 N. W. 84. Compare *United States v. Kraus*, 270 Fed. 578; and *United States v. Porazzo Bros.*, 272 Fed. 276.

<sup>3</sup> *Carroll v. United States*, 267 U. S. 132, 69 L. ed. 543, 45 Sup. Ct. Rep. 280; *Patrick v. Com.*, 199 Ky. 83, 250 S. W. 507; *People v. Chyc*, 219 Mich. 273, 189 N. W. 70; *People v. Case*, 220 Mich. 379, 190 N. W. 289; *People v. De Cesare*, 220 Mich. 417, 190 N. W. 302; *Houck v. State*, 106 Ohio St. 195, 140 N. E. 112; *Hughes v. State*, 145 Tenn. 540, 238 S. W. 588;

*Brown v. State*, 92 Tex. Cr. 147, 242 S. W. 218. Compare *Hoyer v. State*, 180 Wis. 407, 193 N. W. 89.

In *Carroll v. United States*, 267 U. S. 132, 69 L. ed. 543, 45 Sup. Ct. Rep. 280, Chief Justice *Taft*, who delivered the opinion of the court, said: "The guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought. Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those law-

ment to enforce the payment of a debt or penalty does not come within the constitutional prohibition.<sup>1]</sup>

We have said that if the officer follows the command of his warrant, he is protected; and this is so even when the complaint proves to have been unfounded.<sup>2</sup> But if he exceed the command by searching in places not described therein, or by seizing persons or articles not commanded, he is not protected by the warrant, and can only justify himself as in other cases where he assumes to act without process.<sup>3</sup> Obeying strictly the command of his warrant, he may break open outer or inner doors, and his justification does not depend upon his discovering that for which he is to make search.<sup>4</sup> [If he acts without a warrant he will be liable in damages therefor.<sup>5]</sup>

In other cases than those to which we have referred, and subject to the general police power of the State, the law favors the complete and undisturbed dominion of every man over his own premises, and protects him therein with such jealousy that he may defend his possession against intruders, in person or by his servants or guests, even to the extent of taking the life of the intruder, if that seem essential to the defense.<sup>6</sup>

fully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

<sup>1</sup> *State v. Marshall*, 100 Miss. 626, 56 So. 792, Ann. Cas. 1914 A, 434.

<sup>2</sup> *Barnard v. Bartlett*, 10 Cush. 501; *Appling v. State*, 95 Ark. 185, 128 S. W. 866, 28 L. R. A. (N. S.) 548; *Kallock v. Newbert*, 105 Me. 23, 72 Atl. 736; *Ingraham v. Booton*, 117 Minn. 105, 134 N. W. 505, Ann. Cas. 1913 D, 212; *Kinseley v. Ham*, 39 Okla. 623, 136 Pac. 427, 49 L. R. A. (N. S.) 770. After the goods seized are taken before the magistrate, the officer is not liable for them to the owner. *Collins v. Lean*, 68 Cal. 284, 9 Pac. 173.

<sup>3</sup> *Crozier v. Cudney*, 9 D. & R. 224; Same case, 6 B. & C. 232; *State v. Brennan's Liquors*, 25 Conn. 278. Where the warrant was for the search of the person, and the goods were found on the floor of the room where he was, their seizure was held lawful. *Collins v. Lean*, 68 Cal. 284, 9 Pac. 173.

<sup>4</sup> 2 Hale, P. C. 151; *Barnard v. Bartlett*, 10 Cush. 501.

<sup>5</sup> *McClurg v. Brenton*, 123 Iowa, 368, 98 N. W. 881, 101 Am. St. Rep. 325, 65 L. R. A. 519; *Devlin v. McAdoo*, 49 Misc. (N. Y.) 57, 96 N. Y. Supp. 425; *Gardner v. Neil*, 4 N. C. 104; *Regan v. Harkey*, 40 Tex. Civ. App. 16, 87 S. W. 1164; *Lawton v. Cardell*, 22 Vt. 524; *Shall v. Minneapolis, etc., R. Co.*, 156 Wis. 195, 145 N. W. 649, 50 L. R. A. (N. S.) 1151.

<sup>6</sup> That in defense of himself, any member of his family, or his dwelling, a man has a right to employ all necessary violence, even to the taking of life, see *Shorter v. People*, 2 N. Y. 193; *Yates v. People*, 32 N. Y. 509; *Logue v. Commonwealth*, 38 Pa. St. 265; *Pond v. People*, 8 Mich. 150; *Maher v. People*, 24 Ill. 211; *Bohannon v. Commonwealth*, 8 Bush, 481, 8 Am. Rep. 474; *Bean v. State*, 25 Tex. App. 346; *Hall v. State*, 113 Ark. 454, 168 S. W. 1122; *Bailey v. People*, 54 Colo. 337, 130 Pac. 832, 45 L. R. A. (N. S.) 145, Ann. Cas. 1914 C, 1142; *McCray v. State*, 134 Ga. 416, 68 S. E. 62, 20 Ann. Cas. 101; *People v. Osborne*, 278 Ill. 104, 115 N. E. 890; *Steele v. Com.*, 192 Ky. 223, 232 S. W.

[Where one voluntarily consents to a search of his person or premises he is precluded from raising the question of its validity, and has no right of action against the officer.<sup>1</sup> There is no such estoppel, however, where the consent is not voluntary.<sup>2</sup> "A consent accorded to a show of arms even though no open objection be made, will not be regarded as voluntary."<sup>3</sup> And "where a peace officer presents to a citizen a warrant against him, regular on its face, and reads or offers to read it to him, and the latter agrees for him to proceed under it by a search of the premises, it cannot be said that such consent is voluntary. The officer is acting under color of authority, and in agreeing for him to proceed the accused is merely submitting to the authority of the law, and not agreeing to waive his constitutional rights."<sup>4</sup>

646; *Young v. State*, 74 Neb. 346, 104 N. W. 867, 2 L. R. A. (N. S.) 66; *State v. Gray*, 162 N. C. 608, 77 S. E. 833, 45 L. R. A. (N. S.) 71; *Armstrong v. State*, 11 Okla. Cr. Rep. 159, 143 Pac. 870. But except where a forcible felony is attempted against person or property, he should avoid such consequences, if possible, and cannot justify standing up and resisting to the death, when the assailant might have been avoided by retreat. *People v. Sullivan*, 7 N. Y. 396; *Carter v. State*, 82 Ala. 13, 2 So. 766. But a man assaulted in his dwelling is under no obligation to retreat; his house is his castle, which he may defend to any extremity. And this means not simply the dwelling-house proper, but includes whatever is within the curtilage as understood at the common law. *Pond v. People*, 8 Mich. 150; *State v. Middleham*, 62 Iowa, 150, 17 N. W. 446; *State v. Scheele*, 57 Conn. 307, 18 Atl. 256; *Parrish v. Com.*, 81 Va. 1.

If a man's barn is his "castle" from which he may lawfully expel an intruder and deny him re-entrance, the expulsion once accomplished, it is his duty to cease the display of force and permit the intruder to depart. *State v. Baker*, 157 Iowa, 126, 135 N. W. 1097.

In deciding what force it is necessary to employ in resisting the assault, a person must act upon the circumstances as they appear to him at the time; and he is not to be held criminal because on a calm survey of the facts afterwards it appears that the force

employed in defense was excessive. See the cases above cited; also *Schnier v. People*, 23 Ill. 17; *Patten v. People*, 18 Mich. 314; *Hinton v. State*, 24 Tex. 454; *People v. Flanagan*, 60 Cal. 2. But the belief must be *bona fide* and upon reasonable grounds. *State v. Peacock*, 40 Ohio St. 333.

If while one is in his automobile he is violently attacked in a manner involving serious danger both to himself and his guests, he has the right to exert himself to the utmost for their common defense and protection. *State v. Borwick*, 193 Iowa, 639, 187 N. W. 460.

<sup>1</sup> *Maldonado v. United States*, 284 Fed. 853; *Windsor v. United States*, 286 Fed. 51; *Smuk v. People*, 72 Colo. 97, 209 Pac. 636; *McClurg v. Brenton*, 123 Iowa, 368, 98 N. W. 881, 101 Am. St. Rep. 323, 65 L. R. A. 519; *Faulk v. State*, 127 Miss. 894, 90 So. 481; *Smith v. McDuffee*, 72 Oreg. 276, 142 Pac. 558, 143 Pac. 929, Ann. Cas. 1916 D, 947; *State v. Guest*, 118 S. C. 130, 110 S. E. 112.

<sup>2</sup> *Amos v. United States*, 255 U. S. 313, 65 L. ed. 654, 41 Sup. Ct. Rep. 266; *United States v. Marquette*, 271 Fed. 120; *Mattingly v. Com.*, 199 Ky. 30, 250 S. W. 105. As to sufficiency of evidence to prove voluntary consent to search, see *Shall v. Minneapolis, etc., R. Co.*, 156 Wis. 195, 145 N. W. 649, 50 L. R. A. (N. S.) 1151.

<sup>3</sup> *United States v. Marquette*, 271 Fed. 120.

<sup>4</sup> *Mattingly v. Com.*, 199 Ky. 30, 250 S. W. 105.

The Supreme Court of the United States has declared that evidence obtained from one accused of crime by an officer or agent of the government, by means of an illegal search and seizure, is not admissible in a criminal action against the accused.<sup>1</sup> The same rule has been declared by the courts of last resort in many of the states in construing the provisions of the State constitutions relating to searches and seizures;<sup>2</sup> but in about an equal number of states the courts have held that evidence so obtained is admissible in such an action.<sup>3</sup> In expressing the opinion of the Supreme Court of the

<sup>1</sup> *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Weeks v. United States*, 232 U. S. 383, 58 L. ed. 652, 34 Sup. Ct. Rep. 341, L. R. A. 1915 B, 834, Ann. Cas. 1915 C, 1177; *Gould v. United States*, 255 U. S. 298, 65 L. ed. 647, 41 Sup. Ct. Rep. 261; *Silverthorn Lumber Co. v. United States*, 251 U. S. 385, 64 L. ed. 319, 40 Sup. Ct. Rep. 182; *Essgee Co. v. United States*, 262 U. S. 151, 67 L. ed. 917, 43 Sup. Ct. Rep. 514; *Carroll v. United States*, 267 U. S. 132, 69 L. ed. 543, 45 Sup. Ct. Rep. 280; *Agnello v. United States*, 269 U. S. 20, 46 Sup. Ct. Rep. 4, 70, L. ed. —. See also *Burns v. United States*, 296 Fed. 468; *United States v. Madden*, 297 Fed. 679; *United States v. Pappadementro*, 6 Alaska, 769.

<sup>2</sup> *Atz v. Andrews*, 84 Fla. 43, 94 So. 329; *People v. Castree*, 311 Ill. 392, 143 N. E. 112, 32 A. L. R. 357; *Flum v. State*, 193 Ind. 585, 141 N. E. 353; *Youman v. Com.*, 189 Ky. 152, 224 S. W. 860, 13 A. L. R. 1303; *Banks v. Com.*, 202 Ky. 762, 261 S. W. 262; *Nestor v. Com.*, 202 Ky. 748, 261 S. W. 270; *People v. Thompson*, 221 Mich. 618, 192 N. W. 560; *People v. Case*, 220 Mich. 379, 190 N. W. 289; *Taylor v. State*, 129 Miss. 815, 93 So. 355; *State v. Patterson*, 130 Miss. 680, 95 So. 96; *State v. Owens*, 302 Mo. 348, 259 S. W. 100; *State ex rel. Sadler v. District Ct.*, 70 Mont. 378, 225 Pac. 1000; *Klein v. State*, (Okla. Crim. Rep.) 223 Pac. 201; *Cravens v. State*, 148 Tenn. 517, 256 S. W. 431; *State v. Wills*, 91 W. Va. 659, 114 S. E. 261, 24 A. L. R. 1398; *State v. Massie*, 95 W. Va. 233, 120 S. E. 514; *Hoyer v. State*,

180 Wis. 407, 193 N. W. 89, 27 A. L. R. 673; *State v. Jokosh*, 181 Wis. 160, 193 N. W. 976; *Wiggin v. State*, 28 Wyo. 480, 206 Pac. 373; *Tucker v. State*, 128 Miss. 211, 90 So. 845, 24 A. L. R. 1377.

<sup>3</sup> *Banks v. State*, 207 Ala. 179, 93 So. 293, 24 A. L. R. 1359; *Jones v. State*, 19 Ala. App. 232, 96 So. 721; *State v. Chuchola*, (Del.) 120 Atl. 212; *Williams v. State*, 100 Ga. 511, 28 S. E. 624, 39 L. R. A. 269; *Lester v. State*, 155 Ga. 882, 118 S. E. 674; *Williams v. State*, 156 Ga. 285, 119 S. E. 614; *State v. Rowley*, 197 Iowa, 977, 195 N. W. 881, 187 N. W. 7; *State v. Johnson*, 116 Kan. 58, 226 Pac. 245; *State v. Johnson*, 116 Kan. 179, 226 Pac. 251; *State v. Davis*, 154 La. 405, 97 So. 590; *State v. Johnson*, 154 La. 597, 97 So. 874; *Com. v. Donnelly*, 246 Mass. 507, 141 N. E. 500; *State v. McLean*, 157 Minn. 359, 196 N. W. 278; *Boro v. State*, 111 Neb. 706, 197 N. W. 431; *State v. Chin Gin*, 47 Nev. 431, 224 Pac. 798; *State v. Lyons*, 99 N. J. L. 301, 122 Atl. 758; *People v. Chiagles*, 204 App. Div. 706, 199 N. Y. Supp. 256, affirmed in 237 N. Y. 193, 142 N. E. 583, 32 A. L. R. 676; *Rosanski v. State*, 106 Ohio St. 442, 140 N. E. 370; *State v. Maes*, 127 S. C. 397, 120 S. E. 576; *Lott v. State*, 94 Tex. Crim. Rep. 630, 251 S. W. 1070; *Sanchez v. State*, 94 Tex. Crim. Rep. 606, 252 S. W. 548; *State v. Aime*, 62 Utah, 476, 220 Pac. 704, 32 A. L. R. 375; *Casey v. Com.*, 138 Va. 714, 121 S. E. 513; *People v. Mayen*, 188 Cal. 237, 205 Pac. 435, 24 A. L. R. 1383; *State v. Pluth*, 157 Minn. 145, 195 N. W. 789. See also *People v. Strollo*, 191 N. Y. 42, 83 N. E. 573.



United States on this question Justice *Bradley* said: "In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practise had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which *James Otis* pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book': since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said *John Adams*, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child of Independence was born.' These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government."

After speaking of the famous case of *John Wilkes*, Justice *Bradley* continued: "The case, however, which will always be celebrated as being the occasion of Lord *Camden's* memorable discussion of the subject, was that of *Entick v. Carrington* and Three Other King's Messengers, reported at length in 19 How. St. Tr. 1029. The action was trespass for entering the plaintiff's dwelling-house in November, 1762, and breaking open his desks, boxes, etc., and searching and examining his papers. The jury rendered a special verdict, and the case was twice solemnly argued at the bar. Lord *Camden* pronounced the judgment of the court in Michaelmas term, 1765, and the law, as expounded by him, has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such

In Connecticut it has been held that property of the accused, other than his papers, even though seized upon his own premises without authority

and by a trespass, may be introduced in evidence against him. *State v. Griswold*, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227.

by the English authorities on that subject down to the present time.

“As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures. We think, therefore, it is pertinent to the present subject of discussion to quote somewhat largely from this celebrated judgment. After describing the power claimed by the Secretary of State for issuing general search-warrants, and the manner in which they were executed, Lord *Camden* says :

““Such is the power, and therefore one would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there it is not law.

““The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where the right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, etc., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing, which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass or even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.

““Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure, that they will

hardly bear an inspection ; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and command more considerable damages in that respect. Where is the written law that gives any magistrate such power ? I can safely answer, there is none ; and therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.

“ ‘But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods. I answer that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer until the felon’s conviction shall entitle me to restitution. In the other, the party’s own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is declared by acquittal.’ . . .

“Then after showing that these general warrants for search and seizure of papers originated with the Star Chamber, and never had any advocates in Westminster Hall except Chief Justice *Scroggs* and his associates, Lord *Camden* proceeds to add :

“ ‘Lastly it is urged as an argument of utility that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown where the law forceth evidence out of the owner’s custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence there is no way to get it back but by action. In the criminal law such a proceeding was never heard of ; and yet there are some crimes, such, for instance, murder, rape, robbery and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libeling. But our law has provided no paper-search in these cases to help forward the conviction. Whether this proceedeth from gentleness of the law toward criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust ; and it would seem that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty.’

“After a few further observations, his lordship concluded thus :

“ ‘I have now taken notice of everything that has been urged upon

the present point; and upon the whole we are all of opinion that the warrant to seize and carry away the party's papers in the case of a seditious libel is illegal and void.'

"The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord *Camden's* judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other. Can we doubt that when the Fourth and Fifth Amendments to the Constitution of the United States were penned and adopted, the language of Lord *Camden* was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true *criteria* of the reasonable and 'unreasonable' character of such seizures?"<sup>1</sup>

### *Quartering Soldiers in Private Houses.*

A provision is found incorporated in the constitution of nearly every State, that "no soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law." To us, after four-fifths of a century have passed away since occasion has existed for complaint of the action of the government in this particular, the repetition of this declaration seems to savor of idle form and ceremony; but "a frequent recurrence to the fundamental principles of the Constitution" can never be unimportant, and indeed may well be regarded as "absolutely necessary to preserve the advantages of liberty, and to

<sup>1</sup> *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

Dean Wigmore severely criticizes this decision, and the decision in *Weeks v. United States*, *supra*. See Wigmore on Evidence, §§ 2184, 2264. For

comments approving the position of the Supreme Court, see Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361; Chafee, The Progress of the Law, 35 Harv. L. Rev. 673.

maintain a free government.”<sup>1</sup> It is difficult to imagine a more terrible engine of oppression than the power in the executive to fill the house of an obnoxious person with a company of soldiers, who are to be fed and warmed at his expense, under the direction of an officer accustomed to the exercise of arbitrary power, and in whose presence the ordinary laws of courtesy, not less than the civil restraints which protect person and property, must give way to unbridled will; who is sent as an instrument of punishment, and with whom insult and outrage may appear quite in the line of his duty. However contrary to the spirit of the age such a proceeding may be, it may always be assumed as possible that it may be resorted to in times of great excitement, when party action is generally violent; and “the *dragonnades* of Louis XIV. in France, of James II. in Scotland, and those of more recent and present date in certain countries, furnish sufficient justification for this specific guaranty.”<sup>2</sup> The clause, as we find it in the national and State constitutions, has come down to us through the Petition of Right, the Bill of Rights of 1688, and the Declaration of Independence; and it is but a branch of the constitutional principle, that the military shall in time of peace be in strict subordination to the civil power.<sup>3</sup>

### *Criminal Accusations.*

Perhaps the most important of the protections to personal liberty consists in the mode of trial which is secured to every person accused of crime. At the common law, accusations of felony were made in the form of an indictment by a grand jury; and this process is still retained in many of the States,<sup>4</sup> while others have substituted

<sup>1</sup> Constitutions of Massachusetts, New Hampshire, Vermont, Florida, Illinois, and North Carolina. See also Constitutions of Virginia, Nebraska, and Wisconsin for a similar declaration.

<sup>2</sup> Lieber, *Civil Liberty and Self-Government*, c. 11.

<sup>3</sup> Story on the Constitution, §§ 1899, 1900; Rawle on Constitution, 126.

In exceptional cases, however, martial law may be declared and enforced whenever the ordinary legal authorities are unable to maintain the public peace and suppress violence and outrage. Todd, *Parliamentary Government in England*, Vol. I. p. 342; 1 Bl. Com. 413-415. As to martial law in general, see *Ex parte Milligan*, 4 Wall. 129, 18 L. ed. 281.

<sup>4</sup> The accusation, whether by indictment or information, must be sufficiently specific fairly to apprise the respondent of the nature of the charge against him, so that he may know what he is to answer, and so that the record may show, as far as may be, for what he is put in jeopardy. *Whitney v. State*, 10 Ind. 404; *State v. O'Flaherty*, 7 Nev. 153; *State v. McKenna*, 16 R. I. 398, 17 Atl. Rep. 51; *United States v. Behrman*, 258 U. S. 280, 66 L. ed. 619, 42 Sup. Ct. Rep. 303; *Falgout v. United States*, 279 Fed. 513, 29 A. L. R. 1115; *People v. Brady*, 272 Ill. 401, 112 N. E. 126, Ann. Cas. 1918 C, 540; *Brockway v. State*, 192 Ind. 656, 138 N. E. 88, 26 A. L. R. 1338; *State v. Toney*, 81 Ohio St. 130, 90 N. E. 142, 18 Ann. Cas. 395;

in its stead an information filed by the prosecuting officer of the State or county. [In the Federal courts, under the Fifth Amendment to the Constitution of the United States, and in the courts of those States whose Constitutions contain a similar provision, no person can be held to answer for a capital or otherwise infamous crime<sup>1</sup> unless on a presentment or indictment of a grand

*Horton v. State*, 85 Ohio St. 13, 96 N. E. 797, 39 L. R. A. (N. S.) 423, Ann. Cas. 1913 B, 90; *Smythe v. State*, 2 Okla. Crim. Rep. 286, 101 Pac. 611, 139 Am. St. Rep. 918; *State v. Morse*, 35 S. D. 18, 150 N. W. 293, Ann. Cas. 1918 C, 570; *Hardin v. State*, 85 Tex. Crim. Rep. 220, 211 S. W. 233, 4 A. L. R. 1308.

The legislature may allow simplification of old forms of indictment. *Com. v. Freelove*, 150 Mass. 66, 22 N. E. Rep. 435. As to amendment of indictments, see p. 481.

A law authorizing commitment without examination, upon summary arrest, of a pardoned convict for violating the condition of his pardon, is invalid. *People v. Moore*, 62 Mich. 496, 29 N. W. 80.

The indictment for a State offense can only be by the grand jury of the county of offense. *Ex parte Slater*, 72 Mo. 102; *Weyrich v. People*, 89 Ill. 90.

The fourteenth amendment to the Federal Constitution is not violated by dispensing with a grand jury. *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Kalloch v. Superior Court*, 56 Cal. 229; *State v. Boswell*, 104 Ind. 541, 4 N. E. 675; *Hodgson v. Vermont*, 168 U. S. 262, 42 L. ed. 461, 18 Sup. Ct. Rep. 80; *Jordan v. Massachusetts*, 225 U. S. 167, 56 L. ed. 1038, 32 Sup. Ct. Rep. 651; *Lem Woon v. Oregon*, 229 U. S. 586, 57 L. ed. 1340, 33 Sup. Ct. Rep. 783; *Ocampo v. United States*, 234 U. S. 91, 58 L. ed. 1231, 34 Sup. Ct. Rep. 712; *State v. Simpson*, 78 Vt. 124, 62 Atl. 14, 1 L. R. A. (N. S.) 1153, 6 Ann. Cas. 639.

Prosecution by "information" is due process. *Bolin v. Nebraska*, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287. Nor does the fourteenth amendment forbid a grand jury of

seven, if a State law so provides. *Hausenfluck v. Com.*, 85 Va. 702, 8 S. E. Rep. 683.

That the judge in charging the grand jury must be temperate in his language, see *Clair v. State*, 40 Neb. 534, 59 N. W. 118, 28 L. R. A. 367, and note. Upon number of jurors necessary or proper to act on grand jury, see *State v. Belvel*, 89 Iowa, 405, 56 N. W. 545, 27 L. R. A. 846, and note; organization of grand jury, *State v. Noyes*, 87 Wis. 340, 58 N. W. 386, 27 L. R. A. 776, and note, 41 Am. St. 45.

Concurrence of nine cannot be made sufficient by statute where constitution does not so provide. *State v. Barker*, 107 N. C. 913, 12 S. E. 115, 10 L. R. A. 50, and note.

<sup>1</sup> An infamous crime, within the meaning of the Federal Constitution, is one that is punishable by imprisonment in a penitentiary or by imprisonment at hard labor in any place other than a penitentiary. *United States v. Moreland*, 258 U. S. 433, 66 L. ed. 700, 42 Sup. Ct. Rep. 368, 24 A. L. R. 992, in which the court cited the following cases as sustaining its holding: *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283; *Mackin v. United States*, 117 U. S. 348, 29 L. ed. 909, 6 Sup. Ct. Rep. 777, and *Wong Wing v. United States*, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977, and explained the decision in *Fitzpatrick v. United States*, 178 U. S. 304, 44 L. ed. 1078, 20 Sup. Ct. Rep. 944. Mr. Justice *Brandeis*, with whom concurred Mr. Chief Justice *Taft* and Mr. Justice *Holmes*, delivered a dissenting opinion. See also upon this subject, *United States v. De Walt*, 128 U. S. 393, 32 L. ed. 485, 9 Sup. Ct. Rep. 111; *In re Claasen*, 140 U. S. 200, 35 L. ed. 409, 11 Sup. Ct. Rep. 735; *United States v. Johannesen*, 35 Fed. 411; *Ex parte*

jury.<sup>1</sup>] The mode of investigating the facts, however, is the same in all; and this is through a trial by jury, surrounded by certain safeguards which are a well-understood part of the system, and which the government cannot dispense with. First, we may mention that the humanity of our law always presumes an accused party innocent until he is proved to be guilty. This is a presumption which attends all the proceedings against him, from their initiation until they result in a verdict, which either finds the party guilty or converts the presumption of innocence into an adjudged fact.<sup>2</sup> [But there is no constitutional objection to the passage of a law providing that

McClusky, 40 Fed. 71; United States v. Cobb, 43 Fed. 570; Low v. United States, 94 C. C. A. 1, 169 Fed. 86; United States v. Landon, 176 Fed. 976; United States v. J. Lindsay Wells Co., 186 Fed. 249; Falconi v. United States, 280 Fed. 766; Green v. State, 119 Ga. 120, 45 S. E. 990; Butler v. Wentworth, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764; Jones v. Robbins, 8 Gray (Mass.) 329.

In Maine it has been held that a felony, which by statute in that State "includes every offense punishable by imprisonment in the State prison", is an infamous crime. *State v. Orris*, 121 Me. 94, 115 Atl. 648, 24 A. L. R. 990.

In a California case, *Ex parte Westenberg*, 167 Cal. 309, 139 Pac. 674, the court said: "Crimes are infamous either by reason of their punishment or by reason of their nature. In the first class fall all felonies, as the punishment therefor is imprisonment in the State prison. Criminal libel never has been a felony in this State, but always a misdemeanor. As such misdemeanor it is not an offense infamous in its nature. At common law crimes which rendered the person doing them infamous were treason, felony, and the *crimen falsi*, the latter embracing not only offenses involving falsehood, but offenses injuriously affecting the administration of justice. Criminal libel does not come within any of these classes. Our code does not define what are infamous offenses. It divides offenses simply into felonies and misdemeanors. In the absence of such definition the rule of the common law must govern, and under it a con-

viction for criminal libel did not render the perpetrator infamous."

"It is what sentence can be imposed under the law, not what was imposed, that is the material consideration" in determining whether a crime is infamous. *United States v. Moreland*, 258 U. S. 433, 66 L. ed. 700, 42 Sup. Ct. Rep. 368.

"The liability to punishment upon conviction for the commission of crime, rather than the punishment actually inflicted, is the criterion which, as a general rule, renders the offender infamous at common law." *Le Clair v. White*, 117 Me. 335, 104 Atl. 516; *Butler v. Wentworth*, 84 Me. 25, 24 Atl. 456, 17 L. R. A. 764.

<sup>1</sup> When an accused is in danger of an infamous punishment if convicted, he has a right to insist that he be not put upon trial except on the accusation of a grand jury. *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935, 4 Am. Crim. Rep. 283; *Mackin v. United States*, 117 U. S. 348, 29 L. ed. 909, 6 Sup. Ct. Rep. 777; *United States v. Moreland*, 258 U. S. 433, 66 L. ed. 700, 42 Sup. Ct. Rep. 368, 24 A. L. R. 992. As to the rule under the Constitution of Minnesota, see *State ex rel. Erickson v. West*, 42 Minn. 147, 43 N. W. 845.

<sup>2</sup> See *Sullivan v. Oneida*, 61 Ill. 242; *United States v. Murphy*, 253 Fed. 404; *Hall v. United States*, 256 Fed. 748; *Crawford v. State*, 156 Ark. 39, 245 S. W. 189; *Flynn v. People*, 222 Ill. 303, 78 N. E. 617; *People v. Ambach*, 247 Ill. 451, 93 N. E. 310; *People v. Birmingham*, 301 Ill. 513, 134 N. E. 54; *State v. Beckner*, 197 Iowa, 1522, 198 N. W. 643; *Frazier v.*

Com., (Ky.) 114 S. W. 268; *State v. Powell*, (Mo.) 217 S. W. 35; *State v. Johnson*, (Mo.) 225 S. W. 961; *State v. Thompson*, (Mo.) 238 S. W. 115; *State v. Singleton*, 294 Mo. 346, 243 S. W. 147; *State v. Guye*, 299 Mo. 348, 252 S. W. 955; *State v. Kisik*, 99 N. J. L. 385, 125 Atl. 239; *People v. Bingham*, 57 Misc. Rep. 66, 107 N. Y. Supp. 1011; *People v. Bertlini*, 171 App. Div. 460, 157 N. Y. Supp. 599; *State v. Murphrey*, 186 N. C. 113, 118 S. E. 894; *Long v. State*, 109 Ohio St. 77, 141 N. E. 691; *Monaghan v. State*, 10 Okla. Cr. Rep. 89, 134 Pac. 77, 46 L. R. A. (N. S.) 1149; *State v. Rosasco*, 103 Oreg. 343, 205 Pac. 290; *State v. Sonnenschein*, 37 S. D. 585, 159 N. W. 101; *Potts v. Com.*, 113 Va. 732, 73 S. E. 470; *Canter v. Com.*, 123 Va. 794, 96 S. E. 284; *Mohler v. Com.*, 132 Va. 713, 111 S. E. 454. But see *Shepard v. United States*, 236 Fed. 73, 149 C. C. A. 283; *Firth v. United States*, 253 Fed. 36; *McClain v. State*, 182 Ala. 67, 62 So. 241; *Fox v. State*, 205 Ala. 74, 87 So. 623; *Williams v. State*, 18 Ala. App. 218, 90 So. 36; *Brown v. State*, 20 Ala. App. 39, 100 So. 616; *People v. Martinez*, 57 Cal. App. 771, 208 Pac. 170; *State v. Pippi*, 59 Mont. 116, 195 Pac. 556; *People v. Acerno*, 184 App. Div. 541, 172 N. Y. Supp. 373. Upon this subject see *Wigmore on Evidence*, Vol. 5, § 2511.

In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt. *Michaelson v. United States ex rel. Chicago, etc., R. Co.*, 266 U. S. 42, 69 L. ed. 162, 45 Sup. Ct. Rep. 18, 35 A. L. R. 451.

An act making the fact of killing of cattle by a railroad train *prima facie* evidence of negligence, and such negligence a misdemeanor on the part of the superintendent and president, is void as depriving of this presumption. *State v. Divine*, 98 N. C. 778, 4 S. E. 477.

It is sometimes claimed that where insanity is set up as a defense in a criminal case, the defendant takes upon himself the burden of proof to establish it, and that he must make

it out beyond a reasonable doubt. See *Clark v. State*, 12 Ohio, 494; *Loeffner v. State*, 10 Ohio St. 599; *Bond v. State*, 23 Ohio St. 346; *State v. Felton*, 32 Iowa, 49; *McKenzie v. State*, 42 Ga. 334; *Boswell v. Commonwealth*, 20 Gratt. 860; *Baccigalupo v. Commonwealth*, 33 Gratt. 807, 36 Am. Rep. 795; *State v. Hoyt*, 47 Conn. 518; *Wright v. People*, 4 Neb. 407; *State v. Pratt*, 1 Houst. C. C. 249; *State v. Hurley*, 1 Houst. C. C. 28; *State v. De Rancé*, 34 La. An. 186; *State v. Trapp*, 56 Oreg. 588, 109 Pac. 1094. Or at least by a clear preponderance of evidence. *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20; *State v. Redemeier*, 71 Mo. 173, 36 Am. Rep. 462; *Webb v. State*, 9 Tex. App. 490; *Johnson v. State*, 10 Tex. App. 571; *State v. Coleman*, 27 La. An. 691; *State v. Strauder*, 11 W. Va. 745, 823; *Ortwein v. Commonwealth*, 76 Pa. St. 414, 18 Am. Rep. 420; *State v. Starling*, 6 Jones (N. C.), 366; *State v. Payne*, 86 N. C. 609; *State v. Smith*, 53 Mo. 267; *People v. McDonnell*, 47 Cal. 134; *Commonwealth v. Eddy*, 7 Gray, 583; *Danforth v. State*, 75 Ga. 614; *Ball v. Com.*, 81 Ky. 662; *State v. Bundy*, 24 S. C. 439; *Bell v. State*, 120 Ark. 530, 180 S. W. 186; *People v. Miller*, 171 Cal. 649, 154 Pac. 468; *State v. Humbles*, 126 Iowa, 462, 102 N. W. 409; *Feree v. Com.*, 193 Ky. 347, 236 S. W. 246; *State v. Nelson*, 36 Nev. 403, 136 Pac. 377; *State v. Austin*, 71 Ohio St. 317, 73 N. E. 218, 104 Am. St. Rep. 778; *State v. Hauser*, 101 Ohio St. 404, 131 N. E. 66; *Com. v. Molten*, 230 Pa. St. 399, 79 Atl. 638; *State v. Quigley*, 26 R. I. 263, 58 Atl. 905, 67 L. R. A. 322, 3 Ann. Cas. 920; *State v. Fenik*, 45 R. I. 309, 121 Atl. 218; *Burgess v. State*, 78 Tex. Cr. Rep. 469, 181 S. W. 465; *Sagu v. State*, 94 Tex. Cr. Rep. 14, 248 S. W. 390; *State v. Brown*, 36 Utah, 46, 102 Pac. 641, 24 L. R. A. (N. S.) 545; *State v. Clark*, 34 Wash. 485, 76 Pac. 98, 101 Am. St. Rep. 1006.

Other well-considered cases do not support this view. The burden of proof, it is held, rests throughout upon the prosecution to establish all the conditions of guilt; and the presump-



the presumption of innocence may be overcome by a contrary presumption founded upon the experience of human conduct, and enacting what evidence shall be sufficient to overcome such presumption of innocence.<sup>1</sup> And, even in criminal prosecutions, the legislature may, with some limitations, enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question."<sup>2</sup> Thus statutes which make the possession of intoxicating liquor *prima facie* evidence of violation of the prohibition law have been held constitutional in many states.<sup>3</sup>

tion of innocence that all the while attends the prisoner entitles him to an acquittal, if the jury are not reasonably satisfied of his guilt. See *State v. Marler*, 2 Ala. 43; *Commonwealth v. Myers*, 7 Met. 500; *Polk v. State*, 19 Ind. 170; *Chase v. People*, 40 Ill. 352; *People v. Schryver*, 42 N. Y. 1; *Stevens v. State*, 31 Ind. 485; *State v. Pike*, 49 N. H. 399; *State v. Jones*, 50 N. H. 349; *People v. McCann*, 16 N. Y. 58; *Commonwealth v. Kimball*, 24 Pick. 373; *Commonwealth v. Dana*, 2 Met. 340; *Hopps v. People*, 31 Ill. 385; *People v. Garbutt*, 17 Mich. 23; *State v. Klinger*, 43 Mo. 127; *State v. Hundley*, 46 Mo. 414; *State v. Lowe*, 93 Mo. 547, 5 S. W. 889; *Ballard v. State*, 19 Neb. 609, 28 N. W. 271; *State v. Crawford*, 11 Kan. 32; *Brotherton v. People*, 75 N. Y. 159; *O'Connell v. People*, 87 N. Y. 377; *Pollard v. State*, 53 Miss. 410; *Cunningham v. State*, 56 Miss. 269, 31 Am. Rep. 360; *De Rinzie v. People*, 56 Colo. 249, 138 Pac. 1009; *Ellis v. State*, 86 Fla. 155, 97 So. 285, *Blocker v. State*, 87 Fla. 128, 99 So. 250; *State v. Wetter*, 11 Idaho, 433, 83 Pac. 341; *People v. Casey*, 231 Ill. 261, 83 N. E. 278; *Walters v. State*, 183 Ind. 178, 108 N. E. 583; *People v. Eggleston*, 186 Mich. 510, 152 N. W. 944; *Prince v. State*, 92 Neb. 490, 138 N. W. 726; *People v. Carlin*, 194 N. Y. 448, 87 N. E. 805; *Adair v. State*, 6 Okla. Crim. Rep. 284, 118 Pac. 416, 44 L. R. A. (N. S.) 119. But the prosecution may rely upon the presumption of sanity which exists in all cases, until the defense puts in evidence which creates a reasonable doubt. *People v. Finley*, 38 Mich. 482. And see *Guetic v. State*, 66 Ind. 94, 32

Am. Rep. 99. A statute may require insanity to be specially pleaded. *Bennett v. State*, 57 Wis. 69, 14 N. W. 912.

<sup>1</sup> *Diamond v. State*, 123 Tenn. 348, 131 S. W. 666.

<sup>2</sup> *Hawes v. State*, 150 Ga. 101, 103 S. E. 170; *People v. Adams*, 176 N. Y., 351, 68 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675. See also *People v. Beck*, 305 Ill. 593, 137 N. E. 454; *State v. Sheppard*, 64 Kan. 451, 67 Pac. 870.

On this power there are limitations, the principal one of which is that the fact or facts which will raise the presumption and shift the burden of proof must have some fair relation to, or material connection with, the main fact as to which the presumption is raised. The inference or presumption from the facts proved must not be merely arbitrary, or wholly unreasonable, unnatural or extraordinary, but must bear some reasonable relation to the facts proved. The presumption so raised must not be final, but the accused must be allowed a fair opportunity to make his defense and show all of the facts bearing on the issue, and to have the whole case submitted to the jury for decision, after considering all of the evidence as well as the *prima facie* presumption, if the facts from which it arises have been proved to exist. *Hawes v. State*, 150 Ga. 101, 103 S. E. 170. See also *State v. Russell*, 164 N. C. 482, 80 S. E. 66, 68.

<sup>3</sup> *Southern Express Co. v. Whittle*, 194 Ala. 406, 69 So. 652, L. R. A. 1916 C, 278; *State v. Cunningham*, 25 Conn. 195; *State v. Wheeler*, 25 Conn. 290; *People v. Beck*, 305 Ill. 593, 137 N. E.

In some States the constitutionality of such statutes has been sustained though they have been construed to cast the burden of proof upon a person in whose possession intoxicating liquor has been found and upon his failure to produce evidence to sustain such burden to make the possession of the liquor of itself sufficient to support a conviction.<sup>1</sup> In other jurisdictions it is held that such a statute does not shift the burden of proof, but that the term "*prima facie* evidence" or "presumptive evidence", as used therein means evidence sufficient to invoke the judgment of the trier of fact, and to support a judgment if one be found.<sup>2</sup> In the opinions so holding it is generally stated or intimated that a construction that would shift the burden of proof would render the statute unconstitutional.]

454; *State v. Sheppard*, 64 Kan. 451, 67 Pac. 870; *Yeoman v. State*, 81 Neb. 244, 115 N. W. 784, 117 N. W. 997; *State v. Lapointe*, 81 N. H. 227, 123 Atl. 692, 31 A. L. R. 1212; *State v. Randall*, 170 N. C. 757, 87 S. E. 227, Ann. Cas. 1918 A, 438; *Caffee v. State*, 11 Okla. Crim. Rep. 485, 148 Pac. 680; *Sellers v. State*, 11 Okla. Crim. Rep. 588, 149 Pac. 1071; *State v. Humphrey*, 42 S. D. 512, 176 N. W. 39; *Pine v. Com.*, 121 Va. 812, 93 S. E. 652; *State v. Blackwell*, 103 Wash. 337, 174 Pac. 646; *State v. Tincher*, 81 W. Va. 441, 94 S. E. 503.

It is within the constitutional power of the legislature to declare the possession of intoxicating liquor, except in a private dwelling unconnected with a place of business, by a person not legally authorized to sell such liquor, to be *prima facie* evidence of its possession for purposes of illegal sale. *State v. Sheppard*, 67 Kan. 451, 67 Pac. 870.

Within proper limitations the legislature may enact that when specified facts have been proved they shall be *prima facie* evidence of the guilt of the accused or of some other named fact essential to the proof of the crime charged. Thus the provision in a Georgia statute which declares that, when certain specified apparatus is found upon the premises of one accused of violating the statute, it shall be *prima facie* evidence that the person in actual possession of the premises referred to had knowledge of the existence of the apparatus on

the premises, does not render the act violative of the due process of law clause of the Federal or the State constitution. *Hawes v. State*, 150 Ga. 101, 103 S. E. 170.

<sup>1</sup> *Hawes v. State*, 150 Ga. 101, 103 S. E. 170; *Gillespie v. State*, 96 Miss. 856, 51 So. 811, 926; *Yoeman v. State*, 81 Neb. 244, 252; 115 N. W. 784, 117 N. W. 997; *People v. Adams*, 176 N. Y. 351, 68 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675; *State v. Tincher*, 81 W. Va. 441, 94 S. E. 503. See also *Diamond v. State*, 123 Tenn. 348, 131 S. W. 666.

So construed it has been held that such a statute does not deprive the defendant of his right to a trial by jury, nor otherwise invade the province of the court, and that it does not impair the defendant's right to insist that the State must prove the charge laid against him. *Gillespie v. State*, 96 Miss. 856, 51 So. 811, 926; *State v. Tincher*, 81 W. Va. 441, 94 S. E. 503. See also *State v. Kline*, 5 Oreg. 426, 93 Pac. 237.

<sup>2</sup> *State v. Cunningham*, 25 Conn. 195; *State v. Wilkerson*, 164 N. C. 431, 79 S. E. 888; *State v. Russell*, 164 N. C. 482, 80 S. E. 66; *State v. Randall*, 170 N. C. 757, 87 S. E. 227; *Sellers v. State*, 11 Okla. Crim. Rep. 588, 149 Pac. 1071.

In a statute providing that "the keeping in excess of one quart . . . or in any manner permitting any other person to have or keep such liquors in or about his place of business, . . . shall be *prima facie* evidence of an

If there were any mode short of confinement which would, with reasonable certainty, insure the attendance of the accused to answer the accusation, it would not be justifiable to inflict upon him that indignity, when the effect is to subject him, in a greater or less degree, to the punishment of a guilty person, while as yet it is not determined that he has committed any crime. If the punishment on conviction cannot exceed in severity the forfeiture of a large sum of money, then it is reasonable to suppose that such a sum of money, or an agreement by responsible parties to pay it to the government in case the accused should fail to appear, would be sufficient security for his attendance; and therefore, at the common law, it was customary to take security of this character in all cases of misdemeanor; one or more friends of the accused undertaking for his appearance for trial, and agreeing that a certain sum of money should be levied of their goods and chattels, lands and tenements, if he made default. But in the case of felonies, the privilege of giving bail before trial was not a matter of right; and in this country, although the criminal code is much more merciful than it formerly was in England, and in some cases the allowance of bail is almost a matter of course, there are others in which it is discretionary with the magistrate to allow it or not, and where it will sometimes be refused if the evidence of guilt is strong or the presumption great. Capital offenses are not generally regarded as bailable; at least, after indictment, or when

intention to convey, sell, or otherwise dispose of such liquors", the phrase "*prima facie* evidence" means such evidence as, in the judgment of the law, is sufficient to establish the fact, and evidence of such possession is sufficient to establish the unlawful intent, unless rebutted or the contrary proved; yet it does not make it obligatory upon the jury to convict after the presentation of such proof. Whether or not such evidence is sufficient to overcome the presumption of innocence of a defendant, and to establish his guilt beyond a reasonable doubt, when all the evidence, including the presumptions, is considered, is for the determination of the jury. *Sellers v. State*, 11 Okla. Crim. Rep. 588, 149 Pac. 1071.

In *State v. Lapointe*, 81 N. H. 227, 123 Atl. 692, 31 A. L. R. 1212, the term "*prima facie* evidence" as used in the New Hampshire statute, providing that possession of any intoxicat-

ing liquor shall be *prima facie* evidence of a violation of the law, was construed to mean evidence to be considered by the jury.

In a statute which makes the fact that one has or keeps posted in or about his place of business a United States revenue receipt or license for the sale of distilled malt or fermented liquors *prima facie* evidence that he is selling and keeping for sale intoxicating liquor contrary to law, the term "*prima facie* evidence" means competent evidence, and evidence which is legally sufficient to justify the jury in finding the fact of unlawful sales, provided it satisfies them beyond a reasonable doubt, but not otherwise. It does not mean conclusive evidence, and to so instruct is error. *State v. Momberg*, 14 N. D. 291, 103 N. W. 566. See also *State v. Liquors and Vessels*, 80 Me. 57, 12 Atl. 794, 7 Am. Crim. Rep. 291, and *State v. O'Connell*, 82 Me. 30, 19 Atl. 86.

the party is charged by the finding of a coroner's jury;<sup>1</sup> and this upon the supposition that one who may be subjected to the terrible punishment that would follow a conviction, would not for any mere pecuniary considerations remain to abide the judgment.<sup>2</sup> And where the death penalty is abolished and imprisonment for life substituted, it is believed that the rule would be the same notwithstanding this change, and bail would still be denied in the case of the highest offenses, except under very peculiar circumstances.<sup>3</sup> In the case of other felonies it is not usual to refuse bail, and in some of the State constitutions it has been deemed important to make it a matter of right in all cases except on capital charges "when the proof is evident or the presumption great."<sup>4</sup>

When bail is allowed, *unreasonable bail* is not to be required; but the constitutional principle that demands this is one which, from

<sup>1</sup> Matter of Barronet, 1 El. & Bl. 1; *Ex parte* Tayloe, 5 Cow. 39.

In homicide it is said bail should be refused if the evidence is such that the judge would sustain a capital conviction upon it. *Ex parte* Brown, 65 Ala. 446.

<sup>2</sup> State v. Summons, 19 Ohio, 139.

<sup>3</sup> The courts have power to bail, even in capital cases. United States v. Hamilton, 3 Dall. 17, 1 L. ed. 490; United States v. Jones, 3 Wash. 209; State v. Rockafellow, 6 N. J. L. 332; Commonwealth v. Semmes, 11 Leigh, 665; Commonwealth v. Archer, 6 Gratt. 705; People v. Smith, 1 Cal. 9; People v. Van Horne, 8 Barb. 158.

In England when all felonies were capital it was discretionary with the courts to allow bail before trial. 4 Bl. Com. 297, and note.

"If, after hearing the whole evidence, introduced on the application for bail, it is insufficient to generate in the mind of the court a reasonable doubt whether the accused committed the act charged, and in doing so they were guilty of a capital offense, bail should be refused." *In re* Thomas, 20 Okla. 167, 93 Pac. 980, 39 L. R. A. (N. S.) 752.

In Georgia it has been held that whether based on a *prima facie* case of murder, on evidence of probable guilt, on the sickness or physical condition of the defendant, or on other cause, the granting or refusal of bail in capital cases is peculiarly within the

discretion of the judge of the Superior court, and will not be controlled, unless it has been manifestly and flagrantly abused. *Jernagin v. State*, 118 Ga. 307, 45 S. E. 411.

<sup>4</sup> The constitutions of a majority of the States now contain provisions to this effect. And see *Foley v. People*, 1 Ill. 31; *Ullery v. Commonwealth*, 8 B. Monr. 3; *Shore v. State*, 6 Mo. 640; *State v. Summons*, 19 Ohio, 139; *Ex parte* Wray, 30 Miss. 673; *Moore v. State*, 36 Miss. 137; *Ex parte* Banks, 28 Ala. 89; *Ex parte* Dykes, 83 Ala. 114, 3 So. 306; *Ex parte* Kendall, 100 Ind. 599; *In re* Malison, 36 Kan. 725, 14 Pac. 144; *Matter of Troia*, 64 Cal. 152, 28 Pac. 231; *Re* Losasso, 15 Col. 163, 24 Pac. 1080, 10 L. R. A. 847, and note; *Ex parte* Nagel, 41 Nev. 86, 167 Pac. 689; *State v. Hartzell*, 13 N. D. 356, 100 N. W. 745; *In re* Thomas, 20 Okla. 167, 93 Pac. 980; 39 L. R. A. (N. S.) 752; *Ex parte* Watson, 1 Okla. Crim. 595; 99 Pac. 161; *Ex parte* Newby, 13 Okla. Crim. 161, 162 Pac. 1134; *Ex parte* Calmes, (Okla. Crim.) 217 Pac. 893; *Ex parte* Dexter, 93 Vt. 304, 107 Atl. 134.

Under these provisions the power to admit to bail a person charged with a capital offense is one of guarded discretion to be exercised with caution. *State v. Zummo*, 115 La. 456, 39 So. 442; *Ex parte* Nagel, 41 Nev. 86, 167 Pac. 689; *State v. Hartzell*, 13 N. D. 356, 100 N. W. 745; *In re* Thomas, 20 Okla. 167, 93 Pac. 980,

the very nature of the case, addresses itself exclusively to the judicial discretion and sense of justice of the court or magistrate empowered to fix upon the amount. That bail is reasonable which, in view of the nature of the offense, the penalty which the law attaches to it, and the probabilities that guilt will be established on the trial, seems no more than sufficient to secure the party's attendance. In determining this, some regard should be had to the prisoner's pecuniary circumstances; that which is reasonable bail to a man of wealth being equivalent to a denial of right if exacted of a poor man charged with the like offense. When the court or magistrate requires greater security than in his judgment is needful to secure attendance, and keeps the prisoner in confinement for failure to give it, it is plain that the right to bail which the constitution attempts so carefully to secure has been disregarded; and though the wrong is one for which, in the nature of the case, no remedy exists, the violation of constitutional privilege is aggravated, instead of being diminished, by that circumstance.<sup>1</sup>

The presumption of innocence is an absolute protection against conviction and punishment, except either, *first*, on confession in open court; or, *second*, on proof which places the guilt beyond any reasonable doubt. Formerly, if a prisoner arraigned for felony stood mute willfully, and refused to plead, a terrible mode was resorted to for the purpose of compelling him to do so; and this might even end in his death:<sup>2</sup> but a more merciful proceeding is now substituted; the court entering a plea of not guilty for a party who, for any reason, fails to plead for himself.

Again, it is required that the trial be *speedy*; and here also the injunction is addressed to the sense of justice and sound judgment

39 L. R. A. (N. S.) 752; *Ex parte* Watson, 1 Okla. Crim. 595, 99 Pac. 161; *Ex parte* Newby, 13 Okla. Crim. 161, 162 Pac. 1134; *Ex parte* Calmes, (Okla. Cr.) 217 Pac. 893; *Ex parte* Dexter, 93 Vt. 304, 107 Atl. 134.

<sup>1</sup> The magistrate in taking bail exercises an authority essentially judicial. *Regina v. Badger*, 4 Q. B. 468; *Linford v. Fitzroy*, 13 Q. B. 240. As to his duty to look into the nature of the charge and the evidence to sustain it, see *Barronet's Case*, 1 El. & Bl. 1.

See *Carmody v. State*, 105 Ind. 546; 5 N. E. 679, as to fixing amount of bail in advance for different classes of cases.

<sup>2</sup> 4 Bl. Com. 324.

In treason, petit felony, and mis-

demeanors, willfully standing mute was equivalent to a conviction, and the same punishment might be imposed; but in other cases there could be no trial or judgment without plea; and an accused party might therefore sometimes stand mute and suffer himself to be pressed to death, in order to save his property from forfeiture. Poor Giles Corey, accused of witchcraft, was perhaps the only person ever pressed to death for refusal to plead in America. 3 Bancroft's U. S. 93; 2 Hildreth's U. S. 160. For English cases, see Cooley's Bl. Com. 325, note. Now in England the court enters a plea of not guilty for a prisoner refusing to plead, and the trial proceeds as in other cases.

of the court.<sup>1</sup> In this country, where officers are specially appointed or elected to represent the people in these prosecutions, their position gives them an immense power for oppression; and it is to be feared they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused.<sup>2</sup> When a person charged with crime is willing to proceed at once to trial, no delay on the part of the prosecution is reasonable, except only that which is necessary for proper preparation and to secure the attendance of witnesses.<sup>3</sup> Very much, however, must be left to the judgment of the prosecuting officer in these cases; and the court would not compel the government to proceed to trial at the first term after indictment found or information filed, if the officer who represents it should state, under the responsibility of his official oath, that he was not and could not be ready at that time.<sup>4</sup> But further delay would not generally be allowed without a more specific showing of the causes which prevent the State proceeding to trial, including the names of the witnesses, the steps taken to procure them,<sup>5</sup> and the facts expected to be proved by them, in

<sup>1</sup> Speedy trial is said to mean a trial so soon after indictment as the prosecution can, by a fair exercise of reasonable diligence, prepare for trial; regard being had to the terms of court. *United States v. Fox*, 3 Mont. 512; *Creston v. Nye*, 74 Iowa, 369, 37 N. W. 777; *Morris v. State*, 193 Ala. 1, 68 So. 1003; *Bell v. State*, 120 Ark. 530, 180 S. W. 186; *State v. Tyre*, 22 Del. 343, 67 Atl. 199; *People v. Jonas*, 234 Ill. 56, 84 N. E. 685; *State v. Stanfield*, 34 Okla. 524, 126 Pac. 239; *Arrowsmith v. State*, 131 Tenn. 480, 175 S. W. 545, L. R. A. 1915 E. 363; *State v. Keefe*, 17 Wyo. 227, 98 Pac. 122, 22 L. R. A. (N. S.) 896, 17 Ann. Cas. 161. If it becomes necessary to adjourn the court without giving trial, the prisoner should be bailed, though not otherwise entitled to it. *Ex parte Caplis*, 58 Miss. 358.

<sup>2</sup> It is the duty of the prosecuting attorney to treat the accused with judicial fairness: to inflict injury at the expense of justice is no part of the purpose for which he is chosen. Unfortunately, however, we sometimes meet with cases in which these officers appear to regard themselves as the counsel for the complaining party rather than the impartial representatives of

public justice. But we trust it is not often that cases occur like one in Tennessee, in which the Supreme Court felt called upon to set aside a verdict in a criminal case, where by the artifice of the prosecuting officer the prisoner had been induced to go to trial under the belief that certain witnesses for the State were absent, when in fact they were present and kept in concealment by this functionary. *Curtis v. State*, 6 Cold. 9.

<sup>3</sup> See this discussed in *Ex parte Stanley*, 4 Nev. 113, and *In re Bergerow*, 133 Cal. 349, 65 Pac. 828, 85 Am. St. 178. A valuable monographic note to this case discussing the law of this clause of the constitution is found at pages 187 to 204 inclusive of 85 Am. St.

<sup>4</sup> *Watts v. State*, 26 Ga. 231.

<sup>5</sup> The Habeas Corpus Act, 31 Ch. II. c. 2, § 1, required a prisoner charged with crime to be released on bail, if not indicted the first term after the commitment, unless the king's witnesses could not be obtained; and that he should be brought to trial as early as the second term after the commitment. The principles of this statute are considered as having been adopted into the American common

order that the court might judge of the reasonableness of the application, and that the prisoner might, if he saw fit to take that course, secure an immediate trial by admitting that the witnesses, if present, would testify to the facts which the prosecution have claimed could be proved by them.<sup>1</sup>

It is also requisite that the trial be *public*. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether.<sup>2</sup>

But a far more important requirement is that the proceeding to establish guilt shall not be inquisitorial. A peculiar excellence of

law. *Post*, p. 717. See *In re Garvey*, 7 Col. 502, 4 Pac. 758; *In re Edwards*, 35 Kan. 99, 10 Pac. 539.

<sup>1</sup> Such an admission, if made by the prisoner, is binding upon him, and dispenses with the necessity of producing the witnesses. *United States v. Sacramento*, 2 Mont. 239, 25 Am. Rep. 742; *Hancock v. State*, 14 Tex. App. 392; *State v. Fooks*, 65 Iowa, 452, 21 N. W. 773. But in general the right of the prisoner to be confronted with the witnesses against him cannot be waived in advance. *Bell v. State*, 2 Tex. App. 216, 28 Am. Rep. 429. Nor can he be forced to admit what an absent witness would testify to. *Wills v. State*, 73 Ala. 362.

A statute forbidding a continuance if the prosecutor admits that defendant's absent witness would testify as stated in the affidavit for continuance,

is void. *State v. Berkley*, 92 Mo. 41 4 S. W. 24.

<sup>2</sup> See *People v. Kerrigan*, 73 Cal. 222, 14 Pac. 849; *People v. Swafford*, 65 Cal. 223, 3 Pac. 809; *Grimmett v. State* 22 Tex. App. 36, 2 S. W. 631; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *People v. Hartman*, 103, Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108; *People v. Letoile*, 31 Cal. App. 166, 159 Pac. 1057; *Robertson v. State*, 64 Fla. 437, 60 So. 118; *Tilton v. State*, 5 Ga. App. 59, 62 S. E. 651; *Wendling v. Com.*, 143 Ky. 587, 137 S. W. 205; *Dutton v. State*, 123 Md. 373, 91 Atl. 417, Ann. Cas. 1916 C, 89; *State v. Callahan*, 100 Minn. 63, 110 N. W. 342; *Carter v. State*, 99 Miss. 435, 54 So. 734; *State v. Keeler*, 52 Mont. 205, 156 Pac. 1080, L. R. A. 1916 E, 472, Ann. Cas. 1917 E, 619; *Roberts v. State*, 100 Neb. 199, 158

the common-law system of trial over that which has prevailed in other civilized countries, consists in the fact that the accused is never compelled to give evidence against himself. Much as there was in that system that was heartless and cruel, it recognized fully the dangerous and utterly untrustworthy character of extorted confessions, and was never subject to the reproach that it gave judgment upon them.<sup>1</sup>

N. W. 930, Ann. Cas. 1917 E, 1040; *State v. Myhus*, 19 N. D. 326, 124 N. W. 71, 27 L. R. A. (N. s.) 487; *State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462, 116 Am. St. Rep. 734, 9 L. R. A. (N. s.) 277, 9 Ann. Cas. 108.

"The trial should be public in the ordinary common-sense acceptance of the term. The doors of the courtroom are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects . . . with due regard to the size of the courtroom, the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial." *People v. Hartman*, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108.

The Federal Circuit Court of Appeals has held that it is not reversible error to exclude the spectators at a criminal trial when there is no showing whatever that the defendant was prejudiced thereby, or deprived of the presence, aid, or counsel of any person whose presence might have been of advantage to him. *Reagan v. United States*, 202 Fed. 488, 120 C. C. A. 627, 44 L. R. A. (N. s.) 583. See also *State v. Johnson*, 26 Idaho, 609, 144 Pac. 784.

In Kentucky it has been held that the right to a public trial does not mean that all of the public who desire to be present shall have opportunity to do so, or that the trial judge may not without favor or discrimination limit the spectators to the capacity of the room in which the trial is had; and where the orderly conduct of the trial requires it, the court may have policemen or officers stationed at convenient places to preserve order, and limit admissions to the court room to persons holding tickets of admission.

*Wendling v. Com.*, 143 Ky. 587, 137 S. W. 205. See also *State v. Osborne*, 54 Oreg. 289, 103 Pac. 622, 20 Ann. Cas. 627. But it has been held that right to a public trial is violated where citizens and taxpayers are excluded from court room to such an extent that only a very few are admitted, while there is ample room for them in the court room, and many apply for admission and are refused. *People v. Murray*, 89 Mich. 276, 50 N. W. 995, 14 L. R. A. 809, and note, 28 Am. St. 294.

Not only is the accused entitled to a public trial, but also, that such trial shall be in a court in which each step shall be in the presence of the presiding judge of the court who has full authority to protect his every legal right. Where the judge calls an attorney to the bench and leaves him in charge while the judge absents himself from the court room for a quarter of an hour, the trial going on in the meantime, there is a dissolution of the court, and the trial is void, and a new trial will be ordered. *Ellerbe v. State*, 75 Miss. 522, 22 So. 950, 41 L. R. A. 569, and see note to this case in L. R. A. upon when temporary absence of judge is fatal to the trial.

"'Public trial' means trial by jury, perhaps including the rendition of judgment; but, after the accused is convicted and sentenced, the trial is over." Therefore the right to a public trial is not violated by a statute which excludes reporters and representatives of newspapers from witnessing the execution of a death sentence. *State v. Pioneer Press Co.*, 100 Minn. 173, 110 N. W. 867, 117 Am. St. Rep. 684, 9 L. R. A. (N. s.) 480, 10 Ann. Cas. 351.

<sup>1</sup> See Lieber's paper on Inquisitorial Trials, Appendix to Civil Liberty and



Self-Government; Wignmore on Evidence, Vol. 4, §§ 2250, 2251. Also the article on Criminal Procedure in Scotland and England, Edinb. Review, Oct., 1858, and one in 15 Harv. L. Rev. 610, on the History of the Privilege against Self-Crimination. See also an article on "Physical Examinations in Divorce Cases" in 35 Am. L. Rev. 698, and one on "Physical Examinations in Personal Injury Cases" in 1 Mich. L. Rev. 193, 277. And for an illustration of inquisitorial trials in our own day, see Trials of Troppman and Prince Pierre Bonaparte, Am. Law Review, Vol. V. p. 14. Judge Foster relates from White Locke, that the Bishop of London having said to Felton, who had assassinated the Duke of Buckingham, "If you will not confess you must go to the rack," the man replied, "If it must be so, I know not whom I may accuse in the extremity of my torture, — Bishop Laud, perhaps, or any lord of this board." "Sound sense," adds Foster, "in the mouth of an enthusiast and ruffian." Laud having proposed the rack, the matter was shortly debated at the board, and it ended in a reference to the judges, who unanimously resolved that the rack could not be legally used. De Lolme on Constitution of England (ed. of 1807), p. 181, note; 4 Bl. Com. 325; Broom, Const. Law, 148; Trial of Felton, 3 State Trials, 368, 371; Fortescue De Laud, c. 22, and note by Amos; Brodie, Const. Hist. c. 8. As to the use of torture to extort confessions, see also Holdsworth's History of English Law, Vol. 5, p. 194.

A legislative body has no more right than a court to make its examination of parties or witnesses inquisitorial. Emery's Case, 107 Mass. 172. See further, Horstman v. Kaufman, 97 Pa. St. 147; Blackwell v. State, 67 Ga. 76; State v. Lurch, 12 Oreg. 95, 6 Pac. 405.

The Fifth Amendment to the Constitution of the United States embodying the rule that the accused shall not be compelled to give evidence against himself should receive a liberal construction, so as to prevent encroachment upon the rights secured

by it. Gouled v. United States, 255 U. S. 298, 65 L. ed. 647, 41 Sup. Ct. Rep. 261.

The right to refuse to answer any question, the answer to which might incriminate the witness, is not sufficiently preserved by a statute which provides merely that such answer shall never be given against the witness in any trial to which he may be subjected. If it is desired to compel him to answer such question, he must be made absolutely exempt from trial and punishment for any offense thus disclosed in pertinent response to the question which he is compelled to answer. This applies to proceedings before grand juries and legislative committees as well as trial juries. See Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 12 Sup. Ct. Rep. 195, where the subject is fully discussed by Mr. Justice Blatchford. See review of Counselman v. Hitchcock, 5 Harv. L. Rev. 24. *In re Walsh*, 104 Fed. Rep. 518; *In re Scott*, 95 Fed. Rep. 816, and *In re Rosser*, 96 Fed. Rep. 305, are decided on authority of Counselman v. Hitchcock, *supra*. See also Foot v. Buchanan, 113 Fed. 156; People *ex rel.* Lewisohn v. O'Brien, 176 N. Y. 253, 68 N. E. 353, 5 Am. Crim. Rep. 97, affirming 81 App. Div. 51, 80 N. Y. Supp. 816; Mackel v. Rochester, 102 Fed. 314, seems opposed to the doctrine of Counselman v. Hitchcock; and the decisions in Arkansas and Georgia are also opposed to it. Lockett v. State, 145 Ark. 415, 224 S. W. 952; Higdon v. Heard, 14 Ga. 255; Kneeland v. State, 62 Ga. 395; Wheatley v. State, 114 Ga. 175, 39 S. E. 877.

The general rule is that a witness before a grand jury cannot be compelled to testify as to any matter that will incriminate him and his refusal to do so does not constitute contempt of court. Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 12 Sup. Ct. Rep. 195, 3 Inters. Com. Rep. 816; People v. Spain, 307 Ill. 283, 138 N. E. 614; *Ex parte* January, 295 Mo. 653, 246 S. W. 241; Com. v. Bolger, 229 Pa. St. 597, 79 Atl. 113. A person compelled to testify before the grand jury cannot be indicted

upon evidence so secured. *State v. Gardiner*, 88 Minn. 130, 92 N. W. 529.

A witness may be compelled to answer a pertinent question if he is made absolutely exempt from trial and punishment for any offense thus disclosed. *Brown v. Walker*, 161 U. S. 591, 40 L. ed. 819, 16 Sup. Ct. Rep. 644, 5 Inters. Com. Rep. 369; *Ex parte Cohen*, 104 Cal. 524, 38 Pac. 364, 26 L. R. A. 423, 43 Am. St. 127; *Re Buskett*, 106 Mo. 602, 17 S. W. 753, 14 L. R. A. 407, and note, 27 Am. St. 378; *Bradley v. Clarke*, 133 Cal. 196, 65 Pac. 395; *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; *Re Kittle*, 180 Fed. 946. For a case where the court was extremely tender of the recalcitrant witness, see *Ex parte Miskimins*, 8 Wyo. 392, 58 Pac. 411, 49 L. R. A. 831, and see also the dissenting opinion of *Knight, J.*

To permit a demand to be made on a defendant in a criminal case, in the presence of a jury, to produce a paper or document referred to, containing incriminating evidence against him, is a violation of the immunity secured to him by the constitutional provision that no person in a criminal case shall be compelled to give evidence against himself which will tend to incriminate him, even though no order for the production of the paper is made. *Gillespie v. State*, 5 Okla. Crim. Rep. 546, 115 Pac. 620, 35 L. R. A. (N. S.) 1171, Ann. Cas. 1912 D, 259. See also *McKnight v. United States*, 54 C. C. A. 358, 115 Fed. 972, affirmed 61 C. C. A. 112, 122 Fed. 926.

Witness is privileged not to be compelled to testify against himself in contempt proceedings. *Ex parte Gould*, 99 Cal. 360, 33 Pac. 1112, 21 L. R. A. 751, 37 Am. St. 57.

Officer of corporation cannot be compelled to report under oath whether corporation has violated Anti-Trust Act. *State v. Simmons Hardware Co.*, 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676.

In a prosecution for an attempt to administer poison testimony by the sheriff that he compared defendant's shoe with certain tracks, and that it

fitted, was held not to violate the constitutional prohibition against any person being compelled to be a witness against himself, even though the sheriff compelled defendant to remove her shoe and made adjustment himself. *State v. Griffin*, 129 S. C. 200, 124 S. E. 81, 35 A. L. R. 1227. See also *People v. Breen*, 192 Mich. 39, 158 N. W. 142; *People v. Van Wormer*, 175 N. Y. 188, 67 N. E. 299; *Rickelts v. State*, (Okla. Crim. Rep.) 215 Pac. 212; *State v. McIntosh*, 94 S. C. 439, 78 S. E. 327; *State v. Harley*, 107 S. C. 304, 92 S. E. 1034; *State v. Green*, 121 S. C. 230, 114 S. E. 317. But in the same case the sheriff's testimony that he compelled the defendant to put her foot in a certain track, and that she would not do it in the right way, but attempted to obliterate the tracks, was held to be inadmissible. *State v. Griffin*, 129 S. C. 200, 124 S. E. 81, 35 A. L. R. 1227. The court said: "This evidence falls on the wrong side of the line of cleavage. If conformity had been perfect, that fact would have appeared from the enforced conduct of the defendant, clearly testimonial compulsion. If otherwise, as appeared, the inference of guilt from the effort to obliterate the track would have been a legitimate basis of comment; it would have been supplied by the defendant, a clear-cut case of testimonial compulsion." See also *Elder v. State*, 143 Ga. 363, 85 S. E. 97.

Testimony as to marks and scars introduced to identify prisoner is not inadmissible because obtained by forcible examination of prisoner's body. *O'Brien v. State*, 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323, and note. But see *State v. Height*, 117 Iowa, 650, 91 N. W. 935, in which case physicians making a compulsory physical examination of the accused were not permitted to testify.

The constitutional provision that no person shall be compelled in any criminal case to be a witness against himself applies to a witness in a civil case. *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 12 Sup. Ct. Rep. 195; *McCarthy v. Arnd-*

It is the law in some of the States, when a person is charged with crime, and is brought before an examining magistrate, and the witnesses in support of the charge have been heard, that the prisoner may also make a statement concerning the transaction charged against him, and that this may be used against him on the trial if supposed to have a tendency to establish guilt. But the prisoner is to be first cautioned that he is under no obligation to answer any question put to him unless he chooses, and that whatever he says and does must be entirely voluntary.<sup>1</sup> He is also to be allowed the presence and advice of counsel; and if that privilege is denied him it may be sufficient reason for discrediting any damaging statements he may have made.<sup>2</sup> When, however, the statute has been complied with, and no species of coercion appears to have been employed, the statement the prisoner may have made is evidence which can be used against him on his trial, and is generally entitled to great weight.<sup>3</sup> And in any other case

stein 266 U. S. 34, 69 L. ed. 158, 45 Sup. Ct. Rep. 16. See also *People v. Butler St. Foundry, etc., Co.*, 201 Ill. 236, 66 N. E. 349; *Korel v. Conlan*, 155 Wis. 221, 144 N. W. 266, 49 L. R. A. (N. S.) 826. And see upon this subject Wigmore on Evidence, Vol. 4, § 2257. But in Nebraska it has been held that an action to exclude a foreign corporation from the State is a civil action, and the defendant corporation may be compelled to give evidence against itself. *State v. Standard Oil Co.*, 61 Neb. 28, 84 N. W. 413. And in California it has been held that the accused in a proceeding to disbar an attorney may be compelled to testify. *In re Vaughan*, 189 Cal. 491, 209 Pac. 353, 24 A. L. R. 858.

By filing bankruptcy schedules without objection the bankrupt does not waive his constitutional privilege. *Arndstein v. McCarthy*, 254 U. S. 71, 65 L. ed. 138, 41 Sup. Ct. Rep. 26.

The protection against forced self-incrimination was not removed by section 7 of the Bankruptcy Act (Comp. St. § 9591), providing that no testimony given by the bankrupt shall be offered in evidence against him in any criminal proceeding, as it would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his

property. *Arndstein v. McCarthy*, 254 U. S. 71, 65 L. ed. 138, 41 Sup. Ct. Rep. 26; *People v. Elliott*, 123 Misc. 602, 206 N. Y. Supp. 54. As to admissibility of evidence obtained by an illegal search and seizure, see *supra*, p. 632.

<sup>1</sup> See Rev. Stat. of New York, Pt. 4, c. 2, tit. 2, §§ 14-16.

<sup>2</sup> *Rex v. Ellis, Ry. & Mood*. 432. However, there is no absolute right to the presence of counsel, or to publicity in these preliminary examinations, unless given by statute. *Cox v. Coleridge*, 1 B. & C. 37.

<sup>3</sup> It should not, however, be taken on oath, and if it is, that will be sufficient reason for rejecting it. *Rex v. Smith*, 1 Stark. 242; *Rex v. Webb*, 4 C. & P. 564; *Rex v. Lewis*, 6 C. & P. 161; *Rex v. River*, 7 C. & P. 177; *Regina v. Pikesley*, 9 C. & P. 124; *People v. McMahon*, 15 N. Y. 384.

"The view of the English judges, that an oath, even where a party is informed he need answer no questions unless he pleases, would, with most persons, overcome that caution, is, I think, founded on good reason and experience. I think there is no country—certainly there is none from which any of our legal notions are borrowed—where a prisoner is ever examined on oath." *People v.*

except treason<sup>1</sup> the confession of the accused may be received in evidence to establish his guilt, provided no circumstance accompanies the making of it which should detract from its weight in producing conviction.

But to make it admissible in any case it ought to appear that it was made voluntarily, and that no motives of hope or fear were employed to induce the accused to confess.<sup>2</sup> The evidence ought to

Thomas, 9 Mich. 314, 318, per *Campbell*, J.

In *Wilson v. United States*, 162 U. S. 613, 40 L. ed. 1090, 16 Sup. Ct. Rep. 895, Chief Justice *Fuller*, who delivered the opinion of the court, said: "The same rule that the confession must be voluntary is applied to cases where the accused has been examined before a magistrate, in the course of which examination the confession is made, as allowed and restricted by statute in England, and, in this country, in many of the states. Greenl. Ev. (15th ed.) § 224. But it is held that there is a well-defined distinction between an examination when the person testifies as a witness and when he is examined as a party accused (*People v. Moudon*, 103 N. Y. 211, 8 N. E. 496; *State v. Garvey*, 25 La. Ann. 221); and that, where the accused is sworn, any confession he may make is deprived of its voluntary character, though there is a contrariety of opinion on this point. (Greenl. Ev. (15th ed.) § 225; *State v. Gilman*, 51 Me. 215; *Com. v. Clark*, 130 Pa. St. 641, 18 Atl. 988; *People v. Kelly*, 47 Cal. 125). The fact that he is in custody and manacled does not necessarily render his statement involuntary, nor is that necessarily the effect of popular excitement shortly preceding. *Sparf v. U. S.*, 156 U. S. 51, 39 L. ed. 343, 15 Sup. Ct. Rep. 273; *Pierce v. U. S.*, 160 U. S. 355, 40 L. ed. 454, 16 Sup. Ct. Rep. 321; *State v. Gorham*, 67 Vt. 365, 31 Atl. 845; *State v. Ingram*, 16 Kan. 14. . . . In the case at bar defendant was not put under oath, and made no objection to answering the questions propounded. The commissioner testified that the statement was made freely and voluntarily, and no evidence to the contrary was adduced. Nor did defend-

ant, when testifying on his own behalf, testify to the contrary. He testified, merely, that the commissioner examined him 'without giving him the benefit of counsel, or warning him of his right of being represented by counsel, or in any way informing him of his right to be thus represented.' He did not testify that he did not know that he had a right to refuse to answer the questions, or that, if he had known it, he would not have answered. His answers were explanations, and he appeared not to be unwilling to avail himself of that mode of averting suspicion. It is true that, while he was not sworn, he made the statement before a commissioner who was investigating a charge against him, as he was informed. He was in custody, but not in irons. There had been threats of mobbing him the night before the examination. He did not have the aid of counsel, and he was not warned that the statement might be used against him, or advised that he need not answer. These were matters which went to the weight or credibility of what he said of an incriminating character; but, as he was not confessing guilt, but the contrary, we think that, under all the circumstances disclosed, they were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary, as a matter of law." See upon the general subject, Greenleaf on Evidence, ed. 16, § 333 a, and notes; Wigmore on Evidence, Vol. 4, § 2276.

<sup>1</sup> In treason there can be no conviction unless on the testimony of two witnesses to the same overt act, or on confession in open court. Const. of United States, art. 3, § 3.

<sup>2</sup> See *Smith v. Commonwealth*, 10 Gratt. 734; *Shifflet v. Commonwealth*,

be clear and satisfactory that the prisoner was neither threatened nor cajoled into admitting what very possibly was untrue. Under the excitement of a charge of crime, coolness and self-possession are to be looked for in very few persons; and however strongly we may reason with ourselves that no one will confess a heinous offense of which he is not guilty, the records of criminal courts bear abundant testimony to the contrary. If confessions could prove a crime beyond doubt, no act which was ever punished criminally would be better established than witchcraft;<sup>1</sup> and the judicial executions

14 Gratt. 652; *Page v. Commonwealth*, 27 Gratt. 954; *Williams v. Commonwealth*, 27 Gratt. 997; *United States v. Cox*, 1 Cliff. 5, 21; *Jordan's Case*, 32 Miss. 382; *Runnels v. State*, 28 Ark. 121; *Commonwealth v. Holt*, 121 Mass. 61; *Miller v. People*, 39 Ill. 457; *Perovich v. United States*, 205 U. S. 86, 51 L. ed. 722, 27 Sup. Ct. Rep. 456; *Holt v. United States*, 218 U. S. 245, 54 L. ed. 1021, 31 Sup. Ct. Rep. 2, 20 Ann. Cas. 1138; *Ziang Sung Wan v. United States*, 266 U. S. 1, 69 L. ed. 131, 45 Sup. Ct. Rep. 1; *State v. Carta*, 90 Conn. 79, 96 Atl. 411, L. R. A. 1916 E, 634; *State v. Adams*, 85 Kan. 435, 116 Pac. 608, 35 L. R. A. (N. S.) 870; *Com. v. McClanahan*, 153 Ky. 412, 155 S. W. 1131, Ann. Cas. 1915 C, 132; *Com. v. Killion*, 194 Mass. 153, 80 N. E. 222, 10 Ann. Cas. 911; *Johnson v. State*, 107 Miss. 196, 65 So. 218, 51 L. R. A. (N. S.) 1183; *Territory v. Lobato*, 17 N. M. 666, 134 Pac. 222, L. R. A. 1917 A, 1226; *State v. Foster*, 25 N. M. 361, 183 Pac. 397, 7 A. L. R. 417; *People v. Scott*, 195 N. Y. 224, 88 N. E. 35, 133 Am. St. Rep. 789; *Berry v. State*, 4 Okla. Crim. 202, 111 Pac. 676, 31 L. R. A. (N. S.) 849; *Miller v. State*, 13 Okla. Crim. 176, 163 Pac. 131, L. R. A. 1917 D, 383; *State v. Nagle*, 25 R. I. 105, 54 Atl. 1063, 105 Am. St. Rep. 864; *State v. Brown*, 103 S. C. 437, 88 S. E. 21, L. R. A. 1916 D, 1295; *State v. Danelly*, 116 S. C. 113, 107 S. E. 149, 14 A. L. R. 1420; *Parker v. State*, 46 Tex. Crim. 461, 80 S. W. 1008, 108 Am. St. Rep. 1021, 3 Ann. Cas. 893; *Campbell v. State*, 63 Tex. Crim. 595, 141 S. W. 232, Ann. Cas. 1913 D, 858; *Harkey v. State*, 90 Tex. Crim.

212, 234 S. W. 221, 17 A. L. R. 1276; *State v. Moore*, 41 Utah, 247, 126 Pac. 322, Ann. Cas. 1915 C, 976; *State v. Scott*, 86 Wash. 296, 150 Pac. 423, L. R. A. 1916 B, 844; *State v. Zaccario*, (W. Va.) 129 S. E. 763; *Long v. State*, 178 Wis. 114, 189 N. W. 558, 24 A. L. R. 690.

"In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. . . . A confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise." *Ziang Sung Wan v. United States*, 266 U. S. 1, 69 L. ed. 131, 45 Sup. Ct. Rep. 1. See also *People v. Quan Gin Gow*, 23 Cal. App. 507, 138 Pac. 918; *People v. Prestidge*, 182 Mich. 80, 148 N. W. 347; *Ammons v. State*, 80 Miss. 592, 32 So. 9, 18 L. R. A. (N. S.) 768; *State v. Powell*, 266 Mo. 100, 180 S. W. 851; *State v. Monich*, 74 N. J. L. 522, 64 Atl. 1016.

<sup>1</sup> See *Mary Smith's Case*, 2 Howell's State Trials, 1049; *Case of Essex Witches*, 4 Howell's State Trials, 817; *Case of Suffolk Witches*, 6 Howell's State Trials, 647; *Case of Devon Witches*, 8 Howell's State Trials, 1017.

It is true that torture was employed freely in cases of alleged witchcraft, but the delusion was one which often seized upon the victims as well as their accusers, and led the former to freely confess the most monstrous and impossible actions. Much curious and valuable information on this sub-

which have been justified by such confessions ought to constitute a solemn warning against the too ready reliance upon confessions as proof of guilt in any case. As "Mr. Justice *Parke* several times observed", while holding one of his circuits, "too great weight ought not to be attached to evidence of what a party has been supposed to have said, as it very frequently happens, not only that the witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say."<sup>1</sup> And when the admission is full and positive, it perhaps quite as often happens that it has been made under the influence of the terrible fear excited by the charge, and in the hope that confession may ward off some of the consequences likely to follow if guilt were persistently denied.

A confession alone ought not to be sufficient evidence of the *corpus delicti*. There should be other proof that a crime has actually been committed; and the confession should only be allowed for the purpose of connecting the defendant with the offense.<sup>2</sup> And if the party's hopes or fears are operated upon to induce him to make it,

ject may be found in "Superstition and Force", by Lea; "A Physician's Problems", by Elam; and Lecky, History of Rationalism.

<sup>1</sup> Note to *Earle v. Picken*, 5 C. & P. 542. See also 1 Greenl. Ev. § 214, and note; *Commonwealth v. Curtis*, 97 Mass. 574; *Derby v. Derby*, 21 N. J. Eq. 36; *State v. Chambers*, 39 Iowa, 179.

<sup>2</sup> In *Stringfellow v. State*, 26 Miss. 157, a confession of murder was held not sufficient to warrant conviction, unless the death of the person alleged to have been murdered was shown by other evidence. In *People v. Hennessy*, 15 Wend. 147, it was decided that a confession of embezzlement by a clerk would not warrant a conviction where that constituted the sole evidence that an embezzlement had been committed. So on an indictment for blasphemy, the admission by the defendant that he spoke the blasphemous charge, is not sufficient evidence of the uttering. *People v. Porter*, 2 Park. Cr. R. 14. And see *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *Long's Case*, 1 Hayw. 524; *People v. Lambert*, 5 Mich. 349; *Ruloff v. State*, 18 N. Y. 179; *Hector v. State*, 2

Mo. 166, 22 Am. Dec. 454; *Roberts v. People*, 11 Col. 213, 17 Pac. 637; *Winslow v. State*, 76 Ala. 42; *Jaynes v. People*, 44 Colo. 535, 99 Pac. 325, 16 Ann. Cas. 787; *Bines v. State*, 118 Ga. 320, 45 S. E. 376, 68 L. R. A. 33; *People v. Ranney*, 153 Mich. 293, 116 N. W. 999, 19 L. R. A. (N. s.) 443; *Spears v. State*, 92 Miss. 613, 46 So. 166, 16 L. R. A. (N. s.) 285; *Blacker v. State*, 74 Neb. 671, 105 N. W. 302, 121 Am. St. Rep. 751; *People v. Rogers*, 192 N. Y. 331, 85 N. E. 135, 15 Ann. Cas. 177; *State v. Knapp*, 70 Ohio St. 380, 71 N. E. 705, 1 Ann. Cas. 819; *Choate v. State*, 12 Okla. Crim. 560, 160 Pac. 34, L. R. A. 1917 A, 1287; *Nolan v. State*, 60 Tex. Crim. 5, 129 S. W. 1108, Ann. Cas. 1912 B, 1248; *Harkey v. State*, 90 Tex. Crim. 212, 234 S. W. 221, 17 A. L. R. 1276; *State v. Wells*, 35 Utah, 400, 100 Pac. 681, 136 Am. St. Rep. 1059, 19 Ann. Cas. 631; *State v. Scott*, 86 Wash. 296, 150 Pac. 423, L. R. A. 1916 B, 844. But see *Com. v. Killion*, 194 Mass. 153, 80 N. E. 222, 10 Ann. Cas. 911. See upon this subject Wigmore on Evidence, Vol. 4, § 2070 *et seq.*

this fact will be sufficient to preclude the confession being received; the rule upon this subject being so strict that even saying to the prisoner it will be better for him to confess, has been decided to be a holding out of such inducements to confession, especially when said by a person having a prisoner in custody, as should render the statement obtained by means of it inadmissible.<sup>1</sup> If, however, state-

<sup>1</sup> *Rex v. Enoch*, 5 C. & P. 539; *State v. Bostick*, 4 Harr. 563; *Boyd v. State*, 2 Humph. 390; *Morehead v. State*, 9 Humph. 635; *Commonwealth v. Taylor*, 5 Cush. 605; *Rex v. Partridge*, 7 C. & P. 551; *Commonwealth v. Curtis*, 97 Mass. 574; *State v. Staley*, 14 Minn. 105; *Frain v. State*, 40 Ga. 529; *Austine v. State*, 51 Ill. 236; *People v. Phillips*, 42 N. Y. 200; *State v. Brokman*, 46 Mo. 566; *Commonwealth v. Mitchell*, 117 Mass. 431; *Commonwealth v. Sturtivant*, 117 Mass. 122; *Corley v. State*, 50 Ark. 305, 7 S. W. 255; *Harrold v. Oklahoma*, 169 Fed. 47, 94 C. C. A. 415, 17 Ann. Cas. 868; *Johnson v. State*, 107 Miss. 196, 65 So. 218, 51 L. R. A. (n. s.) 1183; *State v. Jones*, 171 Mo. 401, 71 S. W. 680, 94 Am. St. Rep. 786; *State v. Foster*, 25 N. M. 361, 183 Pac. 397, 7 A. L. R. 417; *Berry v. State*, 4 Okla. Crim. 202, 111 Pac. 676, 31 L. R. A. (n. s.) 849; *Cross v. State*, 142 Tenn. 510, 221 S. W. 489, 9 A. L. R. 1354; *Stoddard v. State*, 132 Wis. 520, 112 N. W. 453, 13 Ann. Cas. 1211.

Mr. *Phillips* states the rule thus: "A promise of benefit or favor, or threat or intimation of disfavor, connected with the subject of the charge, held out by a person having authority in the matter, will be sufficient to exclude a confession made in consequence of such inducements, either of hope or fear. The prosecutor, or the prosecutor's wife or attorney, or the prisoner's master or mistress, or a constable, or a person assisting him in the apprehension or custody, or a magistrate acting in the business, or other magistrate, has been respectively looked upon as having authority in the matter; and the same principle applies if the inducement has been held out by a person without authority, but in the presence of a person who

has such authority, and with his sanction, either express or implied."

1 Phil. Ev. by Cowen, Hill, and Edwards, 544, and cases cited. See also *State v. Sherman*, 35 Mont. 512, 90 Pac. 981, 119 Am. St. Rep. 869. But we think the better reason is in favor of excluding confessions where inducements have been held out by any person, whether acting by authority or not. *Rex v. Simpson*, 1 Mood. C. C. 410; *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *Spears v. State*, 2 Ohio St. 583; *Commonwealth v. Knapp*, 9 Pick. 496; *Rex v. Clewes*, 4 C. & P. 221; *Rex v. Kingston*, 4 C. & P. 387; *Rex v. Dunn*, 4 C. & P. 543; *Rex v. Walkley*, 6 C. & P. 175; *Rex v. Thomas*, 6 C. & P. 353; *State v. Sherman*, 35 Mont. 512, 90 Pac. 981, 119 Am. St. Rep. 869. "The reason is, that in the agitation of mind in which the party charged is supposed to be, he is liable to be influenced by the hope of advantage or fear of injury to state things which are not true." Per *Morton*, J. in *Commonwealth v. Knapp*, 9 Pick. 496, 502; *People v. McMahon*, 15 N. Y. 387.

There are not wanting many opposing authorities, which proceed upon the idea, that "a promise made by an indifferent person, who interfered officiously without any kind of authority, and promised without the means of performance, can scarcely be deemed sufficient to produce any effect, even on the weakest mind, as an inducement to confess." 1 Greenl. Ev. § 223. No supposition could be more fallacious; and, in point of fact, a case can scarcely occur in which some one, from age, superior wisdom, or experience, or from his relations to the accused or to the prosecutor, would not be likely to exercise more influence upon his mind than some of

the persons who are regarded as "in authority" under the rule as stated by Mr. Phillips. Mr. Greenleaf thinks that, while as a rule of law all confessions made to persons in authority should be rejected, "promises and threats by private persons, however, not being found so uniform in their operation, perhaps may, with more propriety, be treated as mixed questions of law and fact; the principle of law, that a confession must be voluntary, being strictly adhered to, and the question, whether the promises or threats of the private individuals who employed them were sufficient to overcome the mind of the prisoner, being left to the discretion of the judge under all the circumstances of the case." 1 Greenl. Ev. § 223. This is a more reasonable rule than that which admits such confessions under all circumstances; but it is impossible for a judge to say whether inducements, in a particular case, *have* influenced the mind or not; if their nature were such that they were calculated to have that effect, it is safer, and more in accordance with the humane principles of our criminal law, to presume, in favor of life and liberty, that the confessions were "forced from the mind by the flattery of hope, or by the torture of fear" (per *Eyre*, C. B., *Warickshall's Case*, 1 Leach, C. C. 299), and exclude them altogether. For the views of Mr. Wigmore on this question, see Wigmore on Evidence, Vol. 2, §§ 827-830. In case of doubt as to the fact that the confession was voluntary, the jury should be left to exclude it, if they think it involuntary. *Com. v. Preece*, 140 Mass. 276, 5 N. E. 494; *People v. Barker*, 60 Mich. 277, 27 N. W. 539. In *Ellis v. State*, 65 Miss. 44, 3 So. 188, it is held the duty of the court to decide whether it was voluntary, and that the jury may or may not believe it true, if admitted.

In *State v. Sherman*, 35 Mont. 512, 90 Pac. 981, 119 Am. St. Rep. 869, the court said: "Confusion has arisen from an apparent effort on the part of courts to establish a hard and fast rule for defining the test by which the admissibility of confessions is to be

governed. Manifestly this could not be done, for the reason that every case must be governed by its own surrounding facts and circumstances. The only fair test, if such it can be called, which can be applied is this: Was the inducement held out to the accused such as that there is any fair risk of a false confession? For the object of the rule is not to exclude a confession of the truth, but to avoid the possibility of a confession of guilt from one who is in fact innocent."

Mr. Wigmore says, "In general, then, the position of the confessing person which causes our distrust is that of being compelled to *choose between two alternatives*, one of which involves a confession of guilt irrespective of its truth or falsity. Each instance presented may be thus stated: What were the prospects attending confession (irrespective of its truth) to be weighed by him against the prospects of non-confession? The test of exclusion thus would be: Human nature being what it is, *were the prospects attending confession* (involving the equalization or averaging of the benefit of realizing the promise or the benefit of escaping from the threat, against the drawbacks moral and legal of furnishing damaging evidence) *as weighed at the time against the prospects attending non-confession* (involving a similar averaging), *such as to have created, in any considerable degree, a risk that a false confession would be made?* Putting it more briefly and roughly, Was the inducement such that there was any fair risk of a false confession? It is this test which must be taken as on principle the orthodox one. It is not the test most commonly applied; but, in one phrasing or another, it has from time to time received the support of eminent judges so frequently that it may fairly be put forward as having claims as satisfactory on precedent as on principle." Wigmore on Evidence, Vol. 2, § 824.

This whole subject is very fully considered in note to 2 *Leading Criminal Cases*, 182. And see Whart. Cr. Law, § 686 *et seq.* The cases of



*People v. McMahon*, 15 N. Y. 385, and *Commonwealth v. Curtis*, 97 Mass. 574, have carefully considered the general subject. In the second of these, the prisoner had asked the officer who made the arrest, whether he had better plead guilty, and the officer had replied that "as a general thing it was better for a man who was guilty to plead guilty, for he got a lighter sentence." After this he made statements which were relied upon to prove guilt. These statements were not allowed to be given in evidence. Per *Foster, J.*: "There is no doubt that any inducement of temporal fear or favor coming from one in authority, which preceded and may have influenced a confession, will cause it to be rejected, unless the confession is made under such circumstances as show that the influence of the inducement has passed away. No cases require more careful scrutiny than those of disclosures made by a party under arrest to the officer who has him in custody, and in none will slighter threats or promises of favor exclude the subsequent confessions. *Commonwealth v. Taylor*, 5 Cush. 610; *Commonwealth v. Tuckerman*, 10 Gray, 193; *Commonwealth v. Morey*, 1 Gray, 461. 'Saying to the prisoner that it will be the worse for him if he does not confess, or that it will be the better for him if he does, is sufficient to exclude the confession, according to constant experience.' 2 Hale, P. C. 659; 1 Greenl. Ev. § 219; 2 Bennett and Heard's Lead. Cr. Cas. 164; *Ward v. State*, 50 Ala. 120. Each case depends largely on its own special circumstances. But we have before us an instance in which the officer actually held out to the defendant the hope and inducement of a lighter sentence if he pleaded guilty. And a determination to plead guilty at the trial, thus induced, would naturally lead to an immediate disclosure of guilt." And the court held it an unimportant circumstance that the advice of the officer was given at the request of the prisoner, instead of being volunteered.

A voluntary confession obtained by artifice is admissible. *State v. Brooks*,

92 Mo. 542, 5 S. W. 257, 330; *Heldt v. State*, 20 Neb. 492, 30 N. W. 626. So, if made in response to a simple request by the officer in charge of the person. *Ross v. State*, 67 Md. 286, 10 Atl. 218. See also *State v. Danelly*, 116 S. C. 113, 107 S. E. 149, 14 A. L. R. 1420. And a confession will not be excluded where there is a mere exhortation or adjuration to speak the truth. *State v. Williams*, 129 La. 215, 55 So. 769, Ann. Cas. 1913 B, 302; *State v. General Armstrong*, 167 Mo. 257, 66 S. W. 961. Nor where the defendant is told that it will be better for him to tell the truth. *Wilson v. State*, 19 Ga. App. 759, 92 S. E. 309; *State v. Jon*, 46 Nev. 418, 211 Pac. 676; *Hintz v. State*, 125 Wis. 405, 104 N. W. 110; *Wigmore on Evidence*, Vol. 2, § 832. An exhortation to the accused by a private person to tell the truth about a homicide and the perpetrators thereof, coupled with a statement that his conscience would be the easier if he told the truth, cannot exclude a confession then and there made, preceded by a declaration by the accused that he was tired of lying and wanted to tell the truth. *State v. Williams*, 129 La. 215, 55 So. 769, Ann. Cas. 1913 B, 302. In a South Dakota case it was held that the statement by the sheriff to the defendant, "The best thing you can do is to tell the truth, and you might get out of it today," did not justify the exclusion of the confession from the jury. *State v. Allison*, 24 S. D. 622, 124 N. W. 747.

Statements made to the grand jury as individuals in the jury room are admissible. *State v. Coffee*, 56 Conn. 399, 16 Atl. 151. But not those made to a coroner by an ignorant foreigner, without counsel, or knowledge of his rights. *People v. Mondon*, 103 N. Y. 211, 8 N. E. 496. The rule does not cover statements of facts not involving guilt, but which in connection with other facts may tend to show it. *People v. Le Roy*, 65 Cal. 613, 4 Pac. 649.

See, upon the general subject of admissibility of confessions with reference to their voluntary character, *Greenleaf on Evidence*, ed. 16, §§ 219-

ments have been made before the confession which were likely to do away with the effect of the inducements, so that the accused cannot be supposed to have acted under their influence, the confession may be received in evidence;<sup>1</sup> but the showing ought to be very satisfactory on this point before the court should presume that the prisoner's hopes did not still cling to, or his fears dwell upon, the first inducements.<sup>2</sup>

Before prisoners were allowed the benefit of assistance from counsel on trials for high crimes, it was customary for them to make such statements as they saw fit concerning the charge against them, during the progress of the trial, or after the evidence for the prosecution was put in; and upon these statements the prosecuting officer or the court would sometimes ask questions, which the accused might answer or not at his option. And although this practice has now become obsolete, yet if the accused in any case should manage or assist in his own defense, and should claim the right of addressing the jury, it would be difficult to confine him to "the record" as the counsel may be confined in his argument. A disposition has been manifested of late to allow the accused to give evidence in his own behalf; and statutes to that effect are in existence in some of the States, the operation of which is believed to have been generally satisfactory.<sup>3</sup> These statutes, however, cannot be so construed as to authorize compulsory process against an accused to compel him to disclose more than he chooses; they do not so far change the old system as to establish an inquisitorial process for obtaining evidence; they confer a privilege, which the defendant may use at his option. If he does not choose to avail himself of it, unfavorable inferences are not to be drawn to his prejudice from that circumstance;<sup>4</sup> and

230; Wigmore on Evidence, Vol. 2, §§ 826, 843-845.

<sup>1</sup> *State v. Guild*, 10 N. J. L. 163, 18 Am. Dec. 404; *Commonwealth v. Harman*, 4 Pa. St. 269; *State v. Vaigneur*, 5 Rich. 391; *Rex v. Cooper*, 5 C. & P. 535; *Rex v. Howes*, 6 C. & P. 404; *Rex v. Richards*, 5 C. & P. 318; *Thompson v. Commonwealth*, 20 Gratt. 724.

<sup>2</sup> See *State v. Roberts*, 1 Dev. 259; *Rex v. Cooper*, 5 C. & P. 535; *Thompson v. Commonwealth*, 20 Gratt. 724; *State v. Lowhorne*, 66 N. C. 538; *Thompson v. State*, 19 Tex. App. 593; *Coffee v. State*, 25 Fla. 501, 6 So. 493; *People v. Stewart*, 75 Mich. 21, 42 N. W. 662.

Before the confession can be re-

ceived, it must be shown by the prosecution that it was voluntary. *State v. Garvey*, 28 La. Ann. 955, 26 Am. Rep. 123. Compare *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202.

<sup>3</sup> See *American Law Register*, Vol. V. n. s. pp. 129, 705; *Ruloff v. People*, 45 N. Y. 213. As such statutes do not compel, even morally, a defendant to testify, they are valid. *People v. Courtney*, 94 N. Y. 490.

In Tennessee, the prisoner's statement is not, in a legal sense, testimony, but the jury may nevertheless believe and act upon it. *Wilson v. State*, 3 Heisk. 342.

<sup>4</sup> *People v. Tyler*, 36 Cal. 522; *State v. Cameron*, 40 Vt. 555; *United*

*States v. Kimball*, 117 Fed. 156; *Paxton v. State*, 114 Ark. 393, 170 S. W. 80, Ann. Cas. 1916 A, 1239; *King v. Com.*, 143 Ky. 125, 136 S. W. 147; *Com. v. Spencer*, 212 Mass. 438, 99 N. E. 266, Ann. Cas. 1913 D, 552; *People v. Smith*, 114 App. Div. 513, 100 N. Y. Supp. 259, 20 N. Y. Cr. 307; *People v. Bills*, 129 App. Div. 798, 114 N. Y. Supp. 587; *State v. Hillstrom*, 46 Utah, 341, 150 Pac. 935. For a case resting upon an analogous principle, see *Carne v. Litchfield*, 2 Mich. 340.

A different view would seem to be taken in Maine. See *State v. Bartlett*, 55 Me. 200. The views of the court are thus stated in the case of *State v. Cleaves*, 59 Me. 298, 8 Am. Rep. 422. The judge below had instructed the jury that the fact that the defendant did not go upon the stand to testify was a proper matter to be taken into consideration by them in determining the question of her guilt or innocence. This instruction was sustained. *Appleton*, Ch. J. "It has been urged that this view of the law places the prisoner in an embarrassed condition. Not so. The embarrassment of the prisoner, if embarrassed, is the result of his own previous misconduct, not of the law. If innocent, he will regard the privilege of testifying as a boon justly conceded. If guilty, it is optional with the accused to testify or not, and he cannot complain of the election he may make. If he does not avail himself of the privilege of contradiction or explanation, it is his fault if by his own misconduct or crime he has placed himself in such a situation that he prefers any inferences which may be drawn from his refusal to testify, to those which must be drawn from his testimony, if truly delivered. The instruction given was correct, and in entire accordance with the conclusions to which, after mature deliberation, we have arrived. *State v. Bartlett*, 55 Me. 200; *State v. Lawrence*, 57 Me. 375."

In *People v. Tyler*, 36 Cal. 522, 529, *Sawyer*, Ch. J., expresses the contrary view as follows: "At the trial, by his plea of not guilty, the party charged denies the charge against him. This

is itself a positive act of denial, and puts upon the people the burden of affirmatively proving the offense alleged against him. When he has once raised this issue by his plea of not guilty, the law says he shall thenceforth be deemed innocent till he is proved to be guilty; and both the common law and the statute give him the benefit of any reasonable doubt arising on the evidence. Now, if at the trial, when for all the purposes of the trial the burden is on the people to prove the offense charged by affirmative evidence, and the defendant is entitled to rest upon his plea of not guilty, an inference of guilt could legally be drawn from his declining to go upon the stand as a witness, and again deny the charge against him in the form of testimony, he would practically if not theoretically, by his act declining to exercise his privilege, furnish evidence of his guilt that might turn the scale and convict him. In this mode he would indirectly and practically be deprived of the option which the law gives him, and of the benefit of the provision of the law and the Constitution, which say in substance that he shall not be compelled to criminate himself. If the inference in question could be legally drawn, the very act of exercising his option, as to going upon the stand as a witness, which he is necessarily compelled by the adoption of the statute to exercise one way or the other, would be, at least to the extent of the weight given by the jury to the inference arising from his declining to testify, a crimination of himself. Whatever the ordinary rule of evidence, with reference to inferences to be drawn from the failure of parties to produce evidence that must be in their power to give, we are satisfied that the defendant, with respect to exercising his privilege under the provisions of the act in question, is entitled to rest in silence and security upon his plea of not guilty, and that no inference of guilt can be properly drawn against him from his declining to avail himself of the privilege conferred upon him to testify in his own behalf; that to permit such an inference would be to

if he does testify, he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement, which he declines to make a full one, such weight as, under the circumstances, they think it entitled to;<sup>1</sup> otherwise the statute must have set aside and

violate the principles and the spirit of the Constitution and the statute, and defeat rather than promote the object designed to be accomplished by the innovation in question." See also *Commonwealth v. Bonner*, 97 Mass. 587; *Commonwealth v. Morgan*, 107 Mass. 109; *Commonwealth v. Nichols*, 114 Mass. 285, 19 Am. Rep. 346; *Commonwealth v. Scott*, 123 Mass. 239, 25 Am. Rep. 87; *Bird v. State*, 50 Ga. 585.

In New York and Ohio, by statute, unfavorable inferences are not allowed to be drawn from the fact of the defendant not offering himself as a witness. See *Brandon v. People*, 42 N. Y. 265; *Connors v. People*, 50 N. Y. 240; *Stover v. People*, 56 N. Y. 315; *Calkins v. State*, 18 Ohio St. 366.

In *Devries v. Phillips*, 63 N. C. 53, the Supreme Court of North Carolina held it not admissible for counsel to comment to the jury on the fact that the opposite party did not come forward to be sworn as a witness as the statute permitted. See also *State v. Levy*, 9 Idaho, 483, 75 Pac. 227; *Hoff v. State*, 83 Miss. 488, 35 So. 950; *State v. Currie*, 13 N. D. 655, 102 N. W. 875, 69 L. R. A. 405, 112 Am. St. Rep. 687; *State v. Bennett*, 21 S. D. 396, 113 N. W. 78; *Barnard v. State*, 48 Tex. Cr. 111, 86 S. W. 760, 112 Am. St. Rep. 736; *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247.

In Michigan the wife of an accused party may be sworn as a witness with his assent; but it has been held that his failure to call her was not to subject him to inferences of guilt, even though the case was such that, if his defense was true, his wife must have been cognizant of the facts. *Knowles v. People*, 15 Mich. 408.

When a defendant in a criminal case takes the stand in his own behalf, he is subject to impeachment like other witnesses. *Fletcher v. State*, 49 Ind. 124, 19 Am. Rep. 673; *Mershon v. State*, 51 Ind. 14; *State v. Beal*, 68

Ind. 345; *Morrison v. State*, 76 Ind. 335; *Commonwealth v. Bonner*, 97 Mass. 587; *Commonwealth v. Gallagher*, 126 Mass. 54; *State v. Hardin*, 46 Iowa, 623, 26 Am. Rep. 174; *Gifford v. People*, 87 Ill. 211; *Sweatt v. State*, 156 Ala. 85, 47 So. 194; *May v. State*, 16 Ala. App. 541, 79 So. 677; *Paxton v. State*, 108 Ark. 316, 157 S. W. 396; *Malot v. State*, 52 Fla. 101, 41 So. 791; *State v. Marquardt*, 184 Iowa, 1068, 169 N. W. 338; *Hill v. Com.*, 191 Ky. 477, 230 S. W. 910; *People v. Cutler*, 197 Mich. 6, 163 N. W. 493; *State v. Baker*, 209 Mo. 444, 108 S. W. 6; *State v. Philpott*, 242 Mo. 504, 146 S. W. 1160; *State v. Starr*, 244 Mo. 161, 148 S. W. 862; *Keith v. State*, 127 Tenn. 40, 152 S. W. 1029; *Reed v. State*, 82 Tex. Cr. 657, 200 S. W. 843. But in New York it has been held that though by taking the witness stand the defendant subjects himself to attack upon his credibility, he does not put his general character in issue. *People v. Wangsker*, 191 App. Div. 875, 182 N. Y. Supp. 782.

<sup>1</sup> In *State v. Ober*, 52 N. H. 459, 13 Am. Rep. 88, the defendant was put on trial for an illegal sale of liquors; and having offered himself as a witness, was asked on cross-examination a question directly relating to the sale. He declined to answer, on the ground that it might tend to criminate him. Being convicted, it was alleged for error that the court suffered the prosecuting officer to comment on this refusal to the jury. The Supreme Court held this no error. This ruling is in entire accord with the practice which has prevailed without question in Michigan, and which has always assumed that the right of comment, where the party makes himself his own witness, and then refuses to answer proper questions, was as clear as the right to exemption from unfavorable comment when he abstains from asserting his statutory privilege.

overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger.<sup>1</sup> [Though the foregoing statement in the text is based upon sound reason, the greater weight of authority, since it was written, seems to support the rule that where the accused voluntarily takes the witness stand he thereby waives his privilege and becomes subject to the rules that

The case of *Connors v. People*, 50 N. Y. 240, is different. There the defendant, having taken the stand as a witness, objected to answer a question; but was directed by the court to do so, and obeyed the direction. This was held no error because he had waived his privilege. If the defendant had persisted in refusing we are not advised what action the court would have deemed it proper to take, and it is easy to conceive of serious embarrassments in such a case. Under the Michigan practice, when the court had decided the question to be a proper one it would have been left to the defendant to answer or not at his option, but if he failed to answer what seemed to the jury a proper inquiry, it would be thought surprising if they gave his imperfect statement much credence. On this point see further *State v. Wentworth*, 65 Me. 234, 20 Am. Rep. 688; *State v. Witham*, 72 Me. 531.

As to extent to which comment may be made upon the defendant's testimony or his failure to make it full, see *Heldt v. State*, 20 Neb. 492, 30 N. W. 626; *Watt v. People*, 126 Ill. 9, 18 N. E. 340; *State v. Graves*, 95 Mo. 510, 8 S. W. 739; *State v. Ward*, 61 Vt. 153, 17 Atl. Rep. 483.

<sup>1</sup> The statute of Michigan of 1861, p. 169, removed the common-law disabilities of parties to testify and added, "Nothing in this act shall be construed as giving the right to compel a defendant in criminal cases to testify; but any such defendant shall be at liberty to make a statement to the court or jury, and may be cross-examined on any such statement." It has been held that this statement should not be under oath. *People v. Thomas*, 9 Mich. 314. That its purpose was to give every person

on trial for crime an opportunity to make full explanation to the jury, in respect to the circumstances given in evidence which are supposed to have a bearing against him. *Annis v. People*, 13 Mich. 511. That the statement is evidence in the case, to which the jury can attach such weight as they think it is entitled to. *Maher v. People*, 10 Mich. 212. That the court has no right to instruct the jury that, when it conflicts with the testimony of an unimpeached witness, they must believe the latter in preference. *Durant v. People*, 13 Mich. 351. And that the prisoner while on the stand, is entitled to the assistance of counsel in directing his attention to any branch of the charge, that he may make explanations concerning it if he desires. *Annis v. People*, 13 Mich. 511.

The prisoner does not cease to be a defendant by becoming a witness, nor forfeit rights by accepting a privilege. In *People v. Thomas*, 9 Mich. 321, *Campbell, J.*, in speaking of the right which the statute gives to cross-examine a defendant who has made his statement, says: "And while his constitutional right of declining to answer questions cannot be removed, yet a refusal by a party to answer any fair question, not going outside of what he has offered to explain, would have its proper weight with the jury." See *Commonwealth v. Mullen*, 97 Mass. 547; *Commonwealth v. Curtis*, 97 Mass. 574; *Commonwealth v. Morgan*, 107 Mass. 199. In Florida under a similar statute the prisoner may make his statement even after the evidence is closed. *Higginbotham v. State*, 19 Fla. 557.

Defendant may be compelled to testify against his interest in civil cases. *Levy v. Superior Court of*

govern other witnesses.<sup>1</sup> The privilege extended by the constitutional maxim is limited to criminal matters, but is as broad as the mischief against which it seeks to guard, and, therefore, protects a witness though he is not himself on trial.<sup>2]</sup>

The testimony for the people in criminal cases can only, as a general rule, be given by witnesses who are present in court.<sup>3</sup> The defendant is entitled to be confronted with the witnesses against him;<sup>4</sup> and if any of them be absent from the Commonwealth, so

San Francisco, 105 Cal. 600, 38 Pac. 965, 29 L. R. A. 811, and note in L. R. A. And in criminal cases the accused may be compelled to stand up before the jury for identification. *People v. Gardner*, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. 741, and note in L. R. A.

<sup>1</sup> *State v. Dillman*, 183 Iowa, 1147, 168 N. W. 204; *State v. Simmons*, 78 Kan. 852, 98 Pac. 277; *People v. Owen*, 154 Mich. 571, 118 N. W. 590, 21 L. R. A. (N. S.) 520; *State v. Vroman*, 45 S. D. 465, 188 N. W. 746; *State v. King*, 67 Wash. 651, 122 Pac. 323.

"When a defendant takes the stand and assumes the character of a witness, he is subject to the same tests as other witnesses, and for the purpose of impairing his credibility he may be cross-examined as to his past life and conduct and as to any specific facts tending to disgrace or degrade him, although they are irrelevant to the commission of the offense charged. *State v. Pfefferle*, 36 Kan. 90, 12 Pac. 406. The extent of such inquiry rests in the sound discretion of the trial court." *State v. Bowers*, 108 Kan. 161, 194 Pac. 650. See also *State v. Dillman*, 183 Iowa, 1147, 168 N. W. 204; *Brandon v. People*, 42 N. Y. 265; *Wroe v. State*, 20 Ohio St. 460; *Hanoff v. State*, 37 Ohio St. 178, 41 Am. Rep. 496. That cross-examination may be full and searching, see *Fitzpatrick v. United States*, 178 U. S. 304, 44 L. ed. 1078, 20 Sup. Ct. Rep. 944. As to the extent to which a prisoner may be cross-examined, see also *McGuire v. State*, 3 Ala. App. 40, 58 So. 60; *Fuqua v. State*, 19 Ariz. 40, 165 Pac. 311; *Leonard v. State*, 106 Ark. 449, 153 S. W. 590; *People v. O'Brien*, 66 Cal. 602, 6 Pac. 695;

*Maloy v. State*, 52 Fla. 101, 41 So. 791; *Johnston v. Com.*, 170 Ky. 766, 186 S. W. 655; *Newman v. Com.*, 28 Ky. L. 81, 88 S. W. 1089; *State v. Clinton*, 67 Mo. 380; *People v. Noelke*, 94 N. Y. 137; *Hanoff v. State*, 37 Ohio St. 178; *State v. Saunders*, 14 Oreg. 300, 12 Pac. 441; *State v. Vroman*, 45 S. D. 465, 188 N. W. 746; *State v. King*, 67 Wash. 651, 122 Pac. 323.

<sup>2</sup> *Counselman v. Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 12 Sup. Ct. Rep. 195.

<sup>3</sup> *State v. Thomas*, 64 N. C. 74; *Goodman v. State*, Meigs, 197; *Jackson v. Commonwealth*, 19 Gratt. 656. See *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695.

By the old common law, a party accused of felony was not allowed to call witnesses to contradict the evidence for the Crown; and this seems to have been on some idea that it would be derogatory to the royal dignity to permit it. Afterwards, when they were permitted to be called, they made their statements without oath; and it was not uncommon for both the prosecution and the court to comment upon their testimony as of little weight because unsworn. It was not until Queen Anne's time that they were put under oath.

<sup>4</sup> *Bell v. State*, 2 Tex. App. 216, 28 Am. Rep. 429; *Motes v. United States*, 178 U. S. 458, 44 L. ed. 1150, 20 Sup. Ct. Rep. 993; *Henwood v. People*, 57 Colo. 544, 143 Pac. 373, Ann. Cas. 1916 A, 1111; *State v. Gaetano*, 96 Conn. 306, 114 Atl. 82, 15 A. L. R. 458; *Blackwell v. State*, 79 Fla. 709, 86 So. 224, 15 A. L. R. 465; *Ralph v. State*, 124 Ga. 81, 52 S. E. 298, 2 L. R. A. (N. S.) 509; *Smith v. State*, 147 Ga. 689, 95 S. E. 281, 15 A. L. R. 490; *Sokol v. People*, 212 Ill. 238, 72

N. E. 382; *People v. Love*, 310 Ill. 558, 142 N. E. 204; *State v. Crooker*, 123 Me. 310, 122 Atl. 865, 33 A. L. R. 821; *Dutton v. State*, 123 Md. 373, 91 Atl. 417, Ann. Cas. 1916 C, 89; *Com. v. Slavski*, 245 Mass. 405, 140 N. E. 465, 29 A. L. R. 281; *State v. Von Klein*, 71 Oreg. 159, 142 Pac. 549, Ann. Cas. 1916 C, 1054; *State v. Inlow*, 44 Utah, 485, 141 Pac. 530, Ann. Cas. 1917 A, 741.

"The purpose of this constitutional provision was to put beyond the possibility of abolition by legislative action the principle already established as a part of the common law, that witnesses should confront the accused." *Com. v. Slavski*, 245 Mass. 405, 140 N. E. 465, 29 A. L. R. 281.

The constitutional guaranty to persons accused of crime of meeting witnesses face to face prevents the taking of the depositions of such witnesses in a criminal prosecution. *Sokel v. People*, 212 Ill. 238, 72 N. E. 382; *People v. Love*, 310 Ill. 558, 142 N. E. 204; *State v. Weil*, 83 S. C. 478, 65 S. E. 634, 26 L. R. A. (N. S.) 461. See also *Smith v. State*, 147 Ga. 689, 95 S. E. 281, 15 A. L. R. 490.

Such guaranty was intended "to exclude any evidence by deposition, which could be given orally in the presence of the accused, but was not intended to effect the question as to what was or was not competent evidence to be given face to face according to the settled rules of the common law." *Com. v. Slavski*, 245 Mass. 405, 140 N. E. 465, 29 A. L. R. 281, quoting from opinion in *Com. v. Richards*, 18 Pick. (Mass.) 434, 437, 29 Am. Dec. 608.

It is not competent for the legislature to make reputation evidence against an accused of a public offense, — *e.g.* of keeping a place for the sale of liquors, — which the jury are bound to follow. *State v. Beswick*, 13 R. I. 211; *contra*, *State v. Thomas*, 47 Conn. 546, 36 Am. Rep. 98. It may be made sufficient evidence, provided the jury, while free to convict upon it, are not bound to do so. *State v. Wilson*, 15 R. I. 180, 1 Atl. 415.

The defendant's right to be confronted by the witnesses against him imports the privilege to cross-exam-

ine them. *Wray v. State*, 154 Ala. 36, 45 So. 697, 129 Am. St. Rep. 27, 15 L. R. A. (N. S.) 493, 16 Ann. Cas. 362; *Ralph v. State*, 124 Ga. 81, 52 S. E. 298, 2 L. R. A. (N. S.) 509; *State v. Crooker*, 123 Me. 310, 122 Atl. 865, 33 A. L. R. 821; *State v. Black*, 97 N. J. L. 361, 118 Atl. 103. See also *Dix v. State*, 15 Okla. Crim. Rep. 559, 179 Pac. 624.

This constitutional provision applies to a witness for the defendant if he proves to be adverse and hostile. *State v. Benner*, 64 Me. 267; *State v. Crooker*, 123 Me. 310, 122 Atl. 865, 33 A. L. R. 821. It likewise applies to a co-defendant who takes the stand and gives testimony incriminating defendant. *State v. Crooker*, 123 Me. 310, 122 Atl. 865, 33 A. L. R. 821; *State v. Black*, 97 N. J. L. 361, 118 Atl. 103. See also *Dix v. State*, 15 Okla. Crim. Rep. 559, 179 Pac. 624.

The rule that the prisoner shall be confronted with the witnesses against him does not preclude such documentary evidence to establish collateral facts as would be admissible under the rules of the common law in other cases. *United States v. Benner*, Baldw. 234; *United States v. Little*, 2 Wash. C. C. 159; *United States v. Ortega*, 4 Wash. C. C. 531; *People v. Jones*, 24 Mich. 215; *Dowdell v. United States*, 221 U. S. 325, 55 L. ed. 753, 31 Sup. Ct. Rep. 590.

It has been held competent, even in a criminal case, to make the certificate of the proper official accountant *prima facie* evidence of an official delinquency in the tax collector. *Johns v. State*, 55 Md. 350. So a statute making evidence that a bank failed and that deposits were received by an officer of the bank shortly before the failure, *prima facie* evidence of a taking with knowledge of insolvency is valid. *State v. Buck*, 120 Mo. 479, 25 S. W. 573. See also *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. 668. But the *corpus delicti* — *e.g.* the fact of marriage in an indictment for bigamy — cannot be proved by certificates. *People v. Lambert*, 5 Mich. 349. Compare *Patterson v. State*, 17 Tex. App. 102.

The prisoner must be allowed to

that their attendance cannot be compelled, or if they be dead, or have become incapacitated to give evidence, there is no mode by which their statements against the prisoner can be used for his conviction.<sup>1</sup> The exceptions to this rule are of cases which are excluded from its reasons by their peculiar circumstances; but they are far from numerous. If the witness was sworn before the examining magistrate, or before a coroner, and the accused had an opportunity then to cross-examine him, or if there were a former trial on which he was sworn, it seems allowable to make use of his deposition, or of the minutes of his examination, if the witness has since deceased, or has left the State, or is insane, or sick and unable to testify, or has been summoned but appears to have been kept away by the opposite party.<sup>2</sup> So, also, if a person is on trial for homicide, the

see witness's face and to be near enough to hear what witness says and to watch its effect upon jury. *State v. Mannion*, 19 Utah, 505, 57 Pac. 542, 45 L. R. A. 638.

Where a defendant is deaf and cannot hear the evidence of the witnesses for the State, the presiding judge should permit some reasonable mode of having their evidence communicated to him. *Ralph v. State*, 124 Ga. 81, 52 S. E. 298, 2 L. R. A. (N. S.) 509. In Alabama it has been held that in such case the defendant is not required to provide his own interpreter, but that the court must furnish one. *Terry v. State*, (Ala. App.) 105 So. 386. But the Supreme Court of the United States has held that the failure of the court to have repeated to the accused, who was almost totally deaf, the testimony given on the trial did not cause the court to lose jurisdiction of the case or deprive the accused of his liberty without due process of law. *Felts v. Murphy*, 201 U. S. 123, 50 L. ed. 689, 26 Sup. Ct. Rep. 366.

Record which does not show the prisoner present during the entire trial is fatally defective. *French v. State*, 85 Wis. 400, 55 N. W. 566, 21 L. R. A. 402, 39 Am. St. 855.

<sup>1</sup> *People v. Howard*, 50 Mich. 239, 15 N. W. 101.

In *Wray v. State*, 154 Ala. 36, 45 So. 697, 129 Am. St. Rep. 18, 15 L. R. A. (N. S.) 493, 16 Ann. Cas. 362, it was held that, under the facts set

forth in the opinion, the accused was deprived of his right to be confronted by the witnesses against him since he could not be required to cross-examine the witness offered on account of his dangerous condition, and that to permit the State to ask such witness any question material to the prosecution was error. But a statute may give the prisoner the right to take depositions out of the State upon condition that the State shall have the like right. *Butler v. State*, 97 Ind. 378.

<sup>2</sup> 1 Greenl. Ev. §§ 163-166; Bishop, Cr. Pro. §§ 520-527; Whart. Cr. Law, § 667; 2 Phil. Ev. by Cowen, Hill, and Edwards, 217, 229; *Beets v. State*, Meigs, 108; *Kendricks v. State*, 10 Humph. 479; *United States v. McComb*, 5 McLean, 286; *Summons v. State*, 5 Ohio St. 325; *Pope v. State*, 22 Ark. 371; *Brown v. Commonwealth*, 73 Pa. St. 321; *O'Brien v. Commonwealth*, 6 Bush, 563; *Commonwealth v. Richards*, 18 Pick. 434; *People v. Murphy*, 45 Cal. 137; *People v. Devine*, 46 Cal. 45; *Davis v. State*, 17 Ala. 354; *Marler v. State*, 67 Ala. 55; *State v. Johnson*, 12 Nev. 121; *State v. Hooker*, 17 Vt. 658; *State v. Elliott*, 90 Mo. 350, 2 S. W. 411; *Hair v. State*, 16 Neb. 601, 21 N. W. 464; *State v. Fitzgerald*, 63 Iowa, 268, 19 N. W. 202; *Mattox v. United States*, 156 U. S. 237, 39 L. ed. 409, 15 Sup. Ct. Rep. 337; s. c. 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50; *Dowdell v. United States*, 221 U. S. 325, 55 L. ed. 753, 31 Sup. Ct.



declarations of the party whom he is charged with having killed, if made under the solemnity of a conviction that he was at the point of death, and relating to matters of fact concerning the homicide, which passed under his own observation, may be given in evidence against the accused; the condition of the party who made them being such that every motive to falsehood must be supposed to have been silenced, and the mind to be impelled by the most powerful considerations to tell the truth.<sup>1</sup> Not that such evidence is of very

Rep. 590; *United States v. Greene*, 146 Fed. 796; *Wray v. State*, 154 Ala. 36, 45 So. 697, 129 Am. St. Rep. 18, 15 L. R. A. (N. S.) 493, 16 Ann. Cas. 362; *Henwood v. People*, 57 Colo. 544, 143 Pac. 373, Ann. Cas. 1916 A, 1111; *State v. Gaetano*, 96 Conn. 306, 114 Atl. 82, 15 A. L. R. 458; *Putnal v. State*, 56 Fla. 86, 47 So. 864; *Blackwell v. State*, 79 Fla. 709, 86 So. 224, 15 A. L. R. 465; *Smith v. State*, 147 Ga. 689, 95 S. E. 281, 15 A. L. R. 490; *State v. Kimes*, 152 Iowa, 240, 132 N. W. 180; *State v. Nelson*, 68 Kan. 568, 75 Pac. 505, 1 Ann. Cas. 468; *State v. Harman*, 70 Kan. 476, 78 Pac. 805; *State v. Banks*, 111 La. 22, 35 So. 370; *State v. Bollero*, 112 La. 850, 36 So. 754; *State v. Herlihy*, 102 Me. 310, 66 Atl. 643; *Com. v. Slavski*, 245 Mass. 405, 140 N. E. 465, 29 A. L. R. 281; *State v. Barnes*, 274 Mo. 625, 204 S. W. 267; *People v. Gilhooley*, 108 App. Div. 234, 19 N. Y. Crim. Rep. 541, 95 N. Y. Supp. 636, affirmed 187 N. Y. 551, 80 N. E. 1116; *People v. Gualey*, 210 N. Y. 202, 104 N. E. 138, Ann. Cas. 1916 A, 1108; *Mendenhall v. United States*, 6 Okla. Crim. Rep. 436, 119 Pac. 594; *State v. Walton*, 53 Oreg. 557, 99 Pac. 431, 101 Pac. 389, 102 Pac. 173; *State v. Von Klein*, 71 Oreg. 159, 142 Pac. 549, Ann. Cas. 1916 C, 1054; *State v. Heffernan*, 24 S. D. 1, 123 N. W. 87, 140 Am. St. Rep. 764, 25 L. R. A. (N. S.) 876; *Young v. State*, 82 Tex. Crim. 257, 199 S. W. 479; *Robbins v. State*, 82 Tex. Crim. 650, 200 S. W. 525; *State v. Inlow*, 44 Utah, 485, 141 Pac. 530, Ann. Cas. 1917 A, 741; *Spencer v. State*, 132 Wis. 509, 112 N. W. 462, 122 Am. St. Rep. 989, 13 Ann. Cas. 969. See also *Wigmore on Evidence*, Vol. 3, §§ 1397-1399. But see *Cline v. State*, 36 Tex. Crim.

320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850. See, upon this right of confrontation, note to *Cline v. State*, *supra*, 61 Am. St. 886, and dissenting opinion of *Henderson, J.*, in same case. Compare, *Puryear v. State*, 63 Ga. 692; *State v. Campbell*, 1 Rich. 124.

In Mississippi it has been held that the evidence of a witness at a former trial, alive but out of the State, is inadmissible. *Owens v. State*, 63 Miss. 450.

That the legislature may make the notes of the official stenographer evidence in a subsequent trial, see *State v. Frederic*, 69 Me. 400, 3 Am. Cr. R. 78. See *People v. Sligh*, 48 Mich. 54, 11 N. W. 782.

Whether evidence that the witness cannot be found after diligent inquiry, or is out of the jurisdiction, would be sufficient to let in proof of his former testimony, see *Bul. N. P.* 239, 242; *Rex v. Hagan*, 8 C. & P. 167; *Sills v. Brown*, 9 C. & P. 601; *People v. Chung Ah Chue*, 57 Cal. 567.

The fact that a witness against the defendant is outside of the State at the time of the trial, and therefore beyond the reach of process, authorizes the introduction in evidence of the testimony given by the witness at a former trial of the same case, notwithstanding an opportunity to subpoena the witness may have been neglected by the prosecution. *State v. Nelson*, 68 Kan. 566, 75 Pac. 505, 1 Ann. Cas. 468.

<sup>1</sup> *Greenl. Ev.* § 156; 1 *Phil. Ev.* by Cowen, Hill, and Edwards, 285-289; *Whart. Cr. Law*, §§ 669-682; *Donnelly v. State*, 26 N. J. L. 463; *Anthony v. State*, Meigs, 265; *Hill's Case*, 2 Gratt. 594; *State v. Freeman*, 1 Speers, 57; *State v. Brunetto*, 13 La.

conclusive character; it is not always easy for the hearer to determine how much of the declaration related to what was seen and positively known, and how much was surmise and suspicion only; but it is admissible from the necessity of the case, and the jury must judge of the weight to be attached to it. [A Massachusetts statute extending the rule admitting dying declarations so as to include prosecutions for abortion has been regarded as valid.<sup>1</sup>

Another exception to the constitutional requirement is that public records are competent evidence when of probative value respecting an issuable fact.<sup>2</sup> The principle which seems fairly deducible from the cases is that a record of a primary fact made by a public officer in the performance of official duty is, or may be made by legislation, competent *prima facie* evidence as to the existence of that fact, but the records of investigations and inquiries conducted either voluntarily or pursuant to requirement of law, by public officers concerning causes and effects and involving the exercise of judgment and discretion, expressions of opinion, and making conclusions, are not admissible as evidence as public records. This principle may not be universally applicable and there may be exceptions, but it appears to be available in general as a practical working rule.<sup>3</sup>

Ann. 45; *Dunn v. State*, 2 Ark. 229; *Mose v. State*, 35 Ala. 421; *Brown v. State*, 32 Miss. 433; *Whitley v. State*, 38 Ga. 70; *State v. Quick*, 15 Rich. 158; *Jackson v. Commonwealth*, 19 Gratt. 656; *State v. Oliver*, 2 Houst. 585; *People v. Simpson*, 48 Mich. 474, 12 N. W. 662; *State v. Saunders*, 14 Oreg. 300, 12 Pac. 441; *State v. Vansant*, 80 Mo. 67; *Dawdell v. United States*, 221 U. S. 325, 55 L. ed. 753, 31 Sup. Ct. Rep. 590; *Wray v. State*, 154 Ala. 36, 45 So. 697, 129 Am. St. Rep. 18, 15 L. R. A. (N. S.) 493, 16 Ann. Cas. 362; *Com. v. Slavski*, 245 Mass. 405, 140 N. E. 465, 29 A. L. R. 281; *Spencer v. State*, 132 Wis. 509, 112 N. W. 462, 122 Am. St. Rep. 989, 13 Ann. Cas. 969. This whole subject was largely considered in *Morgan v. State*, 31 Ind. 193; and *State v. Framburg*, 40 Iowa, 555. For an elaborate treatment of the subject of dying declarations, see *Wigmore on Evidence*, Vol. 3, § 1430 *et seq.*

<sup>1</sup> *Com. v. Smith*, 213 Mass. 563, 100 N. E. 1010; *Com. v. Turner*, 224 Mass. 229, 112 N. E. 864; *Com. v. Wagner*, 231 Mass. 265, 121 N. E.

25; *Com. v. Slavski*, 245 Mass. 405, 140 N. E. 465, 29 A. L. R. 281.

<sup>2</sup> *Sokel v. People*, 212 Ill. 238, 72 N. E. 382; *People v. Love*, 310 Ill. 558, 142 N. E. 204; *Com. v. Slavski*, 245 Mass. 405, 140 N. E. 465, 29 A. L. R. 281.

<sup>3</sup> *Evanston v. Gunn*, 99 U. S. 660, 25 L. ed. 306; *Heike v. United States*, 112 C. C. A. 615, 192 Fed. 83; *Tucker v. People*, 122 Ill. 583, 13 N. E. 809; *State v. Smith*, 74 Iowa, 583, 38 N. W. 492; *State v. Donato*, 127 La. 393, 53 So. 662; *Johns v. State*, 55 Md. 350; *Com. v. Dorr*, 216 Mass. 314, 103 N. E. 902; *Worcester v. Northborough*, 140 Mass. 397, 5 N. E. 270; *Com. v. King*, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536; *Shamlan v. Equitable Accident Co.*, 226 Mass. 67, 115 N. E. 46; *Broadbent's Case*, 240 Mass. 449, 134 N. E. 632; *Taylor v. Whittier*, 240 Mass. 514, 138 N. E. 6; *Com. v. Slavski*, 245 Mass. 405, 140 N. E. 465, 29 A. L. R. 281; *Weitzel v. Brown*, 224 Mass. 190, 112 N. E. 945; *Derinza's Case*, 229 Mass. 435, 118 N. E. 942, 16 N. C. C. A. 210; *Jewett v. Boston Elev. R. Co.*, 219 Mass.

In cases of felony, where the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment. If he be absent, either in prison or by escape, there is a want of jurisdiction over the person, and the court cannot proceed with the trial, or receive the verdict, or pronounce the final judgment.<sup>1</sup> But misdemeanors may be tried in the absence of the accused.

528, 107 N. E. 433; *Com. v. Borasky*, 214 Mass. 313, 101 N. E. 377; *Carney v. Boston Elev. R. Co.*, 219 Mass. 552, 107 N. E. 411; *Foudi v. Boston Mutual Life Ins. Co.*, 224 Mass. 6, 112 N. E. 612; *Cawley v. Northern Waste Co.*, 239 Mass. 540, 132 N. E. 365; *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002.

<sup>1</sup> See *Andrews v. State*, 2 Sneed, 550; *Jacobs v. Cone*, 5 S. & R. 335; *Witt v. State*, 5 Cold. 11; *State v. Alman*, 64 N. C. 364; *Gladden v. State*, 12 Fla. 577; *Maurer v. People*, 43 N. Y. 1; note to *Winchell v. State*, 7 Cow. 525; *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202; *Smith v. People*, 8 Col. 457, 8 Pac. 920; *State v. Kelly*, 97 N. C. 404, 2 S. E. 185; *Noell v. Com.*, 135 Va. 600, 115 S. E. 679, 30 A. L. R. 1345; *State v. Stevenson*, 64 W. Va. 392, 62 S. E. 688, 19 L. R. A. (N. S.) 713.

The accused cannot waive this protection. *Noell v. Com.*, 135 Va. 600, 115 S. E. 679, 30 A. L. R. 1345. In capital cases the accused stands upon all his rights, and waives nothing. *Nomaque v. People*, Breese, 145; *Dempsey v. People*, 47 Ill. 325; *People v. McKay*, 18 Johns. 217; *Burley v. State*, 1 Neb. 385.

The court cannot make an order changing the venue in a criminal case in the absence of and without notice to the defendant. *Ex parte Bryan*, 44 Ala. 404. Nor in the course of the trial allow evidence to be given to the jury in his absence, even though it be that of a witness which had been previously reduced to writing. *Jackson v. Commonwealth*, 19 Gratt. 656; *Wade v. State*, 12 Ga. 25. See *People v. Bragle*, 88 N. Y. 585.

A majority of the cases hold that the accused has a right to be present when the jury view the premises where

the alleged crime was committed. *Whitley v. State*, 114 Ark. 243, 169 S. W. 952; *People v. Lowney*, 70 Cal. 193, 11 Pac. 605; *People v. Searle*, 33 Cal. App. 228, 164 Pac. 819; *Haynes v. State*, 71 Fla. 585, 72 So. 180; *Chance v. State*, 156 Ga. 428, 119 S. E. 303; *State v. McGinnis*, 12 Idaho, 336, 85 Pac. 1089; *Carney v. Com.*, 181 Ky. 443, 205 S. W. 408; *State v. Slorah*, 118 Me. 203, 106 Atl. 768, 4 A. L. R. 1256; *People v. Auerbach*, 176 Mich. 23, 141 N. W. 869, Ann. Cas. 1915 B, 557; *Colletti v. State*, 12 Ohio App. 104; *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562, 633; *Pierce v. Com.*, 135 Va. 635, 115 S. E. 686, 28 A. L. R. 864; *Noel v. Com.*, 135 Va. 600, 115 S. E. 679, 30 A. L. R. 1345; *Jenkins v. State*, 22 Wyo. 34, 134 Pac. 260, 135 Pac. 749. But see *Shular v. State*, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211; *State v. Stratton*, 103 Kan. 226, 173 Pac. 300; *Com. v. Dascalakis*, 246 Mass. 12, 140 N. E. 470; *State v. Rogers*, 145 Minn. 303, 177 N. W. 358; *State v. Hartley*, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33; *People v. Thorn*, 156 N. Y. 286, 50 N. E. 947, 42 L. R. A. 368. The following cases hold that the accused may waive his right to be present when the jury view the premises. *Elias v. Territory*, 9 Ariz. 1, 76 Pac. 605, 11 Ann. Cas. 1153; *Whitley v. State*, 114 Ark. 243, 169 S. W. 952; *People v. Mathews*, 139 Cal. 527, 73 Pac. 416; *Haynes v. State*, 71 Fla. 585, 72 So. 180; *Chance v. State*, 156 Ga. 428, 119 S. E. 303; *State v. Stratton*, 103 Kan. 226, 173 Pac. 300; *State v. Slorah*, 118 Me. 203, 106 Atl. 768, 4 A. L. R. 1256; *People v. Auerbach*, 176 Mich. 23, 141 N. W. 869, Ann. Cas. 1915 B, 557; *Starr v. State*, 5 Okla. Crim. Rep. 440, 115 Pac. 356; *State v. Cong-*

*The Traverse Jury.*

Accusations of criminal conduct are tried at the common law by jury;<sup>1</sup> and wherever the right to this trial is guaranteed by the Constitution without qualification or restriction, it must be understood as retained in all those cases which were triable by jury at the common law,<sup>2</sup> and with all the common-law incidents to a jury trial, so

don, 14 R. I. 458; *State v. Suber*, 89 S. C. 100, 71 S. E. 466; *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562, 633; *Jenkins v. State*, 22 Wyo. 34, 134 Pac. 260, 135 Pac. 749. In some jurisdictions, however, it has been held that the accused cannot waive his right to be present at the view. *Foster v. State*, 70 Miss. 755, 12 So. 822; *Pierce v. Com.*, 135 Va. 635, 115 S. E. 686, 28 A. L. R. 864; *Noell v. Com.*, 135 Va. 600, 115 S. E. 679, 30 A. L. R. 1345; *State v. McCausland*, 82 W. Va. 525, 96 S. E. 938.

In a capital case the record must affirmatively show the presence of the accused at the trial, and when the verdict was received and sentence pronounced. *Dougherty v. Commonwealth*, 69 Pa. St. 286.

As to right to be present at argument of motion for a new trial: *People v. Ormsby*, 48 Mich. 494, 12 N. W. 671; *State v. Jefcoat*, 20 S. C. 383; *Bond v. Com.* 83 Va. 581, 3 S. E. 149; *Derden v. State*, 56 Tex. Crim. 396, 120 S. W. 485, 133 Am. St. Rep. 986; when jury come in for further instructions: *Shipp v. State*, 11 Tex. App. 46; *Roberts v. State*, 111 Ind. 340, 12 N. E. 500; *State v. Myrick*, 38 Kan. 238, 16 Pac. 330; *State v. Jones*, 29 S. C. 201, 7 S. E. 296.

Error cannot be predicated upon instructions to the jurors while the accused was absent from the court room, where the address was to all jurors in attendance on the court touching a matter foreign to the case. *State v. Haffer*, 94 Wash. 136, 162 Pac. 45, L. R. A. 1917 C, 610, Ann. Cas. 1917 E, 229.

Whether any of the steps in the trial can be taken in the defendant's absence if he is under bail, see *Barton v. State*, 67 Ga. 653; *Sahlinger v.*

*People*, 102 Ill. 241; *State v. Smith*, 90 Mo. 37, 1 S. W. 753; *Gore v. State*, 52 Ark. 285, 12 S. W. 564, 5 L. R. A. 832.

<sup>1</sup>See in general Thompson and Merriam on Juries. Upon right to trial by jury, see *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620, and note to 42 L. ed. U. S. 1061. It is worthy of note that all that is extant of the legislation of the Plymouth Colony for the first five years, consists of the single regulation, "that all criminal facts, and also all manner of trespasses and debts between man and man, shall be tried by the verdict of twelve honest men, to be impaneled by authority, in form of a jury, upon their oath." 1 Palfrey's New England, 340.

<sup>2</sup>A constitutional provision that "the right of trial by jury shall remain inviolate", guarantees the continuance of that right as it existed at the time of the adoption of the Constitution. *La Bowe v. Balthazor*, 180 Wis. 419, 193 N. W. 244, 32 A. L. R. 862.

The power to punish contempts summarily is incident to courts of record, and the courts have generally held that cases of contempt are not triable by jury. The object of the power would be defeated in many cases if they were. *King v. Almon*, 8 St. Trials, 53; *Republica v. Oswald*, 1 Dall. 319, 1 L. ed. 155, 1 Am. Dec. 246; *Mariner v. Dyer*, 2 Me. 165; *Morrison v. McDonald*, 21 Me. 550; *State v. White*, T. U. P. Charl. 136; *Yates v. Lansing*, 9 Johns. 395, 6 Am. Dec. 290; *Sanders v. Metcalf*, 1 Tenn. Ch. 419; *Clark v. People*, 1 Ill. 340, 12 Am. Dec. 177; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *State v. Morrill*, 16 Ark. 384; *Gorham v. Lockett*, 6 B. Monr. 638; *State v. Woodfin*, 5 Ired. 199; *Ex parte Adams*, 25 Miss. 883; *State v.*

Copp, 15 N. H. 212; *State v. Mathews*, 37 N. H. 450; *Neel v. State*, 9 Ark. 259; *State v. Tipton*, 1 Blackf. 166; *Middlebrook v. State*, 43 Conn. 259; *Garrigus v. State*, 93 Ind. 239; *Chafee v. Quidnick Co.*, 13 R. I. 442; *Tinsley v. Anderson*, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805; *Merchants Stock etc., Co. v. Chicago Board of Trade*, 201 Fed. 20, 120 C. C. A. 582; *Couts v. United States*, 249 Fed. 595, 161 C. C. A. 521; *Van Dyke v. Gila County Superior Ct.*, 24 Ariz. 508; 211 Pac. 576; *People v. Tool*, 35 Colo. 225, 86 Pac. 224, 117 Am. St. Rep. 198, 6 L. R. A. (N. S.) 822; *McDougall v. Sheridan*, 23 Idaho, 191, 128 Pac. 954; *People v. Kowalski*, 307 Ill. 378, 138 N. E. 634; *O'Brien v. People*, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966; *Drady v. District Court*, 126 Iowa, 345, 102 N. W. 115; *Flannagan v. Jepson*, 177 Iowa, 393, 158 N. W. 641, L. R. A. 1918 E, 548; *State ex rel. Hopkins v. Howat*, 109 Kan. 376, 198 Pac. 686, 25 A. L. R. 1210; *Walton Lunch Co. v. Kearney*, 236 Mass. 310, 128 N. E. 429; *O'Flynn v. State*, 89 Miss. 850, 43 So. 82, 119 Am. St. Rep. 727, 9 L. R. A. (N. S.) 1119, 11 Ann. Cas. 530; *State v. Shepherd*, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624; *State v. Little*, 175 N. C. 743, 94 S. E. 680; *Atchison, etc., R. Co. v. State*, 35 Okla. 532, 130 Pac. 940; *State v. North Shore Boom, etc., Co.*, 67 Wash. 317, 121 Pac. 467, Ann. Cas. 1913 D, 456. This is true of the Federal courts. *United States v. Hudson*, 7 Cranch, 32, 3 L. ed. 259; *United States v. New Bedford Bridge*, 1 Wood. & M. 401. See *Ex parte Robinson*, 19 Wall. 505, 22 L. ed. 205; *Ex parte Terry*, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77.

But the Supreme Court of the United States has held that Congress may require a trial by jury upon the demand of the accused in an independent proceeding at law for a criminal contempt which is also a crime. *Michaelson v. United States*, 266 U. S. 42, 69 L. ed. 162, 45 Sup. Ct. Rep. 18. Justice *Sutherland*, who delivered the opinion of the court, said: "It is contended that the statute

materially interferes with the inherent powers of the courts and is therefore invalid. That the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law. It is essential to the administration of justice. The courts of the United States, when called into existence and vested with jurisdiction over any subject, at once become possessed of the power. So far as the inferior Federal courts are concerned, however, it is not beyond the authority of Congress. *Ex parte Robinson*, 19 Wall. 505, 510-511, 22 L. ed. 205; *Bessethe v. W. B. Conkey Co.*, 194 U. S. 324, 326, 48 L. ed. 997, 24 Sup. Ct. Rep. 665; but the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative. That it may be regulated within limits not precisely defined may not be doubted. The statute now under review is of the latter character. It is of narrow scope, dealing with the single class where the act or thing constituting the contempt is also a crime in the ordinary sense. It does not interfere with the power to deal summarily with contempts committed in the presence of the court or so near thereto as to obstruct the administration of justice, and is in express terms carefully limited to the cases of contempt specifically defined. Neither do we think it purports to reach cases of failure or refusal to comply with a decree—that is, to do something which a decree commands—which may be enforced by coercive means or remedied by purely compensatory relief. If the reach of the statute had extended to the cases which are excluded, a different and more serious question would arise. But the simple question presented is whether Congress may require a trial by jury upon the demand of the accused in an independent proceeding at law for a criminal contempt which is also a crime. In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt and the defendant may not be compelled to be a

witness against himself. *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 444, 31 Sup. Ct. Rep. 492. The fundamental characteristics of both are the same. Contempts of the kind within the terms of the statute partake of the nature of crimes in all essential particulars. 'So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure. 3 Transactions of the Royal Historical Society (N. S.) p. 147 (1885); and that at least in England it seems that they still may be and preferably are tried in that way.' *Gompers v. United States*, 233 U. S. 604, 610-611, 58 L. ed. 1115, 34 Sup. Ct. Rep. 693, Ann. Cas. 1915 D, 1044.

"... The proceeding is not between the parties to the original suit, but between the public and the defendant. The only substantial difference between such a proceeding as we have here, and a criminal prosecution by indictment or information is that in the latter the act complained of is the violation of a law, and in the former the violation of a decree. In the case of the latter, the accused has a constitutional right of trial by jury; while in the former he has not. The statutory extension of this constitutional right to a class of contempts which are properly described as 'criminal offenses' does not, in our opinion, invade the powers of the courts as intended by the Constitution or violate that instrument in any other way." See also *Richardson v. Com.*, 141 Ky. 497, 133 S. W. 213; *Riley v. Wallace*, 188 Ky. 471, 222 S. W. 1085; *Ex parte Plastridge*, 68 Okla. 256, 173 Pac. 646; *Phillips v. State*, 77 Okla. 276, 188 Pac. 332; *Blanchard v. Bryan*, 83 Okla. 33, 200 Pac. 444.

The legislature may designate the cases in which a court may punish summarily. *In re Oldham*, 89 N. C. 23; *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407.

Whether justices of the peace may punish contempts in the absence of any statute conferring the power, will perhaps depend on whether the justice's court is or is not deemed a

court of record. See *Lining v. Bentham*, 2 Bay, 1; *Re Cooper*, 32 Vt. 253; *Ex parte Kerrigan*, 33 N. J. L. 344; *Rhinehart v. Lance*, 43 N. J. L. 311, 39 Am. Rep. 592; *Early v. Fitzpatrick*, 161 Ala. 171, 49 So. 686, 135 Am. St. Rep. 123; *Ex parte Patterson*, 110 Ark. 94, 161 S. W. 173, 8 A. L. R. 1541; *McBurnie v. Sullivan*, 152 Ky. 686, 153 S. W. 945, 44 L. R. A. (N. S.) 186; *In re Button*, 83 Neb. 636, 120 N. W. 203, 23 L. R. A. (N. S.) 1173; *Farnham v. Colman*, 19 S. D. 342, 103 N. W. 161, 117 Am. St. Rep. 944, 1 L. R. A. (N. S.) 1135, 9 Ann. Cas. 314. But court commissioners have no such power. *In re Remington*, 7 Wis. 643; *Haight v. Lucia*, 36 Wis. 355; *Ex parte Perkins*, 29 Fed. Rep. 900; nor notaries; *Burt v. Pyle*, 89 Ind. 398; but see *Dogge v. State*, 21 Neb. 272, 31 N. W. 929; *Ex parte Schoepf*, 74 Ohio St. 1, 77 N. E. 276, 6 L. R. A. (N. S.) 325. Nor can the legislature confer it upon municipal councils. *Whitcomb's Case*, 120 Mass. 118.

In Minnesota it has been held that the power of a city council to punish a witness for contempt is not to be inferred, but must be clearly granted either by the Constitution or by statute. *State ex rel. Peers v. Fitzgerald*, 131 Minn. 116, 154 N. W. 750, 8 A. L. R. 1582.

As the courts in punishing contempts are dealing with cases which concern their own authority and dignity, and which are likely to suggest, if not to excite, personal feelings and animosities, the case should be plain before they should assume the authority. *Bachelder v. Moore*, 42 Cal. 415. See *Storey v. People*, 79 Ill. 45; *Hollingsworth v. Duane*, Wall. C. C. 77; *Ex parte Bradley*, 7 Wall. 364, 19 L. ed. 214.

If the contempt is in the presence of the court, it may be punished without notice or opportunity for defense. *Ex parte Terry*, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77. See *State v. Gibson*, 33 W. Va. 87, 10 S. E. 58.

A libelous publication as to a pending cause may be punished as a contempt. *Cooper v. People*, 13 Col. 373, 22 Pac. 790.

The power to punish a party for contempt of court cannot be so used as to deprive him of his right to a defense upon the merits in the principal case. A decree *pro confesso* entered after striking a party's answer from the files as a punishment for his refusal to obey an order of the court is void for want of due process. *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841, aff. 145 N. Y. 126, 39 N. E. 841. See the whole subject of contempts very fully discussed by Mr. Justice *White* in delivering the opinion of the court in this case. See, also, *Carter v. Commonwealth*, 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310; *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. 280; *Dahnke v. People*, 168 Ill. 102, 48 N. E. 137, 39 L. R. A. 197; *Dixon v. People*, 168 Ill. 179, 48 N. E. 108, 39 L. R. A. 116; *State v. Circuit Court*, 97 Wis. 1, 72 N. W. 193, 38 L. R. A. 554, 65 Am. St. 90; *Re Huron*, 58 Kan. 152, 48 Pac. 574, 36 L. R. A. 822, 62 Am. St. 614, and note in L. R. A.; *Coleman v. Roberts*, 113 Ala. 323, 21 So. 449, 36 L. R. A. 84, 59 Am. St. 111; *Ex parte Senior*, 37 Fla. 1, 19 So. 652, 32 L. R. A. 133; *Dailey v. Superior Court of San Francisco*, 112 Cal. 94, 44 Pac. 458, 32 L. R. A. 273, 53 Am. St. 160; *Clair v. State*, 40 Neb. 534, 59 N. W. 118, 28 L. R. A. 367; *Mullin v. People*, 15 Col. 437, 24 Pac. 880, 9 L. R. A. 566, and note, 22 Am. St. 414; *Thomas v. People*, 14 Col. 254, 23 Pac. 326, 9 L. R. A. 569.

Court has no inherent power to prohibit the publication of testimony given before it. *Re Shortridge*, 99 Cal. 526, 34 Pac. 227, 21 L. R. A. 755, 37 Am. St. 78.

The constitutional provision does not apply to trials by court-martial. *In re McDonald*, 49 Mont. 454, 143 Pac. 947, L. R. A. 1915 B, 988, Ann. Cas. 1916 A, 1166. See also *State v. Wagener*, 74 Minn. 518, 77 N. W. 424, 42 L. R. A. 749. But a citizen not in the land or naval service, or in the militia in actual service, cannot be tried by court-martial or military commission, on a charge of discouraging

volunteer enlistments or resisting a military conscription. *In re Kemp*, 16 Wis. 359. See *Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281.

The constitutional provision does not apply to a proceeding to remove a public officer. *Ashley v. Superior Ct.*, 228 Mass. 63, 116 N. E. 961, 8 A. L. R. 1463; *Gay v. District Ct.*, 41 Nev. 330, 171 Pac. 156, 3 A. L. R. 224; *Diehl v. Totten*, 32 N. D. 131, 155 N. W. 74, Ann. Cas. 1918 A, 884. In *Mason v. State*, 58 Ohio St. 30, 50 N. E. 6, 41 L. R. A. 291, M. was ousted from the office of probate judge for having attempted to influence the votes of sundry persons by promising that in case of his election he would use his influence to secure them various appointments to office, and the right to jury trial was denied since the action was merely one to try title to office.

Jury trial is not required in disbarment proceedings. *Shepard's Case*, 109 Mich. 631, 67 N. W. 971. Where an attorney is accused of withholding money belonging to a client and proceedings are brought against him to require him to turn over the money and for his disbarment, he is not entitled in either proceeding to a jury trial unless there is an honest dispute as to the amount due for fees. In this class of cases there is a preliminary inquiry by the court, just as there would be on the request for an issue *devisavit vel non* and certain other issues, as to whether the dispute is in good faith and meritorious, and only if found to be such is the issue remitted to a jury to determine the amount due. If, however, the court reaches the conclusion, on the preliminary inquiry, that there was bad faith, overreaching fraud, or dishonesty on the attorney's part, it proceeds summarily to dispose of the matter by order. *Balogh v. Jackson*, 272 Pa. St. 482, 116 Atl. 377, 22 A. L. R. 1497, distinguishing *In re Murphy's Estate*, 258 Pa. St. 38, 101 Atl. 935. The determination in such cases as to whether the issue shall be submitted to a jury rests in the sound discretion of the court. *Brunings v. Townsend*, 139 Cal. 137, 72 Pac. 919; *Goss Printing Press Co. v. Todd*, 202 Mass. 185,

88 N. E. 780; *Charest v. Bishop*, 137 Minn. 102, 162 N. W. 1063; *Keeney v. Tredwell*, 71 App. Div. 521, 75 N. Y. Supp. 1097; *In re Nellis*, 116 App. Div. 94, 101 N. Y. Supp. 698; *In re Hitchings*, 157 App. Div. 392, 142 N. Y. Supp. 339. In *Diggs v. Thurston*, 39 App. D. C. 267, 275, the reason upon which the right of the court to exercise summary jurisdiction in such cases is based is thus stated: "An attorney is an officer of the court and, as such, is bound to so conduct himself that the administration of justice shall not be brought into contempt and disrepute. When guilty of bad faith in his relations with his client, his conduct tends to prevent, rather than promote, justice, and the court whose officer he is has jurisdiction at common law and is charged with the duty of protecting the client from the bad faith of its officer. The ground of the jurisdiction thus exercised is the alleged misconduct of the officer. If an attorney has collected money for his client, it is *prima facie* his duty, after deducting his own costs and disbursements, to pay it over to such client; and his refusal to do this, without some good excuse, is gross misconduct and dishonesty on his part, calculated to bring discredit on the court and on the administration of justice. It is this misconduct on which the court seizes as a ground of jurisdiction to compel him to pay the money in conformity with his professional duty. See also *Charest v. Bishop*, 137 Minn. 102, 162 N. W. 1063; *Lynde v. Lynde*, 64 N. J. Eq. 736, 52 Atl. 694, 58 L. R. A. 471, 97 Am. St. Rep. 692.

The guaranty of jury trial does not extend to a suit by a State board of medical examiners to recover a penalty imposed by statute for practicing medicine without a license. *State Board of Medical Examiners v. Buettel*, (N. J. L.), 131 Atl. 89.

Charges of vagrancy and disorderly conduct were never triable by jury. See full review by *Alvey, J.*, in *State v. Glenn*, 54 Md. 572. Also *State v. Anderson*, 40 N. J. L. 224. Petty offenses need not be so tried. *Ex parte Wooten*, 62 Miss. 174; *Inwood v.*

*State*, 42 Ohio St. 186; *Ex parte Marx*, 86 Va. 40, 9 S. E. 617; *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; *Schick v. United States*, 195 U. S. 65, 49 L. ed. 99, 24 Sup. Ct. Rep. 826, 1 Ann. Cas. 585; *In re Kinsel*, 64 Kan. 1, 67 Pac. 634, 56 L. R. A. 475; *State v. Loden*, 117 Md. 373, 83 Atl. 564, 40 L. R. A. (N. S.) 193, Ann. Cas. 1913 E, 1300. Nor violations of municipal ordinances. *Natal v. Louisiana*, 139 U. S. 621, 35 L. ed. 288, 11 Sup. Ct. Rep. 636; *Pearson v. Wimbish*, 124 Ga. 701, 52 S. E. 751, 4 Ann. Cas. 501; *Loeb v. Jennings*, 133 Ga. 796, 67 S. E. 101, 18 Ann. Cas. 376; *In re Kinsel*, 64 Kan. 1, 67 Pac. 634, 56 L. R. A. 475; *St. Paul v. Robinson*, 129 Minn. 383, 152 N. W. 777, Ann. Cas. 1916 E, 845; *McGear v. Woodruff*, 33 N. J. L. 213; *Ex parte Schmidt*, 24 S. C. 363; *Wong v. Astoria*, 13 Oreg. 538, 11 Pac. 295; *Lieberman v. State*, 26 Neb. 464, 42 N. W. 419; *Mankato v. Arnold*, 36 Minn. 62, 30 N. W. 305; *Ogden v. City of Madison*, 111 Wis. 413, 87 N. W. 568, 55 L. R. A. 506. Compare *Miller v. Birmingham*, 151 Ala. 469, 44 So. 388, 125 Am. St. Rep. 31. Otherwise if the offense is a crime. *In re Rolfs*, 30 Kan. 758, 1 Pac. 523; *Creston v. Nye*, 74 Iowa, 369, 37 N. W. 777.

The right to trial by jury does not extend to a summary proceeding for a restraining order. *Ex parte Keeler*, 45 S. C. 537, 23 S. E. 865, 31 L. R. A. 678, 55 Am. St. 785. But an offense triable by jury at time of adoption of Constitution cannot subsequently be made triable without jury in the first instance. *Miller v. Com.*, 88 Va. 618, 14 S. E. 161, 342, 979, 15 L. R. A. 441, and note.

The provision being considered does not require trial by jury of offenses before consuls under the authority of treaty stipulations, though such offense was committed on the deck of an American vessel. *Ross v. McIntyre*, 140 U. S. 453, 35 L. ed. 581, 11 Sup. Ct. Rep. 897. Nor can one ordered to leave this country under the Chinese exclusion act object that he was not given a jury trial of his



far, at least, as they can be regarded as tending to the protection of the accused.<sup>1</sup> [Where a new offense is created by statute, if it belongs to a class of cases that is triable by jury, one accused of such offense will be entitled to a jury trial.<sup>2</sup> But he will not be so entitled if the new offense does not belong to such a class.<sup>3</sup> The privileges

claimed right to remain. *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016.

The procedure in equity to enforce a mechanics' lien is not in conflict with the constitutional right to trial by jury. *Hathorne v. Panama Park Co.*, 44 Fla. 194, 32 So. 812. But one may not be imprisoned for two years as an habitual drunkard upon a chamber order. *State v. Ryan*, 70 Wis. 676, 36 N. W. 823.

That right to jury extends to trial of issues of fact in *quo warranto* proceedings, see *Buckman v. State*, 34 Fla. 48, 15 So. 697, 24 L. R. A. 806, and note; *Louisiana, etc., R. Co. v. State*, 75 Ark. 435, 88 S. W. 559, 5 Ann. Cas. 637; *State v. Cobb*, 24 Okla. 662, 104 Pac. 361, 24 L. R. A. (N. S.) 639. Compare *State v. Sengstacken*, 61 Oreg. 455, 122 Pac. 292, Ann. Cas. 1914 B, 230. But not to actions of book-account. *Hall v. Armstrong*, 65 Vt. 421, 26 Atl. 592, 20 L. R. A. 366. Nor to assessment of damages for negligence on default of answer. *Dean v. Willamette Bridge Co.*, 22 Oreg. 167, 29 Pac. 440, 15 L. R. A. 614.

A provision in an excise law, authorizing the excise board to revoke licenses, is not void as violating the constitutional right of jury trial. *People v. Board of Commissioners*, 59 N. Y. 92. See *LaCroix v. Co. Com'rs*, 50 Conn. 321.

The right to trial by jury may be conditioned upon furnishing an affidavit of merits in actions *ex contractu*. *Fidelity & Deposit Co. v. United States*, 187 U. S. 315, 47 L. ed. 194, 23 Sup. Ct. Rep. 120.

<sup>1</sup> See *post*, p. 864. A jury may by statute be dispensed with where the defendant pleads guilty, and the court may be empowered to examine witnesses and determine from their testimony what is the degree of the offense.

This is true even in capital cases. *Hallinger v. Davis*, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105; and see note to 36 L. ed. U. S. 986; *State v. Almy*, 67 N. H. 274, 28 Atl. 372, 22 L. R. A. 744; *Craig v. State*, 49 Ohio St. 415, 30 N. E. 1120, 16 L. R. A. 358.

The jury may by law be required to be drawn from a special list secured by a special commissioner by eliminating unfit persons from the general list. *People v. Dunn*, 157 N. Y. 528, 52 N. E. 572, 43 L. R. A. 247.

Fixing of period of sentence is no part of constitutional function of jury of which it cannot be deprived. *Miller v. State*, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109.

Statute authorizing dismissal of part of jury and receipt of verdict from remainder is void. *McRae v. Grand Rapids, L. & D. R. Co.*, 93 Mich. 399, 53 N. W. 561, 17 L. R. A. 750.

Where the Constitution gives right to trial by jury in civil cases, it is a violation of that right for the court to take the question of negligence from the jury though the facts are undisputed if different inferences may be drawn from such facts. *Shobert v. May*, 40 Oreg. 68, 66 Pac. 466, 55 L. R. A. 810.

The power of a court to set aside the verdict of a jury as against the weight of evidence is not in conflict with the constitutional right to trial by jury. *Hintz v. Mich. Cent. Ry. Co.*, 132 Mich. 305, 93 N. W. 634.

<sup>2</sup> *Swanson v. State*, 105 Neb. 761, 181 N. W. 921; *Plimpton v. Somerset*, 33 Vt. 283; *State v. Peterson*, 41 Vt. 504. But see *Tims v. State*, 26 Ala. 165; *Com. v. Andrews*, 211 Pa. St. 110, 60 Atl. 554.

<sup>3</sup> *Hoffrichter v. State*, 102 Ohio St. 65, 130 N. E. 157; *State v. Sexton*, 121 Tenn. 35, 114 S. W. 494.

and immunities of a citizen of the United States protected from abridgment by the Constitution of the United States do not include the right of trial by jury in a State court for a State offense.<sup>1</sup>

A petit, petty, or traverse jury is a body of twelve men, who are sworn to try the facts of a case, as they are presented in the evidence placed before them. Any less than this number of twelve would not be a common-law jury, and not such a jury as the Constitution guarantees to accused parties, when a less number is not allowed in express terms; and the necessity of a full panel could not be waived — at least in case of felony — even by consent.<sup>2</sup> The infirmity in case of a trial by jury of less than twelve, by consent,

<sup>1</sup> *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448.

<sup>2</sup> *Work v. State*, 2 Ohio St. 296; *Cancemi v. People*, 18 N. Y. 128; *Brown v. State*, 8 Blackf. 561; 2 Lead. Cr. Cas. 337; *Hill v. People*, 16 Mich. 351; *Ex parte Brocklis*, 52 Cal. App. 274, 198 Pac. 659; *People v. Peete*, 54 Cal. App. 333, 202 Pac. 51; *Florida Fertilizer Co. v. Boswell*, 45 Fla. 301, 34 So. 241; *State v. Wells*, 69 Kan. 792, 77 Pac. 547; *Lakes v. Goodloe*, 195 Ky. 240, 242 S. W. 632; *State v. Woodward*, 144 La. 845, 81 So. 337; *Robinson v. Wayne Cir. Judges*, 151 Mich. 315, 115 N. W. 682; *State v. Sanders*, (Mo.) 243 S. W. 771; *State v. Mott*, 29 Mont. 292, 74 Pac. 728; *State v. James*, 96 N. J. L. 132, 114 Atl. 553, 16 A. L. R. 1141; *State v. Schuck*, 96 N. J. L. 154, 114 Atl. 562; *People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967; *State v. Rogers*, 162 N. C. 656, 78 S. E. 293, 46 L. R. A. (N. S.) 38, Ann. Cas. 1914 A., 867; *Queenan v. Terr.*, 11 Okla. 261, 71 Pac. 218, 61 L. R. A. 324, affirmed 190 U. S. 548, 47 L. ed. 1175, 23 Sup. Ct. Rep. 762; *Bettge v. Terr.*, 17 Okla. 85, 87 Pac. 897; *Ex parte Wilkins*, 7 Okla. Cr. 422, 115 Pac. 1118; *Com. v. Collins*, 268 Pa. St. 295, 110 Atl. 738; *State v. Hall*, (S. C.) 101 S. E. 662; *Jones v. State*, 52 Tex. Crim. 303, 106 S. W. 345, 124 Am. St. Rep. 1097; *White v. White*, (Tex. Civ. App.) 183 S. W. 369; *Bennett v. State*, 89 Tex. Crim. 617, 232 S. W. 841; *State v. Hirsch*, 91 Vt. 330, 110 Atl. 877; *Jennings v. State*, 134 Wis. 307, 114 N. W. 492, 14 L. R. A. (N. S.) 862. And see *State v. Cox*, 3 Eng. 436; *Murphy v. Commonwealth*, 1 Met. (Ky.) 365; *Tyzee v. Commonwealth*, 2 Met. (Ky.) 1; *State v. Mansfield*, 41 Mo. 470; *Brown v. State*, 16 Ind. 496; *Opinions of Judges*, 41 N. H. 550; *Lincoln v. Smith*, 27 Vt. 328; *Dowling's Case*, 13 Miss. 664; *Tillmann v. Arles*, 13 Miss. 373; *Vaughan v. Seade*, 30 Mo. 600; *Kleinschmidt v. Dumphy*, 1 Mont. 118; *Allen v. State*, 54 Ind. 461; *State v. Everett*, 14 Minn. 447; *State v. Lockwood*, 43 Wis. 403; *State v. Davis*, 66 Mo. 484; *Williams v. State*, 12 Ohio St. 622; *Allen v. State*, 54 Ind. 461; *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635; *Mays v. Com.*, 82 Va. 550; *Harris v. People*, 128 Ill. 585, 21 N. E. 563; *State v. Stewart*, 89 N. C. 563.

That a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution, see *Thompson v. Utah*, 170 U. S. 343, 349, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; and that their verdict shall be unanimous in all Federal courts where a jury trial is held, see *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618, and *Springville v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717. See also *Capital Traction Co. v. Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580. Upon number of jurymen necessary to jury, etc., see note to 14 L. ed. U. S. 394. With regard to grand jury, and that it must, unless otherwise expressly stated in constitution, consist of not less than twelve, whose verdict must

would be that the tribunal would be one unknown to the law, created by mere voluntary act of the parties; and it would in effect be an attempt to submit to a species of arbitration the question whether the accused has been guilty of an offense against the State. But in those cases which formerly were not triable by jury, if the legislature provide for such a trial now, they may doubtless create for the

be concurred in by twelve, see *State v. Hartley*, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33, and note.

A statute allowing less than twelve to sit if a juror is sick is bad. *Eshelman v. Chicago, &c. Ry. Co.*, 67 Iowa, 296, 25 N. W. 251. But a jury of six may be allowed in inferior courts. *Higgins v. Farmers' Ins. Co.*, 60 Iowa, 50, 14 N. W. 118. One of less than twelve may act in statutory highway proceedings. *McManus v. McDonough*, 107 Ill. 95.

Under the constitution of Wyoming providing that the right to a jury trial in criminal cases shall remain inviolate, but that in civil cases a jury may consist of less than twelve, it is held that a statute providing that a verdict might be found in civil cases by an agreement of three-fourths of the jurors is void. *First Nat'l Bank of Rock Springs v. Foster*, 9 Wyo. 157, 61 Pac. 466, 63 Pac. 1056, 54 L. R. A. 549. See also *Power v. Williams*, (N. D.) 205 N. W. 9.

In a North Carolina case it has been held that a trial by jury in a criminal action cannot be waived by the accused, and though by express agreement and his conduct, and that of his attorneys, he may have agreed that his case should be tried by only eleven men, or have attempted to waive his right to have twelve, his subsequent motion on the trial in arrest of judgment on the ground that the jury, being composed of eleven men, was not lawfully constituted, should be granted. *State v. Rogers*, 162 N. C. 656, 78 S. E. 293, 46 L. R. A. (N. S.) 38, Ann. Cas. 1914 A, 867.

In *Commonwealth v. Dailey*, 12 Cush. 80, it was held that, in a case of misdemeanor, the consent of the defendant that a verdict might be received from eleven jurors was binding upon him, and the verdict was valid.

See also *State v. Borowsky*, 11 Nev. 119; *Murphy v. Commonwealth*, 1 Met. (Ky.) 365; *Connelly v. State*, 60 Ala. 89, 31 Am. Rep. 34; *State v. Sackett*, 39 Minn. 69, 38 N. W. 773. No distinction is made in the last case between felony and misdemeanor in this regard.

In Iowa the right to jury trial is regarded as a personal privilege which may be waived. *State v. Polson*, 29 Iowa, 133; *State v. Kaufman*, 51 Iowa, 578, 2 N. W. 275, 33 Am. Rep. 148; *State v. Browman*, 191 Iowa, 608, 182 N. W. 823. But not in case of homicide. *State v. Carman*, 63 Iowa, 130, 18 N. W. 691. And in Connecticut and Ohio, under statutes permitting a defendant in a criminal case to elect to be tried by the court, his election is held to bind him. *State v. Worden*, 46 Conn. 349, 33 Am. Rep. 27; *Dillingham v. State*, 5 Ohio St. 280. Such a statute is valid: *Edwards v. State*, 45 N. J. L. 419; except as to a capital case. *Murphy v. State*, 97 Ind. 579.

In *Hill v. People*, 16 Mich. 356, it was decided that if one of the jurors called was an alien, the defendant did not waive the objection by failing to challenge him, if he was not aware of the disqualification; and if the court refused to set aside the verdict on affidavits showing these facts, the judgment upon it would be reversed on error. The case of *State v. Quarrel*, 2 Bay, 150, is *contra*. The case of *State v. Stone*, 3 Ill. 326, in which it was held competent for the court, even in a capital case, to strike off a juror after he was sworn, because of alienage, affords some support for *Hill v. People*.

"Struck" juries are permissible. *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196, 68 N. W. 53, 33 L. R. A. 437, 60 Am. St. 450.

purpose a statutory tribunal, composed of any number of persons, and no question of constitutional power or right could arise. [A State statute providing that the trial of criminal cases, not capital, shall be by a jury composed of eight jurors is not a denial of due process of law if its provisions are made applicable to all persons within the jurisdiction of the State.<sup>1</sup>]

Many of the incidents of a common-law trial by jury are essential elements of the right. The jury must be indifferent between the prisoner and the Commonwealth; and to secure impartiality challenges are allowed, not only for cause,<sup>2</sup> but also peremptory without assigning cause. The jury must also be summoned from the vicinage where the crime is supposed to have been committed;<sup>3</sup> and the accused will thus have the benefit on his trial of his own good character and standing with his neighbors, if these he has preserved;

<sup>1</sup> *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448.

<sup>2</sup> Inability to read and write may be made good cause for challenge. *McCampbell v. State*, 9 Tex. App. 124, 35 Am. Rep. 726. But not inability to understand English, in New Mexico, in the absence of statute. *Terr. v. Romine*, 2 New Mexico, 114.

See, on the subject of challenges for opinion formed, *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Spies v. Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Hopt v. Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614; *Palmer v. State*, 42 Ohio St. 596; *State v. Munchrath*, 78 Iowa, 268, 43 N. W. 211; *Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57; *Scribner v. State*, 3 Okla. Crim. 601, 108 Pac. 422, 35 L. R. A. (N. S.) 985; *Morehead v. State*, 12 Okla. Crim. 62, 151 Pac. 1183, Ann. Cas. 1918 C, 416; *State v. Megorden*, 49 Oreg. 259, 88 Pac. 306, 14 Ann. Cas. 130; *Rhoades v. El Paso, etc., R. Co.*, (Tex. Com. App.) 248 S. W. 1064, 27 A. L. R. 1048, and upon challenges generally, notes to 41 L. ed. U. S. 104 and 20 L. ed. U. S. 659.

<sup>3</sup> Offenses against the United States are to be tried in the district, and those against the State in the county in which they are charged to have been committed: *Swart v. Kimball*, 43 Mich. 443, 5 N. W. 635; *People v. Brock*, 149 Mich. 464, 112 N. W. 1116,

119 Am. St. Rep. 684; *State v. Carroll*, 55 Wash. 588, 104 Pac. 814, 133 Am. St. Rep. 1047, 19 Ann. Cas. 1234; but courts are generally empowered, on the application of an accused party, to order a change of venue, where for any reason a fair and impartial trial cannot be had in the locality. See *Hudson v. State*, 3 Cold. 355; *Rowan v. State*, 30 Wis. 129; *State v. Mooney*, 10 Iowa, 507; *State v. Read*, 49 Iowa, 85; *Wayrick v. People*, 89 Ill. 90; *Manly v. State*, 52 Ind. 215; *Gut v. State*, 9 Wall. 35, 19 L. ed. 573; *State v. Albee*, 61 N. H. 423; *State v. McCarty*, 52 Ohio St. 363, 39 N. E. 1041, 27 L. R. A. 534; *Oborn v. State*, 143 Wis. 249, 126 N. W. 737, 31 L. R. A. (N. S.) 966.

As to whether a change of venue may be ordered upon the application of the prosecution, the authorities are somewhat at variance. See *Osborn v. State*, 24 Ark. 629; *People v. Powell*, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75; *O'Berry v. State*, 47 Fla. 75, 36 So. 440; *Miller v. People*, 230 Ill. 65, 82 N. E. 521; *State v. Wheat*, 111 La. 860, 35 So. 955; *Glinnan v. Judge of Recorder's Ct.*, 173 Mich. 674, 140 N. W. 87; *State v. Holloway*, 19 N. M. 528, 146 Pac. 1066; *Barry v. Traux*, 13 N. D. 131, 99 N. W. 769, 112 Am. St. Rep. 662, 65 L. R. A. 762, 3 Ann. Cas. 191; *Zinn v. District Ct.*, 17 N. D. 135, 114 N. W. 472; *State v. Winchester*, 19 N. D. 756, 122 N. W. 1111, 21 Ann. Cas. 1196;

and also of such knowledge as the jury may possess of the witnesses who may give evidence against him. He will also be able with more certainty to secure the attendance of his own witnesses. The jury must unanimously concur in the verdict. This is a very old requirement in the English common law, and it has been adhered to, notwithstanding very eminent men have assailed it as unwise and inexpedient.<sup>1</sup> And the jurors must be left free to act in accord-

State *ex rel.* Hornbeck *v.* Durflinger, 73 Ohio St. 154, 76 N. E. 291; *In re* Nelson, 19 S. D. 214, 102 N. W. 885; Kirk *v.* State, 1 Cold. 344; Wheeler *v.* State, 24 Wis. 52.

In a case in Tennessee it was decided that a statute which permitted offenses committed near the boundary line of two counties to be tried in either was an invasion of the constitutional principle stated in the text. *Armstrong v. State*, 1 Cold. 338. See also *State v. Denton*, 6 Cold. 539; *Buckrice v. People*, 110 Ill. 29; *State v. Lowe*, 21 W. Va. 782, 45 Am. Rep. 570. *Contra*, *State v. Robinson*, 14 Minn. 447; *Willis v. State*, 10 Tex. App. 493.

Statute providing that where the blow is struck outside the state and the stricken one dies within the state, the crime shall be deemed to have been committed at the place of death was sustained in *Ex parte McNeely*, 36 W. Va. 84, 14 S. E. 436, 15 L. R. A. 226, 32 Am. St. 831.

Jury cannot be summoned from country districts to exclusion of residents of city in which crime occurred. *Zanone v. State*, 97 Tenn. 101, 36 S. W. 711, 35 L. R. A. 556.

The case of Dana decided by Judge *Blatchford*, when U. S. District Judge for the southern district of New York, is of interest in this connection. The "New York Sun", of which Mr. Charles A. Dana was editor-in-chief, published an article reflecting upon the public conduct of an official at Washington. This article was claimed to be a libel. The actual offense, if any, was committed in New York; but a technical publication also took place in Washington, by the sale of papers there. The offended party chose to have his complaint tried summarily by a police justice of the latter city,

instead of submitting it to a jury required to be indifferent between the parties. A Federal commissioner issued a warrant for Mr. Dana's arrest in New York for transportation to Washington for trial; but Judge *Blatchford* treated the proceeding with little respect, and ordered Mr. Dana's discharge. *Matter of Dana*, 7 Ben. 1. It would have been a singular result of a revolution where one of the grievances complained of was the assertion of a right to send parties abroad for trial, if it should have been found that an editor might be seized anywhere in the Union and transported by a Federal officer to every territory into which his paper might find its way, to be tried in each in succession for offenses which consisted in a single act not actually done in any of them.

<sup>1</sup>Unanimity necessary. *American Publishing Co. v. Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; *Springville City v. Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717. For the origin of this principle, see Forsyth, *Trial by Jury*, c. 11. That statute may make majority of three-fourths sufficient in civil cases, where the constitution expressly so provides, see *Hess v. White*, 9 Utah, 61, 33 Pac. 243, 24 L. R. A. 277. Upon number and agreement of jurors necessary to constitute a valid verdict, see note to 43 L. R. A. 33. See also *Jacksonville, T. & K. W. R. Co. v. Adams*, 33 Fla. 608, 15 So. 257, 24 L. R. A. 272, and note.

The requirement of unanimity does not prevail in Scotland, or on the Continent. Among the eminent men who have not approved it may be mentioned Locke and Jeremy Bentham. See Forsyth, *supra*; Lieber, *Civil Liberty and Self-Government*, c. 20.

ance with the dictates of their judgment. The final decision of the facts is to rest with them, and interference by the court with a view to coerce them into a verdict against their convictions is unwarrantable and irregular. A judge is not justified in expressing his conviction to the jury that the defendant is guilty upon the evidence adduced.<sup>1</sup> Still less would he be justified in refusing to receive and record the verdict of the jury, because of its being, in his opinion, rendered in favor of the prisoner when it ought not to have been.<sup>2</sup>

He discharges his duty of giving instructions to the jury when he informs them what in his view the law is which is applicable to the case before them, and what is essential to constitute the offense charged; and the jury should be left free and unbiased by his opinion to determine for themselves whether the facts in evidence are such as, in the light of the instructions of the judge, make out beyond any reasonable doubt that the accused party is guilty as alleged.<sup>3</sup>

<sup>1</sup> A judge who urges his opinion upon the facts to the jury decides the cause, while avoiding the responsibility. How often would a jury be found bold enough to declare their opinion in opposition to that of the judge upon the bench, whose words would fall upon their ears with all the weight which experience, learning, and commanding position must always carry with them? What lawyer would care to sum up his case, if he knew that the judge, whose words would be so much more influential, was to declare in his favor, or would be bold enough to argue the facts to the jury, if he knew the judge was to declare against him? Blackstone has justly remarked that "in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder." 3 Bl. Com. 380. These are evils which jury trial is designed to prevent; but the effort must be vain if the judge is to control by his opinion, where the law has given him no power to command. In Lord Campbell's *Lives of the Chancellors*, c. 181, the author justly condemns the practice

with some judges in libel cases, of expressing to the jury their belief in the defendant's guilt. On the trial of parties, charged with a libel on the Empress of Russia, Lord *Kenyon*, sneering at the late Libel Act, said: "I am bound by my oath to declare my own opinion, and I should forget my duty were I not to say to you that it is a gross libel." Upon this Lord *Campbell* remarks: "Mr. Fox's act only requires the judges to give their opinion on matters of law in libel cases as in other cases. But did any judge ever say, 'Gentlemen, I am of opinion that this is a willful, malicious, and atrocious murder?' For a considerable time after the act passed, against the unanimous opposition of the judges, they almost all spitefully followed this course. I myself heard one judge say: 'As the legislature requires me to give my own opinion in the present case, I am of opinion that this is a diabolically atrocious libel.'"

<sup>2</sup> But when verdict is unintelligible or its parts are repugnant the jury may be sent back to correct it. *Grant v. State*, 33 Fla. 291, 14 So. 757, 23 L. R. A. 723, and note upon correction of verdict.

<sup>3</sup> The independence of the jury, with respect to the matters of fact in issue before them, was settled by *Penn's Case*, 6 Howell's State Trials,

How far the jury are to judge of the law as well as of the facts, is a question, a discussion of which we do not propose to enter upon. If it be their choice to do so, they may return specially what facts they find established by the evidence, and allow the court to apply the law to those facts, and thereby to determine whether the party is guilty or not. But they are not obliged in any case to find a special verdict; they have a right to apply for themselves the law to the facts, and to express their own opinion, upon the whole evidence, of the defendant's guilt. Where a general verdict is thus given, the jury necessarily determine in their own mind what the law of the case is;<sup>1</sup> and if their determination is favorable to the prisoner, no mode is known to the law in which it can be reviewed or reversed. A writ of error does not lie on behalf of the Commonwealth to reverse an acquittal, unless expressly given by statute;<sup>2</sup>

951, and by *Bushel's Case*, which grew out of it, and is reported in *Vaughan's Reports*, 135. A very full account of these cases is also found in *Forsyth on Trial by Jury*, 397. See *Bushel's Case* also in *Broom's Const. Law*, 120, and the valuable note thereto. *Bushel* was foreman of the jury which refused to find a verdict of guilty at the dictation of the court, and he was punished as for contempt of court for his refusal, but was released on *habeas corpus*. Upon this subject, see *McGuffie v. State*, 17 Ga. 497; *State v. McGinnis*, 5 Nev. 337; *Pittock v. O'Niell*, 63 Pa. St. 253, 3 Am. Rep. 544; *People v. Gastro*, 75 Mich. 127, 42 N. W. 937.

<sup>1</sup> "As the main object of the institution of the trial by jury is to guard accused persons against all decisions whatsoever by men invested with any permanent official authority, it is not only a settled principle that the opinion which the judge delivers has no weight but such as the jury choose to give it, but their verdict must besides [unless they see fit to return a special finding] comprehend the whole matter in trial, and decide as well upon the fact as upon the point of law that may arise out of it; in other words, they must pronounce both on the commission of a certain fact, and on the reason which makes such fact to be contrary to law." *De Lolme on the Constitution of England*, c. 13. In January, 1735, *Zenger*, the publisher of *Zenger's*

*Journal* in New York, was informed against for a libel on the governor and other officers of the king in the province. He was defended by *Hamilton*, a Quaker lawyer from Philadelphia, who relied upon the truth as a defense. The court excluded evidence of the truth as constituting no defense, but *Hamilton* appealed to the jury as the judges of the law, and secured an acquittal. *Street's Council of Revision*, 71.

<sup>2</sup> See *State v. Reynolds*, 4 Hayw. 110; *United States v. More*, 3 Cranch, 174, 2 L. ed. 397; *People v. Dill*, 2 Ill. 257; *People v. Royal*, 2 Ill. 557; *Commonwealth v. Cummings*, 3 Cush. 212; *People v. Corning*, 2 N. Y. 9; *State v. Kemp*, 17 Wis. 669; *Grafton v. United States*, 206 U. S. 333, 51 L. ed. 1084, 27 Sup. Ct. Rep. 749, 11 Ann. Cas. 640; *State v. Dulaney*, 87 Ark. 17, 112 S. W. 158, 15 Ann. Cas. 192; *State v. Casey*, 207 Mo. 1, 105 S. W. 645, 123 Am. St. Rep. 367, 13 Ann. Cas. 878; *McCue v. State*, 75 Tex. Crim. 137, 170 S. W. 280, Ann. Cas. 1918 C, 674; *State v. Hotel McCreery Co.*, 68 W. Va. 130, 69 S. E. 472, Ann. Cas. 1912 A, 966. Compare *State v. Robinson*, 37 La. Ann. 673.

Where putative father is liable to fine, no appeal can be allowed against successful defendant in a bastardy proceeding. *State v. Ostwalt*, 118 N. C. 1208, 24 S. E. 660, 32 L. R. A. 396.

How great a change is made in the common law by these provisions it is difficult to say, because the rule of the common law was not very clear upon the authorities; but for that very reason, and because the law of libel was sometimes administered with great harshness, it was certainly proper and highly desirable that a definite and liberal rule should be thus established.<sup>1</sup>

In all other cases the jury have the clear legal right to return a simple verdict of guilty or not guilty, and in so doing they necessarily decide such questions of law as well as of fact as are involved in the general question of guilt. If their view conduce to an acquittal, their verdict to that effect can neither be reviewed nor set aside. In such a case, therefore, it appears that they pass upon the law as well as the facts, and that their finding is conclusive. If, on the other hand, their view leads them to a verdict of guilty, and it is the opinion of the court that such verdict is against law, the verdict will be set aside and a new trial granted. In such a case, although they have judged of the law, the court sets aside their conclusion as improper and unwarranted. But it is clear that the jury are no more the judges of the law when they acquit than when they condemn, and the different result in the two cases comes from the merciful maxim of the common law, which will not suffer an accused party to be twice put in jeopardy for the same cause, however erroneous may have been the first acquittal. In theory, therefore, the rule

or no crime at all. This is where they *doubt* the matter of the law, and therefore *choose* to leave it to the determination of the court, though they have an unquestionable right of determining upon all the circumstances, and of finding a general verdict, *if they think proper* so to hazard a breach of their oaths,' &c. 4 Bl. Com. 361; Co. Lit. 228 a; 2 Hale, P. C. 313. Our legislature have left no doubt about this matter. The juries in Georgia can find no special verdict at law. They are declared to be judges of the law and the facts, and are required in every case to give a general verdict of guilty or not guilty; so jealous, and rightfully jealous, were our ancestors of the influence of the State upon the trial of a citizen charged with crime. We are not called upon in this case to determine the relative strength of the judgment of the court and the jury, upon the law in criminal cases, and shall express no opinion thereon. We only say it

is the right and duty of the court to declare the law in criminal cases as well as civil, and that it is at the same time the right of the jury to judge of the law as well as of the facts in criminal cases. I would not be understood as holding that it is not the province of the court to give the law of the case distinctly in charge to the jury; it is unquestionably its privilege and its duty to instruct them as to what the law is, and officially to direct their finding as to the law, yet at the same time in such way as not to limit the range of their judgment." See also *McGuffie v. State*, 17 Ga. 497; *Clem v. State*, 31 Ind. 480; and *post*, p. 949, *et seq.*

<sup>1</sup> For a condensed history of the struggle in England on this subject, see May's Constitutional History, c. 9. See also Lord Campbell's *Lives of the Chancellors*, c. 178; *Introduction to Speeches of Lord Erskine*, edited by James L. High; *Forsyth's Trial by Jury*, c. 12.



nor can a new trial be granted in such a case;<sup>1</sup> but neither a writ of error nor a motion for a new trial could remedy an erroneous acquittal by the jury, because, as they do not give reasons for their verdict, the precise grounds for it can never be legally known, and it is always presumable that it was given in favor of the accused because the evidence was not sufficient in degree or satisfactory in character; and no one is at liberty to allege or assume that they have disregarded the law.

Nevertheless, as it is the duty of the court to charge the jury upon the law applicable to the case, it is still an important question whether it is the duty of the jury to receive and act upon the law as given to them by the judge, or whether, on the other hand, his opinion is advisory only, so that they are at liberty either to follow it if it accords with their own convictions, or to disregard it if it does not.

In one class of cases, that is to say, in criminal prosecutions for libels, it is now very generally provided by the State constitutions, or by statute, that the jury shall determine the law and the facts.<sup>2</sup>

Statute giving State right of appeal upon questions of law in criminal cause is valid. *State v. Lee*, 65 Conn. 265, 30 Atl. 1110, 27 L. R. A. 498, 48 Am. St. 202.

A constitutional provision, saving "to the defendant the right of appeal" in criminal cases, does not, by implication, preclude the legislature from giving to the prosecution the same right. *State v. Tait*, 22 Iowa, 143. Compare *People v. Webb*, 38 Cal. 467; *State v. Lee*, 10 R. I. 494.

<sup>1</sup> *People v. Comstock*, 8 Wend. 549; *State v. Brown*, 16 Conn. 54; *State v. Kanouse*, 20 N. J. L. 115; *State v. Burns*, 3 Tex. 118; *State v. Taylor*, 1 Hawks, 462; *Cochran v. State*, 119 Md. 539, 87 Atl. 400; *State v. Silver Bow County*, Dist. Ct., 44 Mont. 318, 119 Pac. 1103, Ann. Cas. 1913 B, 396; *State v. Reed*, 52 Oreg. 377, 97 Pac. 627.

<sup>2</sup> See Constitutions of Alabama, Connecticut, California, Delaware, Georgia, Kentucky, Maine, Michigan, Missouri, Nebraska, New York, Pennsylvania, South Carolina, Tennessee, and Texas. See *post*, p. 876, note. That of Maryland makes the jury judges of the law in all criminal cases; and the same rule is established by

constitution or statute in some other States.

In *Holder v. State*, 5 Ga. 444, the following view was taken of such a statute: "Our penal code declares, 'On every trial of a crime or offense contained in this code, or for any crime or offense, the jury shall be judges of the law and the fact, and shall in every case give a general verdict of guilty or not guilty, and on the acquittal of any defendant or prisoner, no new trial shall on any account be granted by the court.' Juries were, at common law, in some sense judges of the law. Having the right of rendering a general verdict, that right involved a judgment on the law as well as the facts, yet not such a judgment as necessarily to control the court. The early commentators on the common law, notwithstanding they concede this right, yet hold that it is the duty of the jury to receive the law from the court. Thus Blackstone equivocally writes: 'And such public or open verdict may be either general, *guilty* or *not guilty*, or special, setting forth all the circumstances of the case, and praying the judgment of the court whether, for instance, on the facts stated, it be murder or manslaughter,

of law would seem to be, that it is the duty of the jury to receive and follow the law as delivered to them by the court; and such is the clear weight of authority.<sup>1</sup>

There are, however, opposing decisions,<sup>2</sup> and it is evident that the judicial prerogative to direct conclusively upon the law cannot

<sup>1</sup> *United States v. Battiste*, 2 Sum. 240; *Stettinus v. United States*, 5 Cranch, C. C. 573; *United States v. Morris*, 1 Curt. 53; *United States v. Riley*, 5 Blatch. 204; *United States v. Greathouse*, 4 Sawyer, 459; *Montgomery v. State*, 11 Ohio, 427; *Robbins v. State*, 8 Ohio St. 131; *Commonwealth v. Porter*, 10 Met. 263; *Commonwealth v. Anthes*, 5 Gray, 185; *Commonwealth v. Rock*, 10 Gray, 4; *State v. Peace*, 1 Jones, 251; *Handy v. State*, 7 Mo. 607; *Nels v. State*, 2 Tex. 280; *State v. Tally*, 23 La. Ann. 677; *State v. Tisdale*, 41 La. Ann. 338, 6 So. 579; *People v. Pine*, 2 Barb. 566; *Carpenter v. People*, 8 Barb. 603; *People v. Finnigan*, 1 Park C. R. 147; *Safford v. People*, 1 Park C. R. 474; *McMath v. State*, 55 Ga. 303; *Hamilton v. People*, 29 Mich. 173; *McGowan v. State*, 9 Yerg. 184; *Pleasant v. State*, 13 Ark. 360; *Montee v. Commonwealth*, 3 J. J. Marsh. 132; *Commonwealth v. Van Tuyl*, 1 Met. (Ky.) 1; *Pierce v. State*, 13 N. H. 536; *People v. Stewart*, 7 Cal. 40; *Mullinix v. People*, 76 Ill. 211; *Batre v. State*, 18 Ala. 119; *State v. Truskett*, 85 Kan. 804, 118 Pac. 1047; *State v. De Wolfe*, 29 Mont. 415, 74 Pac. 1084; *Gibbons v. Terr.*, 5 Okla. Cr. 212, 115 Pac. 129; *State v. Carlisle*, 30 S. D. 475, 139 N. W. 127; *State v. Hoben*, 36 Utah, 186, 102 Pac. 1000; *State v. Anselmo*, 46 Utah, 137, 148 Pac. 1071; *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247.

"As the jury have the right, and if required by the prisoner are bound to return a general verdict of guilty or not guilty, they must necessarily, in the discharge of this duty, decide such questions of law as well as of fact as are involved in the general question, and there is no mode in which their opinions upon questions of law can be reviewed by this court or by any other tribunal. But this does not

diminish the obligation resting upon the court to explain the law. The instructions of the court in matters of law may safely guide the consciences of the jury, unless they know them to be wrong; and when the jury undertake to decide the law (as they undoubtedly have the power to do) in opposition to the advice of the court, they assume a high responsibility, and should be very careful to see clearly that they are right." *Commonwealth v. Knapp*, 10 Pick. 496; cited with approval in *McGowan v. State*, 9 Yerg. 195, and *Dale v. State*, 10 Yerg. 555. And see *Kane v. Commonwealth*, 89 Pa. St. 522, 33 Am. Rep. 787; *Habersham v. State*, 56 Ga. 61, 2 Am. Cr. Rep. 45; *Hunt v. State*, 81 Ga. 140, 7 S. E. 142.

Even where the jury are judges of the law and facts and instructions are only advisory, error in the charge is prejudicial. *State v. Rice*, 56 Iowa, 431; *Hudelson v. State*, 94 Ind. 426. Even if there is no dispute, a court cannot direct a conviction. *United States v. Taylor*, 3 McCrary, 500.

<sup>2</sup> See especially *State v. Croteau*, 23 Vt. 14, where will be found a very full and carefully considered opinion, holding that at the common law the jury are the judges of the law in criminal cases. See also *State v. Wilkinson*, 2 Vt. 280; *Doss v. Commonwealth*, 1 Gratt. 557; *State v. Jones*, 5 Ala. 666; *State v. Snow*, 18 Me. 346; *State v. Allen*, 1 McCord, 525, 10 Am. Dec. 687; *Armstrong v. State*, 4 Blackf. 247; *Warren v. State*, 4 Blackf. 150; *Stocking v. State*, 7 Ind. 326; *Lynch v. State*, 9 Ind. 541; *Nelson v. State*, 2 Swan, 482; *People v. Thyers*, 1 Park. C. R. 596; *People v. Videto*, 1 Park. C. R. 603; *People v. Campbell*, 234 Ill. 391, 84 N. E. 1035, 123 Am. St. Rep. 107, 14 Ann. Cas. 186; *Schuster v. State*, 178 Ind. 320, 99 N. E. 422; *Esterline v. State*, 105 Md. 629, 66 Atl. 269; *Dick v.*

be carried very far or insisted upon with much pertinacity, when the jury have such complete power to disregard it, without the action degenerating into something like mere scolding. Upon this subject the remarks of Mr. Justice *Baldwin*, of the Supreme Court of the United States, to a jury assisting him in the trial of a criminal charge, and which are given in the note, seem peculiarly dignified and appropriate, and at the same time to embrace about all that can properly be said to a jury on this subject.<sup>1</sup>

State, 107 Md. 11, 68 Atl. 286, 576. The subject was largely discussed in *People v. Croswell*, 3 Johns. Cas. 337.

In Virginia, it is said that unless instructions are asked, a court should in general not instruct the jury upon the law: *Dejarnette v. Com.*, 75 Va. 867; and in Maryland it seems to be optional with the court to instruct them. *Broll v. State*, 45 Md. 356.

<sup>1</sup>“In repeating to you what was said on a former occasion to another jury, that you have the power to decide on the law as well as the facts of this case, and are not bound to find according to our opinion of the law, we feel ourselves constrained to make some explanations not then deemed necessary, but now called for from the course of the defense. You may find a general verdict of guilty or not guilty, as you think proper, or you may find the facts specially, and leave the guilt or innocence of the prisoner to the judgment of the court. If your verdict acquit the prisoner, we cannot grant a new trial, however much we may differ with you as to the law which governs the case; and in this respect a jury are the judges of the law, if they choose to become so. Their judgment is final, not because they settle the law, but because they think it not applicable, or do not choose to apply it to the case.

“But if a jury find a prisoner guilty against the opinion of the court on the law of the case, a new trial will be granted. No court will pronounce a judgment on a prisoner against what they believe to be the law. On an acquittal there is no judgment; and the court do not act, and cannot

judge, there remaining nothing to act upon.

“This, then, you will understand to be what is meant by your power to decide on the law; but you will still bear in mind that it is a very old, sound, and valuable maxim in law, that the court answers to questions of law, and the jury to facts. Every day's experience evinces the wisdom of this rule.” *United States v. Wilson*, Baldw. 108. We quote also from an Alabama case: “When the power of juries to find a general verdict, and consequently their right to determine without appeal both law and fact, is admitted, the abstract question whether it is or is not their duty to receive the law from the court becomes rather a question of casuistry or conscience than one of law; nor can we think that anything is gained in the administration of criminal justice by urging the jury to disregard the opinion of the court upon the law of the case. It must, we think, be admitted, that the judge is better qualified to expound the law, from his previous training, than the jury; and in practice, unless he manifests a wanton disregard of the rights of the prisoner, — a circumstance which rarely happens in the age of the world and in this country, — his opinion of the law will be received by the jury as an authoritative exposition, from their conviction of his superior knowledge of the subject. The right of the jury is doubtless one of inestimable value, especially in those cases where it may be supposed that the government has an interest in the conviction of the criminal; but in this country, where the government in all its branches, executive, legislative, and judicial, is created by the people, and is in

fact their servant, we are unable to perceive why the jury should be invited or urged to exercise this right contrary to their own convictions of their capacity to do so, without danger of mistake. It appears to us that it is sufficient that it is admitted that it is their peculiar province to determine facts, intents, and purposes; that it is their right to find a general verdict, and consequently that they must determine the law; and whether in the exercise of this right they will distrust the court as expounders of the law, or whether they will receive the law from the court, must be left to their own discretion under the sanction of the oath they have taken." *State v. Jones*, 5 Ala. 672. But as to this case, see *Batre v. State*, 18 Ala. 119.

It cannot be denied that discredit is sometimes brought upon the administration of justice by juries acquitting parties who are sufficiently shown to be guilty, and where, had the trial been by the court, a conviction would have been sure to follow. In such cases it must be supposed that the jury have been controlled by their prejudices or their sympathies. However that may be, it by no means follows that because the machinery of jury trial does not work satisfactorily in every case, we must therefore condemn and abolish the system, or, what is still worse, tolerate it, and yet denounce it as being unworthy of public confidence. The remarks of Lord *Erskine*, the most distinguished jury lawyer known to English history, may be quoted as peculiarly appropriate in this connection: "It is of the nature of everything that is great and useful, both in the animate and inanimate world, to be wild and irregular, and we must be content to take them with the alloys which belong to them, or live without them. . . . Liberty herself, the last and best gift of God to his creatures, must be taken just as she is. You might pare her down into bashful regularity, shape her into a perfect model of severe, scrupulous law; but she would then be liberty no longer; and you must be content to die under the lash of this

inexorable justice which you have exchanged for the banners of freedom."

The province of the jury is sometimes invaded by instructions requiring them to adopt, as absolute conclusions of law, those deductions which they are at liberty to draw from a particular state of facts, if they regard them as reasonable: such as that a homicide must be presumed malicious, unless the defendant proves the contrary; which is a rule contradictory of the results of common observation; or that evidence of a previous good character in the defendant ought to be disregarded, unless the other proof presents a doubtful case; which would deprive an accused party of his chief protection in many cases of false accusations and conspiracies. See *People v. Garbutt*, 17 Mich. 9; *People v. Lamb*, 2 Keyes, 360; *State v. Henry*, 5 Jones (N. C.), 66; *Harrington v. State*, 19 Ohio St. 269; *Silvus v. State*, 22 Ohio St. 90; *State v. Patterson*, 45 Vt. 308; *Remsen v. People*, 43 N. Y. 6; *Kistler v. State*, 54 Ind. 400; *State v. Birkby*, 122 Iowa, 102, 97 N. W. 980; *State v. Jewell*, 88 Kan. 130, 127 Pac. 608; *State v. Simon* 131 La. 520, 59 So. 975; *People v. Conrow*, 200 N. Y. 356, 93 N. E. 943; *Schutz v. State*, 125 Wis. 452, 104 N. W. 90; *Grabowski v. State*, 126 Wis. 447, 105 N. W. 805. But see *People v. McGlade*, 139 Cal. 66, 72 Pac. 600; *People v. Botkin*, 9 Cal. App. 244, 98 Pac. 861; *State v. Gray*, 46 Ore. 24, 79 Pac. 53.

Upon the presumption of malice in homicide, the reader is referred to the Review of the Trial of Professor Webster, by Hon. Joel Parker, in the North American Review, No. 72, p. 178. See also Bemis' report of the case of John W. Webster, p. 457. See also, upon the functions of judge and jury respectively, the cases of *Commonwealth v. Wood*, 11 Gray, 86; *Maher v. People*, 10 Mich. 212; *Commonwealth v. Billings*, 97 Mass. 405; *State v. Patterson*, 63 N. C. 520; *State v. Newton*, 4 Nev. 410. See, upon the right of the jury to pass upon the law, note to *State v. Whitmore* in 42 Am. St. Rep. 290-295, 13 Am. Law Reg. 355, and 7 Crim. Law Mag. 652.

One thing more is essential to a proper protection of accused parties, and that is, that one shall not be subject to be twice put in jeopardy upon the same charge. One trial and verdict must, as a general rule, protect him against any subsequent accusation of the same offense,<sup>1</sup> whether the verdict be for or against him, and whether

No more scholarly contribution to the discussion of this general subject of "Law and Fact in Jury Trials" can be found than in the late Professor Thayer's "Preliminary Evidence at the Common Law", c. 5.

<sup>1</sup> By the same offense is not signified the same *eo nomine*, but the same criminal act or omission. *Hershfield v. State*, 11 Tex. App. 207; *Wilson v. State*, 24 Conn. 57; *State v. Thornton*, 37 Mo. 360; *Holt v. State*, 38 Ga. 187; *Commonwealth v. Hawkins*, 11 Bush, 603; *People v. Majors*, 65 Cal. 138, 3 Pac. 597; *People v. Stephens*, 79 Cal. 428, 21 Pac. 856; *State v. Colgate*, 31 Kan. 511, 3 Pac. 346; *State v. Mikesell*, 70 Iowa, 176, 30 N. W. 474; *Hurst v. State*, 86 Ala. 604, 6 So. 120; *Moore v. State*, 71 Ala. 307; *Barton v. United States*, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688, 6 Ann. Cas. 362; *Gavieres v. United States*, 220 U. S. 338, 55 L. ed. 489, 31 Sup. Ct. Rep. 421; *Allen v. United States*, 194 Fed. 664, 114 C. C. A. 357, 39 L. R. A. (N. S.) 385; *Spears v. People*, 220 Ill. 72, 77 N. E. 112, 4 L. R. A. (N. S.) 402; *Mann v. Com.*, 118 Ky. 67, 80 S. W. 438, 111 Am. St. Rep. 289; *State v. Roberts*, 152 La. 283, 93 So. 95, 24 A. L. R. 1122; *State v. Oakes*, 202 Mo. 86, 100 S. W. 434, 119 Am. St. Rep. 792; *State v. Mowser*, 92 N. J. L. 474, 106 Atl. 416, 4 A. L. R. 695; *State v. Freeman*, 162 N. C. 594, 77 S. E. 780, 45 L. R. A. (N. S.) 977; *Com. v. Ramunno*, 219 Pa. St. 204, 68 Atl. 184, 123 Am. St. Rep. 653, 14 L. R. A. (N. S.) 209, 12 Ann. Cas. 818; *State v. Dewees*, 76 S. C. 72, 56 S. E. 674, 11 Ann. Cas. 991. *State v. Pianfetti*, 79 Vt. 236, 65 Atl. 84, 9 Ann. Cas. 127.

The great weight of authority supports the rule that there may be more than one conviction where there is more than one offense growing out of the same facts, and where neither of

such offenses is necessarily included in the other. *Carter v. McClaughry*, 183 U. S. 365, 22 Sup. Ct. Rep. 181, 46 L. ed. 236; *Gavieres v. United States*, 220, U. S. 338, 55 L. ed. 489, 31 Sup. Ct. Rep. 421; *Ebeling v. Morgan*, 237 U. S. 625, 59 L. ed. 1151, 35 Sup. Ct. Rep. 710; *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720; *Spears v. People*, 220 Ill. 72, 77 N. E. 112, 4 L. R. A. (N. S.) 402; *People v. Mendelson*, 264 Ill. 453, 106 N. E. 249, L. R. A. 1915 C, 627; *State v. Reed*, 168 Ind. 588, 81 N. E. 571; *Thomas v. Indianapolis*, 195 Ind. 540, 145 N. E. 550, 35 A. L. R. 1194; *Com. v. Vaughn*, 101 Ky. 603, 42 S. W. 117, 45 L. R. A. 858; *Hughes v. Com.*, 131 Ky. 502, 115 S. W. 744, 31 L. R. A. (N. S.) 693; *Gordon v. State*, 127 Miss. 396, 90 So. 95, 18 A. L. R. 1150.

The forgery of the names of several different persons on the same note constitutes but one offense and cannot be made the ground for several prosecutions. *Everage v. State* 14, Ala. App. 106, 71 So. 983; rehearing denied without opinion: 196 Ala. 701, 72 So. 1019; *State v. Coffman*, 149 Tenn. 525, 261 S. W. 678, 33 A. L. R. 559.

Where accused is acquitted of the offense charged, he cannot thereafter be prosecuted for perjury in swearing that he did not commit the offense charged. *Cooper v. Commonwealth*, 106 Ky. 909, 51 S. W. 789, 45 L. R. A. 216.

Where injunction may issue to prevent a prohibited act, punishment for contempt in disobeying the injunction will not prevent a prosecution for the crime. *State v. Roby*, 142 Ind. 168, 41 N. E. 145, 33 L. R. A. 213, 51 Am. St. 174.

The fact that acquittal was secured by bribery of prosecuting attorney does not invalidate plea of former jeopardy. *Shideler v. State*, 129 Ind. 523, 28 N. E. 537, 29 N. E. 36, 16 L. R. A. 225, 28 Am. St. 206.

the court are satisfied with the verdict or not. [But the same act may constitute an offense against both Federal law and the law of a State, and, where such is the case, the preponderant weight of authority holds that an acquittal or conviction in one jurisdiction will not preclude a prosecution in the other.<sup>1</sup>] We shall not attempt in this place to collect together the great number of judicial decisions bearing upon the question of legal jeopardy, and the exceptions to the general rule above stated; for these the reader must be referred to the treatises on criminal law, where the subject will be found to be extensively treated. It will be sufficient for our present purpose to indicate very briefly some general principles.

A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance.<sup>2</sup> And a jury is

<sup>1</sup> *Fox v. Ohio*, 5 How. 410, 12 L. ed. 213; *Moore v. Illinois*, 14 How. 13, 14 L. ed. 306; *Crossley v. California*, 168 U. S. 640, 42 L. ed. 610, 18 Sup. Ct. Rep. 242; *United States v. Lanza*, 260 U. S. 377, 67 L. ed. 314, 43 Sup. Ct. Rep. 141; *United States v. Palan*, 167 Fed. 991; *United States v. Cascy*, 247 Fed. 362; *United States v. Holt*, 270 Fed. 639; *United States v. Boston*, 273 Fed. 535; *United States v. Regan*, 273 Fed. 727; *United States v. Ratagczak*, 275 Fed. 558; *United States v. McCann*, 281 Fed. 880; *Layman v. State*, 18 Ala. App. 441, 93 So. 66; *Cooley v. State*, 152 Ga. 469, 110 S. E. 449; *Boyson v. State*, 27 Ga. App. 230, 108 S. E. 63; *Moore v. State*, 27 Ga. App. 268, 108 S. E. 65; *Heier v. State*, 191 Ind. 410, 133 N. E. 200; *State v. Moore*, 143 Iowa, 240, 121 N. W. 1052, 21 Ann. Cas. 63; *State v. Gouthier*, 121 Me. 522, 118 Atl. 380, 26 A. L. R. 652; *Detroit, etc., R. Co. v. State*, 82 Ohio St. 60, 91 N. E. 869, 137 Am. St. Rep. 758; *State v. Rhodes*, 146 Tenn. 398, 242 S. W. 642, 22 A. L. R. 1544; *State v. Kenney*, 83 Wash. 441, 145 Pac. 450; *State v. Jewett*, 120 Wash. 36, 207 Pac. 3. See also *In re Chapman*, 166 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677. But see *State v. Smith*, 101 Oreg. 127, 199 Pac. 194, 16 A. L. R. 1220.

In *United States v. Lanza*, 260 U. S. 377, 67 L. ed. 314, 43 Sup. Ct.

Rep. 141, Chief Justice *Taft*, who delivered the opinion of the court, said: "An act denounced as a crime by both national and State sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the Federal government (*Barron v. City of Baltimore*, 7 Pet. 243, 8 L. ed. 672), and the double jeopardy therein forbidden is a second prosecution under authority of the Federal government after a first trial for the same offense under the same authority."

<sup>2</sup> *Commonwealth v. Cook*, 6 S. & R. 586; *State v. Norvell*, 2 Yerg. 24; *Williams v. Commonwealth*, 2 Gratt. 568; *People v. McGowan*, 17 Wend. 386; *Mounts v. State*, 14 Ohio, 295; *Price v. State*, 19 Ohio, 423; *Wright v. State*, 5 Ind. 292; *State v. Nelson*, 26 Ind. 366; *State v. Spier*, 1 Dev. 491; *State v. Ephraim*, 2 Dev. & Bat. 162; *Commonwealth v. Tuck*, 20 Pick. 356; *People v. Webb*, 28 Cal. 467; *People v. Cook*, 10 Mich. 164; *State v. Ned*, 7 Port. 217; *State v. Callendine*, 8 Iowa, 288; *State v. Rook*, 61 Kan. 382, 59 Pac. 653, 49 L. R. A. 186; *State v. Richardson*, 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238; *Allen v. State*, 52 Fla. 1, 41 So. 593, 120 Am. St. Rep. 188, 10 Ann. Cas. 1085;

said to be thus charged when they have been impaneled and sworn.<sup>1</sup> The defendant then becomes entitled to a verdict which shall con-

*State v. Hansford*, 76 Kan. 678, 92 Pac. 551, 14 L. R. A. (N. S.) 548; *Runyon v. Morrow*, 192 Ky. 785, 234 S. W. 304, 19 A. L. R. 632; *State v. Slorah*, 118 Me. 203, 106 Atl. 768, 4 A. L. R. 1256; *State v. Buente*, 256 Mo. 227, 165 S. W. 340, Ann. Cas. 1915 D, 879; *McKay v. State*, 90 Neb. 63, 132 N. W. 741, 39 L. R. A. (N. S.) 714, Ann. Cas. 1913 B, 1034; *United States v. Aurandt*, 15 N. W. 292, 107 Pac. 1064, 27 L. R. A. (N. S.) 1181; *Rupert v. State*, 9 Okla. Crim. 226, 131 Pac. 713, 45 L. R. A. (N. S.) 60; *Green v. State*, 147 Tenn. 299, 247 S. W. 84, 28 A. L. R. 842; *State v. Thompson*, 58 Utah, 291, 199 Pac. 161, 38 A. L. R. 697; *Ex parte Bornee*, 76 W. Va. 360, 85 S. E. 529, L. R. A. 1915 F, 1093; *Hack v. State*, 141 Wis. 346, 124 N. W. 492, 45 L. R. A. (N. S.) 664.

"The preliminary examination of one arrested on suspicion of a crime is not a trial; and his discharge by the magistrate upon such examination is not an acquittal. *Com. v. Rice*, 216 Mass. 480, 104 N. E. 347; *People v. Dillon*, 197 N. Y. 254, 256, 90 N. E. 820, 18 Ann. Cas. 552. Even the finding of an indictment followed by arraignment, pleading thereto, repeated continuances, and eventually dismissal at the instance of the prosecuting officer on the ground that there was not sufficient evidence to hold the accused, was held, in *Bassing v. Cady*, 208 U. S. 386, 391, 52 L. ed. 540, 28 Sup. Ct. Rep. 392, 13 Ann. Cas. 905, not to constitute jeopardy. Likewise it has been consistently held under the treaties with Great Britain and other countries, that a fugitive from justice may be arrested in extradition proceedings a second time upon a new complaint charging the same crime, where he was discharged by the magistrate on the first complaint or the complaint was withdrawn." *Collins v. Loisel*, 262 U. S. 426, 67 L. ed. 1062, 43 Sup. Ct. Rep. 618. But it has been held that if a defendant is arraigned before a justice who has jurisdiction, and pleads guilty, and

the prosecutor dismisses the case, he has been in jeopardy. *Boswell v. State*, 111 Ind. 47.

It cannot be said that a party is in legal jeopardy in a prosecution brought about by his own procurement; and a former conviction or acquittal is consequently no bar to a second indictment, if the former trial was brought about by the procurement of the defendant, and the conviction or acquittal was the result of fraud or collusion on his part. *Commonwealth v. Alderman*, 4 Mass. 477; *State v. Little*, 1 N. H. 257; *State v. Lowry*, 1 Swan, 35; *State v. Green*, 16 Iowa, 239; *Richards v. State*, 108 Ark. 87, 157 S. W. 141, Ann. Cas. 1915 B, 231; *State v. Bartlett*, 181 Iowa, 436, 164 N. W. 757, L. R. A. 1918 A, 1179. See also *State v. Reed*, 26 Conn. 202; *Bigham v. State*, 59 Miss. 529; *State v. Simpson*, 28 Minn. 66, 9 N. W. 78; *McFarland v. State*, 68 Wis. 400, 32 N. W. 226. And if a jury is called and sworn, and then discharged for the reason that it is discovered the defendant has not been arraigned, this will not constitute a bar. *United States v. Riley*, 5 Blatch. 204.

Indefinite suspension of sentence and discharge without recognizance after plea of guilty amounts to a complete loss of power over prisoner, and he cannot subsequently be taken and sentenced. *People v. Allen*, 155 Ill. 61, 39 N. E. 568, 41 L. R. A. 473; but the court may after sentence suspend in whole or in part the execution thereof, and may at any time thereafter within the term in which such sentence was rendered revoke the suspension of execution. *Weber v. State*, 58 Ohio St. 616, 51 N. E. 116, 41 L. R. A. 472. See also *People v. Monroe Co. Ct.*, 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856.

Statute giving complainant in criminal case for illegal fishing a right of appeal in case of acquittal is void. *People v. Miner*, 144 Ill. 308, 33 N. E. 40, 19 L. R. A. 342, and note.

<sup>1</sup> *McFadden v. Commonwealth*, 23 Pa. St. 12; *Lee v. State*, 26 Ark. 260,

stitute a bar to a new prosecution; and he cannot be deprived of this bar by a *nolle prosequi* entered by the prosecuting officer against his will, or by a discharge of the jury and continuance of the cause.<sup>1</sup> If, however, the court had no jurisdiction of the cause,<sup>2</sup> or if the indictment was so far defective that no valid judgment could be rendered upon it,<sup>3</sup> or if by any overruling necessity the jury are discharged without a verdict,<sup>4</sup> which might happen from the sickness

7 Am. Rep. 611; *O'Brian v. Commonwealth*, 9 Bush, 333, 15 Am. Rep. 715; *Allen v. State*, 52 Fla. 1, 41 So. 593, 120 Am. St. Rep. 188, 10 Ann. Cas. 1085; *State v. Duvall*, 135 La. 710, 65 So. 904, L. R. A. 1916 E, 1264; *State v. Slorah*, 118 Me. 203, 106 Atl. 768, 4 A. L. R. 1256; *State v. Gould*, 261 Mo. 694, 170 S. W. 868, Ann. Cas. 1916 E, 855; *State v. Herold*, 68 Wash. 654, 123 Pac. 1076, 40 L. R. A. (N. S.) 1213.

The jury must be of competent men. If, after the jury is sworn but before any evidence is taken, an incompetent juror is set aside, there has been no jeopardy. *People v. Barker*, 60 Mich. 277, 27 N. W. 539; *State v. Pritchard*, 16 Nev. 101. Compare *Adams v. State*, 99 Ind. 244; *Whitmore v. State*, 43 Ark. 271.

<sup>1</sup> *People v. Barrett*, 2 Caines, 304; *Commonwealth v. Tuck*, 20 Pick. 365; *Mounts v. State*, 14 Ohio, 295; *State v. Connor*, 5 Cold. 311; *State v. Callendine*, 8 Iowa, 288; *Baker v. State*, 12 Ohio St. 214; *Grogan v. State*, 44 Ala. 9; *State v. Alman*, 64 N. C. 364; *Nolan v. State*, 55 Ga. 521; *Pizaño v. State*, 20 Tex. App. 139.

A judge cannot order discharge in order to try again upon another complaint. *Com. v. Hart*, 149 Mass. 7, 20 N. E. 310. But in Vermont it has been held that a *nolle prosequi* entered at any stage of a trial before verdict by order of the court is not a bar to another indictment for the same offense. *State v. Champeau*, 52 Vt. 313, 36 Am. Rep. 754. And in a Connecticut case, *State v. Garvey*, 42 Conn. 232, it is held that a prosecution *nol. prossed* after the jury is sworn is no bar to a new prosecution, "If the prisoner does not claim a verdict, but waives his right to insist

upon it." See *Hoffman v. State*, 20 Md. 425.

<sup>2</sup> *Commonwealth v. Goddard*, 13 Mass. 455; *People v. Tyler*, 7 Mich. 161; *Montross v. State*, 61 Miss. 429; *State v. Shelly*, 98 N. C. 673, 4 S. E. 530; *Brown v. State*, 79 Ga. 324, 4 S. E. 861; *State v. Fox*, 83 Conn. 286, 76 Atl. 302, 19 Ann. Cas. 682; *Peterson v. State*, 79 Neb. 132, 112 N. W. 306, 126 Am. St. Rep. 651, 14 L. R. A. (N. S.) 292; *Huey v. State*, 88 Tex. Crim. 377, 227 S. W. 186, 12 A. L. R. 1003.

Acquittal by court-martial is no bar to a prosecution in the criminal courts. *State v. Rankin*, 4 Cold. 146; *United States v. Cashiel*, 1 Hughes, 552.

<sup>3</sup> *Gerzad v. People*, 4 Ill. 363; *Pritchett v. State*, 2 Sneed, 285; *People v. Cook*, 10 Mich. 164; *Mount v. Commonwealth*, 2 Duv. 93; *People v. McNealy*, 17 Cal. 333; *Kohlheimer v. State*, 39 Miss. 548; *State v. Kason*, 20 La. Ann. 48; *Black v. State*, 36 Ga. 447; *Commonwealth v. Bakeman*, 105 Mass. 53; *State v. Ward*, 48 Ark. 36, 2 S. W. 191; *People v. Clark*, 67 Cal. 99, 7 Pac. 178; *Garvey's Case*, 7 Col. 384, 4 Pac. 758; *Bennett v. Com.*, 150 Ky. 604, 150 S. W. 806, 43 L. R. A. (N. S.) 419.

<sup>4</sup> *United States v. Perez*, 9 Wheat. 579, 6 L. ed. 165; *State v. Ephraim*, 2 Dev. & Bat. 166; *Commonwealth v. Fells*, 9 Leigh, 620; *People v. Goodwin*, 18 Johns. 205; *Commonwealth v. Bowden*, 9 Mass. 194; *Hoffman v. State*, 20 Md. 425; *Price v. State*, 36 Miss. 533; *Lovato v. New Mexico*, 242 U. S. 199, 61 L. ed. 244, 37 Sup. Ct. Rep. 107; *Andrews v. State*, 174 Ala. 11, 56 So. 998, Ann. Cas. 1914 B, 760; *Martin v. State*, 163 Ark. 103, 259 S. W. 6, 33 A. L. R. 133; *Fails v. State*, 60 Fla. 8, 53 So. 612, Ann. Cas.



or death of the judge holding the court,<sup>1</sup> or of a juror,<sup>2</sup> or the inability of the jury to agree upon a verdict after reasonable time for delibera-

1912 B, 1146; *State v. Duvall*, 135 La. 710, 65 So. 904, L. R. A. 1916 E, 1264; *State v. Slorah*, 118 Me. 203, 106 Atl. 768, 4 A. L. R. 1256; *State v. Van Ness*, 82 N. J. L. 181, 83 Atl. 195; *People v. Neff*, 122 App. Div. 135, 106 N. Y. Supp. 747, affirmed 191 N. Y. 210, 83 N. E. 970; *People v. Fishman*, 64 Misc. 256, 119 N. Y. Supp. 89; *State v. Tyson*, 138 N. C. 627, 50 S. E. 456; *Green v. State*, 147 Tenn. 299, 247 S. W. 84, 28 A. L. R. 842; *Oborn v. State*, 143 Wis. 249, 126 N. W. 737, 31 L. R. A. (N. S.) 966.

If a jury is discharged because of the incompetency of a juror the accused cannot plead former jeopardy to a subsequent prosecution for the same offense. *Simmons v. United States*, 142 U. S. 148, 35 L. ed. 968, 12 Sup. Ct. Rep. 171.

Where, after the jury is sworn and testimony is introduced, the court learns and determines from an inquiry judicially conducted that a juror is prejudiced and unfit to sit in the case, and that the disqualification is such as would vitiate a verdict, the jury may be discharged and another jury impaneled to try the case. *State v. Hansford*, 76 Kan. 678, 92 Pac. 551, 14 L. R. A. (N. S.) 548.

In *State v. Wiseman*, 68 N. C. 203, the officer in charge of the jury was found to have been conversing with them in a way calculated to influence them unfavorably towards the evidence of the prosecution, and it was held that this was such a case of necessity as authorized the judge to permit a juror to be withdrawn, and that it did not operate as an acquittal. See also *State v. Washington*, 89 N. C. 535.

Where the fact is brought to the judge's notice that one of the jurors had sat upon the grand jury that returned the indictment and the jury is discharged, there is no jeopardy. *Thompson v. United States*, 155 U. S. 271, 39 L. ed. 146, 15 Sup. Ct. Rep. 73.

Where a juror who, by concealing

the fact that he had served on a former jury in the trial of the same case, had been accepted to serve as a juror on the second trial, and this fact was not discovered until after the jury had been selected and sworn, it was held that the substitution in his place of a new juror was not a violation of the constitutional inhibition against double jeopardy. *Martin v. State*, 163 Ark. 103, 259 S. W. 6, 33 A. L. R. 133.

If a *nolle prosequi* to an indictment is entered after the jury is sworn, because it is found that the person alleged to have been murdered is misnamed, this is no bar to a new indictment which shall give the name correctly. *Taylor v. State*, 35 Tex. 97.

<sup>1</sup> *Nugent v. State*, 4 Stew. & Port. 72; *Freeman v. United States*, 237 Fed. 815, 151 C. C. A. 57; *Whitmore v. State*, 43 Ark. 271; *Martin v. State*, 163 Ark. 103, 259 S. W. 6, 33 A. L. R. 133; *State v. Varnado*, 124 La. 711, 50 So. 661.

<sup>2</sup> *Hector v. State*, 2 Mo. 166; *State v. Curtis*, 5 Humph. 601; *Mahala v. State*, 10 Yerg. 532; *Commonwealth v. Fells*, 9 Leigh, 613; *Doles v. State*, 97 Ind. 555; *State v. Emery*, 59 Vt. 84, 7 Atl. 129; *Whitmore v. State*, 43 Ark. 271; *Martin v. State*, 163 Ark. 103, 259 S. W. 6, 33 A. L. R. 133; *State v. Hansford*, 76 Kan. 678, 92 Pac. 551, 14 L. R. A. (N. S.) 548; *People v. Hutchins*, 137 Mich. 527, 100 N. W. 753; *People v. Smith*, 172 N. Y. 210, 64 N. E. 814.

Where judge is authorized to discharge jury when a juror becomes sick, such discharge must be in open court and in presence of prisoner; else he will be allowed to plead former jeopardy. *Upchurch v. State*, 36 Tex. Cr. 624, 38 S. W. 206, 44 L. R. A. 694; *State v. Nelson*, 19 R. I. 467, 34 Atl. 990, 33 L. R. A. 559.

Proof that a juror is sick must be given in open court in order to justify discharge of jury and retention of prisoner. Telephone message is insufficient. *State v. Nelson*, 19 R. I. 467, 34 Atl. 990, 33 L. R. A. 559, 61

tion and effort;<sup>1</sup> or if the term of the court as fixed by law comes to an end before the trial is finished;<sup>2</sup> or the jury are discharged with the consent of the defendant expressed or implied;<sup>3</sup> or if, after

Am. St. 780. See also *Upchurch v. State*, 36 Tex. Cr. 624, 38 S. W. 206, 44 L. R. A. 694.

<sup>1</sup> *People v. Goodwin*, 18 Johns. 187; *Commonwealth v. Olds*, 5 Lit. 140; *Dobbins v. State*, 14 Ohio St. 493; *Miller v. State*, 8 Ind. 325; *State v. Walker*, 26 Ind. 346; *Commonwealth v. Fells*, 9 Leigh, 613; *Winsor v. The Queen*, L. R. 1 Q. B. 289; *State v. Prince*, 63 N. C. 529; *Moseley v. State*, 33 Tex. 671; *Lester v. State*, 33 Ga. 329; *Ex parte McLaughlin*, 41 Cal. 211, 10 Am. Rep. 272; *People v. Harding*, 53 Mich. 481, 18 N. W. 555, 19 N. W. 155; *Conklin v. State*, 25 Neb. 784, 41 N. W. 788; *Powell v. State*, 17 Tex. App. 345; *State v. Sutfin*, 22 W. Va. 771; *State v. Hager*, 61 Kan. 504, 59 Pac. 1080, 48 L. R. A. 254; *Re Allison*, 13 Col. 525, 22 Pac. 820, 10 L. R. A. 790, 16 Am. St. 224; *Dreyer v. Illinois*, 187 U. S. 71, 47 L. ed. 79, 23 Sup. Ct. Rep. 28; *Keerl v. Montana*, 213 U. S. 135, 53 L. ed. 734, 29 Sup. Ct. Rep. 469; *Carmen v. State*, 120 Ark. 172, 179 S. W. 183; *People v. Ham Long*, 155 Cal. 579, 102 Pac. 263, 24 L. R. A. (N. S.) 481; *Johnson v. State*, 54 Fla. 45, 44 So. 765; *White v. State*, 63 Fla. 49, 59 So. 17; *State v. Larimore*, 173 Ind. 452, 90 N. E. 898; *State v. Huff*, 75 Kan. 585, 90 Pac. 279, 12 L. R. A. (N. S.) 1094; *State v. Harris*, 119 La. 297, 44 So. 22, 11 L. R. A. (N. S.) 178; *People v. Parker*, 145 Mich. 488, 108 N. W. 999; *State v. Keerl*, 33 Mont. 501, 85 Pac. 862; *State v. Trueman*, 34 Mont. 249, 85 Pac. 1024; *People v. Hayes*, 215 N. Y. 172, 109 N. E. 77; *State v. McMillen*, 69 Ohio St. 247, 69 N. E. 433; *Kent v. State*, 8 Okla. Cr. 188, 126 Pac. 1040; *State v. Barnes*, 54 Wash. 493, 103 Pac. 792, 23 L. R. A. (N. S.) 932; *Hovey v. Shaffner*, 16 Wyo. 254, 93 Pac. 305, 125 Am. St. Rep. 1037, 15 L. R. A. (N. S.), 227, 15 Ann. Cas. 318. See also *United States v. Perez*, 9 Wheat. 579, 6 L. ed. 165.

But in Pennsylvania it has been

held that in a capital case the inability of the jury to agree upon a verdict within a few days is not such a necessity as will authorize the discharge of the jury and the placing of the defendant again on trial for the same offense. *Com. v. Fitzpatrick*, 121 Pa. St. 109, 15 Atl. 466, 6 Am. St. Rep. 757.

<sup>2</sup> *State v. Brooks*, 3 Humph. 70; *State v. Battle*, 7 Ala. 259; *Mahala v. State*, 10 Yerg. 532; *State v. Spier*, 1 Dev. 491; *Wright v. State*, 5 Ind. 290; *State v. Slorah*, 118 Me. 203, 106 Atl. 768, 4 A. L. R. 1256. See *Whitten v. State*, 61 Miss. 717.

<sup>3</sup> *State v. Slack*, 6 Ala. 676; *Elijah v. State*, 1 Humph. 103; *Commonwealth v. Stowell*, 9 Met. 572; *People v. Curtis*, 76 Cal. 57, 17 Pac. 941; *People v. White*, 68 Mich. 648, 37 N. W. 34; *State v. Parker*, 66 Iowa, 586, 24 N. W. 225; *Lewis v. State*, 121 Ala. 1, 25 So. 1017; *Stone v. State*, 160 Ala. 94, 49 So. 823, 135 Am. St. Rep. 69; *Burnett v. State*, 76 Ark. 295, 88 S. W. 956, 113 Am. St. Rep. 94; *State v. Slorah*, 118 Me. 203, 106 Atl. 768, 4 A. L. R. 1256; *Com. v. Sholes*, 13 Allen (Mass.) 554; *People v. Gardner*, 52 Mich. 307, 29 N. W. 19; *State v. Ulrich*, 110 Mo. 350, 19 S. W. 656; *Stewart v. State*, 15 Ohio St. 155; *Arcia v. State*, 28 Tex. App. 198, 12 S. W. 599; *Carroll v. State*, 50 Tex. Cr. 485, 98 S. W. 859, 123 Am. St. Rep. 851, 14 Ann. Cas. 426; *People v. Kerm*, 8 Utah, 268, 30 Pac. 988.

But in some jurisdictions it has been held that the silence of a defendant, or his failure to object or protest against an illegal discharge of the jury before verdict, does not constitute a consent to such discharge, or a waiver of the inhibition against a second jeopardy for the same offense. *Ex parte Glenn*, 111 Fed. 257; *Allen v. State*, 52 Fla. 1, 41 So. 593, 120 Am. St. Rep. 188, 10 Ann. Cas. 1085; *People v. Warden City Prison*, 139 App. Div. 488, 124 N. Y. Supp. 341; *State v. Richardson*, 47 S. C. 166,

verdict against the accused, it has been set aside on his motion for a new trial, or on writ of error,<sup>1</sup> or the judgment thereon been arrested,<sup>2</sup> — in any of these cases the accused may again be put upon trial upon the same facts before charged against him, and the proceedings had will constitute no protection. But where the legal bar has once attached, the government cannot avoid it by varying the form of the charge in a new accusation: if the first indictment or information were such that the accused might have been convicted under it on proof of the facts by which the second is sought to be sustained, then the jeopardy which attached on the first must constitute a protection against a trial on the second.<sup>3</sup> And if a prisoner is acquitted

25 S. E. 220, 35 L. R. A. 238; *Hipple v. State*, 80 Tex. Crim. 531, 191 S. W. 1150, L. R. A. 1917 D, 1141.

As to the effect of jury's separation by defendant's consent, see *State v. Ward*, 48 Ark. 36, 2 S. W. 191; *Hilands v. Com.*, 111 Pa. St. 1, 2 Atl. 70.

<sup>1</sup> *Kendall v. State*, 65 Ala. 492; *State v. Blaisdell*, 59 N. H. 328; *Gannon v. People*, 127 Ill. 507, 21 N. E. 525; *State v. Brecht*, 41 Minn. 50, 42 N. W. 602; *People v. Hardisson*, 61 Cal. 378; *Murphy v. Massachusetts*, 177 U. S. 155, 44 L. ed. 711, 20 Sup. Ct. Rep. 639; *State v. Slack*, 6 Ala. 676; *State v. McFarland*, 121 Ala. 45, 25 So. 625; *Johnson v. State*, 29 Ark. 31, 21 Am. Rep. 154; *People v. Hardisson*, 61 Cal. 378; *People v. Mooney*, 132 Cal. 13, 63 Pac. 1070; *People v. Long*, 155 Cal. 579, 102 Pac. 263, 132 Am. St. Rep. 110, 24 L. R. A. (n. s.) 481; *Brantley v. State*, 132 Ga. 573, 64 S. E. 676, 131 Am. St. Rep. 218, 22 L. R. A. (n. s.) 959, 16 Ann. Cas. 1203; *Brown v. United States*, 2 Ind. Terr. 582, 52 S. W. 56; *State v. Hart*, 33 Kan. 218, 6 Pac. 288; *State v. Terresco*, 56 Kan. 126, 42 Pac. 354; *Fain v. Com.*, 109 Ky. 545, 22 Ky. Law Rep. 1111, 59 S. W. 1091; *State v. Walters*, 16 La. Ann. 400; *State v. Thompson*, 10 Mont. 549, 27 Pac. 349; *People v. Shields*, 34 Misc. (N. Y.) 256, 69 N. Y. Supp. 520, 15 N. Y. Cr. Rep. 388; *State v. Davis*, 80 N. C. 384; *Johnson v. State*, 1 Okla. Crim. 321, 97 Pac. 1059, 18 Ann. Cas. 300; *Com. v. Endrukut*, 231 Pa. St. 529, 80 Atl. 1049, 35 L. R. A. (n. s.) 470; *Benton v. Com.*, 91 Va. 782, 21 S. E.

495; *State v. Cross*, 44 W. Va. 315, 29 S. E. 527. See *Com. v. Downing*, 150 Mass. 197, 22 N. E. 912.

And it seems, if the verdict is so defective that no judgment can be rendered upon it, it may be set aside even against the defendant's objection, and a new trial had. *State v. Redman*, 17 Iowa, 329.

<sup>2</sup> *Casborus v. People*, 13 Johns. 351; *State v. Clark*, 69 Iowa, 196, 28 N. W. 537; *State v. McFarland*, 121 Ala. 45, 25 So. 625; *Hill v. Nelms*, 122 Ga. 572, 50 S. E. 344; *Bedee v. People*, 73 Ill. 320; *State v. Spephans*, 13 S. C. 285; *Brown v. State*, 43 Tex. Cr. App. 272, 64 S. W. 1056. But where the indictment was good, and the judgment was erroneously arrested, the verdict was held to be a bar. *State v. Norvell*, 2 Yerg. 24. See *People v. Webb*, 28 Cal. 467. So if the error was in the judgment and not in the prior proceedings, if the judgment is reversed, the prisoner must be discharged. See *post*, p. 473. But it is competent for the legislature to provide that on reversing the erroneous judgment in such case, the court, if the proper proceedings are regular, shall remand the case for the proper sentence. *McKee v. People*, 32 N. Y. 239. Upon correction of sentence and re-sentence, see note to 36 L. ed. U. S. 969. It is also competent, by statute, in the absence of express constitutional prohibition, to allow an appeal or writ of error to the prosecution, in criminal cases. See cases, p. 462, note 2.

<sup>3</sup> *State v. Cooper*, 13 N. J. L. 361; *Commonwealth v. Roby*, 12 Pick. 504;

on some of the counts in an indictment, and convicted on others, and a new trial is obtained on his motion, he can be put upon trial a second time on those counts only on which he was before convicted, and is forever discharged from the others.<sup>1</sup>

*Excessive Fines and Cruel and Unusual Punishments.*

It is also a constitutional requirement that excessive bail shall not be required, nor cruel and unusual punishments inflicted.

Within such bounds as may be prescribed by law, the question what fine shall be imposed is one addressed to the discretion of the court. But it is a discretion to be judicially exercised; and there may be cases in which a punishment, though not beyond any limit fixed by statute, is nevertheless so clearly excessive as to be erro-

People v. McGowan, 17 Wend. 386; Price v. State, 19 Ohio, 423; Leslie v. State, 18 Ohio St. 395; State v. Benham, 7 Conn. 414; United States v. Nickerson, 17 How. 204, 15 L. ed. 219; Ryan v. United States, 216 Fed. 13, 132 C. C. A. 257; Pierson v. State, 159 Ala. 6, 48 So. 813; Jacobs v. State, 100 Ark. 591, 141 S. W. 489; People v. Mendelson, 264 Ill. 453, 106 N. E. 249, L. R. A. 1915 C, 627; State v. Price, 127 Iowa, 301, 103 N. W. 195; Hughes v. Com., 131 Ky. 502, 115 S. W. 744, 31 L. R. A. (N. S.) 693; State v. Terry, 128 La. 680, 55 So. 15; State v. Freeman, 162 N. C. 594, 77 S. E. 780, 45 L. R. A. (N. S.) 977; State v. Virgo, 14 N. D. 293, 103 N. W. 610; State v. Rose, 89 Ohio St. 383, 106 N. E. 50, L. R. A. 1915 A, 256; Jackson v. State, 11 Okla. Crim. 523, 148 Pac. 1058. See Mitchell v. State, 42 Ohio St. 383; Williams v. Com., 78 Ky. 93; Sims v. State, 66 Miss. 33, 5 So. 525.

The identity of the offense which is an essential element in support of a plea of *autre fois* need not be a "formal, technical, absolute identity; the rule is that there must be only substantial identity, that the evidence necessary to support the second indictment would have been sufficient for the first." State v. Roberts, 152 La. 283, 93 So. 95, 24 A. L. R. 1122.

<sup>1</sup> Campbell v. State, 9 Yerg. 333; State v. Kettle, 2 Tyler, 475; Morris v. State, 8 S. & M. 762; Esmon v. State,

1 Swan, 14; Guenther v. People, 24 N. Y. 100; State v. Kattleman, 35 Mo. 105; State v. Ross, 29 Mo. 39; State v. Martin, 30 Wis. 216, 11 Am. Rep. 567; United States v. Davenport, Deady, 264, 1 Green, Cr. R. 429; Stuart v. Commonwealth, 28 Gratt. 950; Johnson v. State, 29 Ark. 31; Barnett v. People, 54 Ill. 331; State v. Casey, 207 Mo. 1, 105 S. W. 645, 123 Am. St. Rep. 367, 13 Ann. Cas. 878. *Contra*, State v. Behimer, 20 Ohio St. 572; State v. Hamilton, 80 S. C. 435, 61 S. E. 965, 128 Am. St. Rep. 881. Compare State v. Pianfetti, 79 Vt. 236, 65 Atl. 84, 9 Ann. Cas. 127.

Where the accused was engaged with another in a criminal conspiracy or plan having for its purpose the larceny of specific automobiles belonging to separate owners, and in pursuance of such plan the confederate stole such automobiles at divers times and places, each theft constituted a distinct and separate offense, and an acquittal of one does not place him twice in jeopardy on the trial for another. Patterson v. State, 96 Ohio St. 90, 117 N. E. 169, L. R. A. 1918 A, 583.

A *nolle prosequi* on one count of an indictment after a jury is called and sworn, is a bar to a new indictment for the offense charged therein. Baker v. State, 12 Ohio St. 214; Murphy v. State, 25 Neb. 807, 41 N. W. 792. See Com. v. Dunster, 145 Mass. 101, 13 N. E. 350.

neous in law.<sup>1</sup> A fine should have some reference to the party's ability to pay it. By Magna Charta a freeman was not to be amerced for a small fault, but according to the degree of the fault, and for a great crime in proportion to the heinousness of it, *saving to him his contenment*; and after the same manner a merchant, *saving to him his merchandise*. And a villein was to be amerced after the same manner, *saving to him his wainage*. The merciful spirit of these provisions addresses itself to the criminal courts of the American States through the provisions of their constitutions.

It has been decided by the Supreme Court of Connecticut that it was not competent in the punishment of a common-law offense to inflict fine and imprisonment without limitation. The precedent, it was said, cited by counsel contending for the opposite doctrine, of the punishment for a libel upon Lord Chancellor *Bacon*, was deprived of all force of authority by the circumstances attending it; the extravagance of the punishment being clearly referable to the temper of the times. "The common law can never require a fine to the extent of the offender's goods and chattels, or sentence of imprisonment for life. The punishment is both uncertain and unnecessary. It is no more difficult to limit the imprisonment of an atrocious offender to an adequate number of years than to prescribe

<sup>1</sup> The subject of cruel and unusual punishments was somewhat considered in *Barker v. People*, 3 Cow. 686, where the opinion was expressed by Chancellor *Sanford* that a forfeiture of fundamental right — e.g. the right to jury trial — could not be imposed as a punishment, but that a forfeiture of the right to hold office might be. But such a forfeiture could not be imposed without giving a right to trial in the usual mode. *Commonwealth v. Jones*, 10 Bush, 725.

In *Done v. People*, 5 Park. 364, the cruel punishments of colonial times, such as burning alive and breaking on the wheel, were enumerated by *W. W. Campbell, J.*, who was of opinion that they must be regarded as "cruel" if not "unusual", and therefore as being now forbidden. And where the criminal is convicted of many offenses, he cannot complain if the punishments therefor are cumulated, provided the punishment for a single offense is not excessive, although the aggregate punishments may amount to imprisonment for a term much greater than his

natural life. *O'Neil v. Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693; but see the vigorous dissenting opinion of Mr. Justice *Field* in this case, and also the dissenting opinion of *Harlan* and *Brewer, JJ.* And see also *State v. Whitaker*, 48 La. Ann. 527, 19 So. 457, 35 L. R. A. 561, and note thereto in L. R. A., in which cases upon "cruel and unusual punishment" are collected. In *Whitaker's* case it was held, that a total imprisonment for 2160 days or fine of \$720 for 72 violations imposed within one hour and forty minutes, though upon separate complaints, was within the prohibition of the constitution. Also *Ex parte Keeler*, 45 S. C. 537, 23 S. E. 865, 31 L. R. A. 678, 55 Am. St. 785. See also *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211, upon cumulative punishment, holding that punishment for several offenses charged in separate counts of same indictment is unlawful: that punishment for one offense exhausts the power of the court under that indictment.

a limited punishment for minor offenses. And when there exists no firmly established practice, and public necessity or convenience does not imperiously demand the principle contended for, it cannot be justified by the common law, as it wants the main ingredients on which that law is founded. Indefinite punishments are fraught with danger, and ought not to be admitted unless the written law should authorize them.”<sup>1</sup>

It is certainly difficult to determine precisely what is meant by cruel and unusual punishments. Probably any punishment declared by statute for an offense which was punishable in the same way at the common law could not be regarded as cruel or unusual in the constitutional sense. And probably any new statutory offense may be punished to the extent and in the mode permitted by the common law for offenses of similar nature. But those degrading punishments which in any State had become obsolete before its existing constitution was adopted, we think may well be held forbidden by it as cruel and unusual.<sup>2</sup> We may well doubt the right to establish the whipping-post and the pillory in States where they were never recognized as instruments of punishment, or in States whose constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishment. In such States the public sentiment must be regarded as having condemned them as “cruel”, and any punishment which if ever employed at all, has become altogether obsolete, must certainly be looked upon as “unusual.”<sup>3</sup>

<sup>1</sup> Per *Hosmer*, Ch. J., in *State v. Danforth*, 3 Conn. 112-116. *Peters*, J., in the same case, pp. 122-124, collects a number of cases in which perpetual imprisonment was awarded at the common law, but, as his associates believed, unwarrantably. Compare *Blydenburg v. Miles*, 39 Conn. 484.

Fixing by statute the minimum fine to be collected for a certain offense, but not the maximum, is not the imposition of an excessive fine. *Southern Express Co. v. Com.*, 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436.

A statute which prescribes the minimum penalty for robbery and leaves it within the power of the court to impose a sentence of imprisonment for life is not unconstitutional. *Franklin v. Brown*, 73 W. Va. 727, 81 S. E. 405, L. R. A. 1915 C, 557.

Prisoner upon conviction may, where statute authorizes, be sentenced

for the maximum period with power to prison managers to release upon parol and good behavior after satisfactory conduct during minimum period. *Miller v. State*, 149 Ind. 607, 49 N. E. 894, 40 L. R. A. 109; *People v. Bd. of Managers, &c.*, 148 Ill. 413, 36 N. E. 76, 23 L. R. A. 139; *In re Henry*, 15 Idaho, 755, 99 Pac. 1054, 21 L. R. A. (N. S.) 207. *Contra*, *People v. Cummings*, 88 Mich. 249, 50 N. W. 310, 14 L. R. A. 285, and note.

A statute providing for a more severe punishment for a second conviction is not for that reason invalid. *Moore v. Missouri*, 159 U. S. 673, 40 L. ed. 301, 16 Sup. Ct. Rep. 179, aff. 121 Mo. 514, 26 S. W. 345.

<sup>2</sup> *Territory v. Ketchum*, 10 N. M. 718, 65 Pac. 169, 55 L. R. A. 90, quoting the language of the text.

<sup>3</sup> The constitutional inhibition of cruel and unusual punishment “is not

fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by humane justice." *Weems v. United States*, 217 U. S. 349, 5 L. ed. 793, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705.

Statutes providing for the sterilization of certain criminals have been held to violate the prohibition against cruel and unusual punishments. *Davis v. Berry*, 216 Fed. 413; *Mickle v. Henricks*, 262 Fed. 687. *Contra*, *State v. Feilin*, 70 Wash. 65, 126 Pac. 75.

In New Mexico it has been decided that flogging may be made the punishment for horse-stealing: *Garcia v. Territory*, 1 N. M. 415; so for wife-beating. *Foote v. State*, 59 Md. 264.

For the non-payment of fine for unlicensed liquor selling, street labor may be imposed. *Ex parte Bedell*, 20 Mo. App. 125.

The power in prison keepers to inflict corporal punishment for the misconduct of convicts cannot be delegated to contractors for convict labor or their managers. *Cornell v. State*, 6 Lea, 624. The keeper of a workhouse may not be authorized to inflict such punishment at his discretion. *Smith v. State*, 8 Lea, 744. A jailer may not chain up a prisoner for several hours by the neck so he cannot lie or sit. *In re Birdsong*, 39 Fed. Rep. 599.

Punishment of death may be inflicted by electric shock. *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930, aff. *People v. Durston*, 55 Hun, 64, 119 N. Y. 569, 24 N. E. 6, 16 Am. St. 859; *McElvaine v. Brush*, 142 U. S. 155, 35 L. ed. 155, 12 Sup. Ct. Rep. 156, aff. 121 N. Y. 250, 24 N. E. 465, 125 N. Y. 596, 26 N. E. 929; *Re Storti*, 178 Mass. 549, 60 N. E. 210, 52 L. R. A. 520; *State v. Tomasi*, 75 N. J. L. 739, 69 Atl. 214; *Holt v. State*, 107 Ohio St. 307, 140 N. E. 349. The infliction of the death penalty by the administration of lethal gas as a penalty for murder is not a cruel or unusual punishment. *State v. Gee Jon*, 46 Nev. 418, 211 Pac. 676, 30 A. L. R. 1443. A statute which provides that one sentenced to death shall during

the weeks intervening between the issuing of the warrant and its execution, be kept in solitary confinement, and that no person shall be allowed access to him without order of the court, excepting the officers of the prison, his counsel, his physician, a priest or minister of religion, if he shall desire one, and the members of his family, does not inflict a cruel or unusual punishment. *State v. Tomasi*, 75 N. J. L. 739, 69 Atl. 214. Compare *Williams v. State*, 125 Ark. 287, 188 S. W. 826, L. R. A. 1917 B, 586.

An act of Congress providing for the arrest, trial, and punishment of one as a "suspicious person" is invalid as providing a punishment without an offense, which is cruel and unusual. *Stoutenburgh v. Frazier*, 16 D. C. App. 229, 48 L. R. A. 220.

An act providing the death penalty for assault upon a railway train with intent to commit robbery or other felony, does not prescribe a cruel or unusual punishment. *Terr. of New Mexico v. Ketchum*, 10 N. M. 718, 65 Pac. 169, 55 L. R. A. 90.

The punishment of death for an attempt to commit rape is not a cruel or unusual punishment. *Dutton v. State*, 123 Md. 373, 91 Atl. 417, Ann. Cas. 1916 C, 89; *Hart v. Com.*, 131 Va. 726, 109 S. E. 582.

A statute providing that any tramp who shall threaten to do injury to the person or property of any person shall be imprisoned in the State penitentiary, is not one providing for cruel or unusual punishments. *State v. Hogan*, 63 Ohio St. 202, 58 N. E. 572, 81 Am. St. 626.

The West Virginia statute closing saloons on Sunday, which provides that upon a conviction for a violation of its provisions the court shall revoke defendant's liquor license and close the place of sale, is not unconstitutional as imposing punishment cruel or unusual or disproportionate to the offense. *State v. Woodward*, 68 W. Va. 66, 69 S. E. 385, 30 L. R. A. (N. S.) 1004.

See further as to cruel and unusual punishments, *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10; *People v. Haug*,

A defendant, however, in any case is entitled to have the precise punishment meted out to him which the law provides, and no other. A different punishment cannot be substituted on the ground of its being less in severity. Sentence to transportation for a capital offense would be void; and as the error in such a case would be in the judgment itself, the prisoner would be entitled to his discharge, and could not be tried again.<sup>1</sup> If, however, the legal punishment consists of two distinct and severable things, — as fine and imprisonment, — the imposition of either is legal, and the defendant cannot be heard to complain that the other was not imposed also.<sup>2</sup>

### *The Right to Counsel.*

Perhaps the privilege most important to the person accused of crime, connected with his trial, is that to be defended by counsel.

68 Mich. 549, 37 N. W. 21; *Weems v. United States*, 217 U. S. 349, 54 L. ed. 793, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705; *Badders v. United States*, 240 U. S. 391, 60 L. ed. 706, 36 Sup. Ct. Rep. 367; *Williams v. State*, 125 Ark. 287, 188 S. W. 826, L. R. A. 1917 B, 586; *Pearson v. Wimbish*, 124 Ga. 701, 52 S. E. 751, 4 Ann. Cas. 501; *Loeb v. Jennings*, 133 Ga. 796, 67 S. E. 101, 18 Ann. Cas. 376; *In re Henry*, 15 Idaho, 755, 99 Pac. 1054, 21 L. R. A. (N. S.) 207; *People v. Elliott*, 272 Ill. 592, 112 N. E. 300, Ann. Cas. 1918 B, 391; *Clampitt v. United States*, 6 Ind. Terr. 92, 89 S. W. 666, 10 Ann. Cas. 1087; *State v. Gilmore*, 88 Kan. 835, 129 Pac. 1123, 47 L. R. A. (N. S.) 217; *State v. Shaft*, 166 N. C. 407, 81 S. E. 932, Ann. Cas. 1916 C, 627; *State v. Ross*, 55 Oreg. 450, 104 Pac. 596, 106 Pac. 1022, 42 L. R. A. (N. S.) 601; *State v. Davis*, 88 S. C. 229, 70 S. E. 811, 34 L. R. A. (N. S.) 295; *State v. Woodward*, 68 W. Va. 66, 69 S. E. 385, 30 L. R. A. (N. S.) 1004; *Franklin v. Brown*, 73 W. Va. 727, 81 S. E. 405, L. R. A. 1915 C, 557; *Spencer v. State*, 132 Wis. 509, 112 N. W. 462, 122 Am. St. Rep. 989, 13 Ann. Cas. 969.

<sup>1</sup> *Bourne v. The King*, 7 Ad. & El. 58; *Lowenberg v. People*, 27 N. Y. 336; *Hartung v. People*, 26 N. Y. 167; *Elliott v. People*, 13 Mich. 365; *Ex parte Page*, 49 Mo. 291; *Christian v. Commonwealth*, 5 Met. 530; *Ex*

*parte Lange*, 18 Wall. 163, 21 L. ed. 872; *McDonald v. State*, 45 Md. 90. See also *Whitebread v. The Queen*, 7 Q. B. 582; *Rex v. Fletcher*, Russ. & Ry. 58.

It is competent, however, to provide by statute that on setting aside an erroneous sentence the court shall proceed to impose the sentence which the law required. *Wilson v. People*, 24 Mich. 410; *McDonald v. State*, 45 Md. 90.

<sup>2</sup> See *Kane v. People*, 8 Wend. 203.

When one has been convicted and sentenced to imprisonment, it is not competent, after the period of his sentence has expired, to detain him longer in punishment for misbehavior in prison; and a statute to that effect is unwarranted. *Gross v. Rice*, 71 Me. 241. The whole measure of punishment must be imposed at once. The judgment cannot be split up. *People v. Felker*, 61 Mich. 110, 114, 27 N. W. 869, 28 N. W. 83.

Cumulative punishment may be imposed: *Lillard v. State*, 17 Tex. App. 114; *State v. O'Neil*, 58 Vt. 140, 2 Atl. 586, sustained in 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693, but with very vigorous dissenting opinions from *Field*, *Harlan*, and *Brewer*, JJ.; *Graham v. West Virginia*, 224 U. S. 616, 56 L. ed. 917, 32 Sup. Ct. Rep. 583; *Badders v. United States*, 240 U. S. 391, 60 L. ed. 706, 36 Sup. Ct. Rep. 367; *People v.*



From very early days a class of men who have made the laws of their country their special study, and who have been accepted for the confidence of the court in their learning and integrity, have been set apart as officers of the court, whose special duty it should be to render aid to the parties and the court <sup>1</sup> in the application of the law to legal controversies. These persons, before entering upon their employment, were to take an oath of fidelity to the courts whose officers they were, and to their clients; <sup>2</sup> and it was their special duty to see that no wrong was done their clients by means of false or prejudiced

Elliott, 272 Ill. 592, 112 N. E. 300, Ann. Cas. 1918 B, 391. But see *State v. Whitaker*, 48 La. Ann. 527, 19 So. 457, 35 L. R. A. 561; *Ex parte Keeler*, 45 S. C. 537, 23 S. E. 865, 31 L. R. A. 678, 55 Am. St. 785, and *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; so increased punishment for second offense may be imposed. *Kelly v. People*, 115 Ill., 583, 4 N. E. 644; *Chenowith v. Com.*, 11 Ky. L. 561, 12 S. W. 585; *Graham v. West Virginia*, 224 U. S. 616, 56 L. ed. 917, 32 Sup. Ct. Rep. 583.

<sup>1</sup> In *Commonwealth v. Knapp*, 9 Pick. 498, the court denied the application of the defendant that Mr. Rantoul should be assigned as his counsel, because, though admitted to the Common Pleas, he was not yet an attorney of the Supreme Court, and that court, consequently, had not the usual control over him; and, besides, counsel was to give aid to the court as well as to the prisoner, and therefore it was proper that a person of more legal experience should be assigned.

<sup>2</sup> "Every countor is chargeable by the oath that he shall do no wrong nor falsity, contrary to his knowledge, but shall plead for his client the best he can, according to his understanding." *Mirror of Justices*, c. 2, § 5.

The oath in Pennsylvania, on the admission of an attorney to the bar, "to behave himself in the office of an attorney, according to the best of his learning and ability, and with all good fidelity, as well to the court as to the client; that he will use no falsehood, nor delay any man's cause, for lucre or malice", is said, by Mr. Sharswood, to present a comprehensive summary of

his duties as a practitioner. *Sharswood's Legal Ethics*, p. 3.

The advocate's oath, in Geneva, was as follows: "I solemnly swear, before Almighty God, to be faithful to the Republic, and to the canton of Geneva; never to depart from the respect due to the tribunals and authorities; never to counsel or maintain a cause which does not appear to be just or equitable, unless it be the defence of an accused person; never to employ, knowingly, for the purpose of maintaining the causes confided to me, any means contrary to truth, and never to seek to mislead the judges by any artifice or false statement of facts or law; to abstain from all offensive personality, and to advance no fact contrary to the honor and reputation of the parties, if it be not indispensable to the cause with which I may be charged; not to encourage either the commencement or continuance of a suit from any motives of passion or interest; nor to reject, for any consideration personal to myself, the cause of the weak, the stranger, or the oppressed." In "The Lawyer's Oath, its Obligations, and some of the Duties springing out of them", by D. Bethune Duffield, Esq., a masterly analysis is given of this oath; and he well says of it: "Here you have the creed of an upright and honorable lawyer. The clear, terse, and lofty language in which it is expressed needs no argument to elucidate its principles, no eloquence to enforce its obligations. It has in it the sacred savor of divine inspiration, and sounds almost like a restored reading from Sinai's original, but broken tablets."

witnesses, or through the perversion or misapplication of the law by the court. Strangely enough, however, the aid of this profession was denied in the very cases in which it was needed most, and it has cost a long struggle, continuing even into the present century, to rid the English law of one of its most horrible features. In civil causes and on the trial of charges of misdemeanor, the parties were entitled to the aid of counsel in eliciting the facts, and in presenting both the facts and the law to the court and jury; but when the government charged a person with treason or felony, he was denied this privilege.<sup>1</sup> Only such legal questions as he could suggest was counsel allowed to argue for him; and this was but a poor privilege to one who was himself unlearned in the law, and who, as he could not fail to perceive the monstrous injustice of the whole proceeding, would be quite likely to accept any perversion of the law that might occur in the course of it as regular and proper, because quite in the spirit that denied him a defense. Only after the Revolution of 1688 was a full defense allowed on trials for treason,<sup>2</sup> and not until 1836

<sup>1</sup> "From a very early period persons accused of treason or felony were refused the help of counsel. This rule was sternly insisted upon all through this period; and when its justice began to be questioned, *Coke* justified it partly on the ground that the court was counsel for the prisoner — a view which was clearly not acted upon in the important state trials of the period; and partly on the ground that, it being for the prosecutor to prove his case so clearly that no defense to it was possible, no counsel was therefore needed." Holdsworth's *History of English Law*, Vol. 5, p. 192.

When an ignorant person, unaccustomed to public assemblies, and perhaps feeble in body or in intellect, was put upon trial on a charge which, whether true or false, might speedily consign him to an ignominious death, with able counsel arrayed against him, and all the machinery of the law ready to be employed in bringing forward the evidence of circumstances indicating guilt, it is painful to contemplate the barbarity which could deny him professional aid. Especially when in most cases he would be imprisoned immediately on being apprehended, and would thereby be prevented from making even the feeble preparations

which might otherwise have been within his power. A "trial" under such circumstances would be only a judicial murder in very many cases. The spirit in which the old law was administered may be judged of from the case of Sir William Parkins, tried for high treason before Lord *Holt* and his associates in 1695, after the statute 7 Wm. III. c. 3, allowing counsel to prisoners indicted for treason, had been passed, but *one day* before it was to take effect. He prayed to be allowed counsel, and quoted the preamble to the statute that such allowance was just and reasonable. His prayer was denied; Lord *Holt* declaring that he must administer the law as he found it, and could not anticipate the operation of an act of Parliament, even by a single day. The accused was convicted and executed. See Lieber's *Hermeneutics*, c. 4, § 15; Sedgwick on Stat. and Const. Law, 81. In proceedings by the Inquisition against suspected heretics the aid of counsel was expressly prohibited. Lea's *Superstition and Force*, 377.

<sup>2</sup> See an account of the final passage of this bill in Macaulay's "England", Vol. IV. c. 21. It is surprising that the effort to extend the same right to all

persons accused of felony was so strenuously resisted afterwards, and that, too, notwithstanding the best lawyers in the realm admitted its importance and justice. "I have myself," said Mr. Scarlett, "often seen persons I thought innocent convicted, and the guilty escape, for want of some acute and intelligent counsel to show the bearings of the different circumstances on the conduct and situation of the prisoner." House of Commons Debates, April 25, 1826. "It has lately been my lot," said Mr. Denman, on the same occasion, "to try two prisoners who were deaf and dumb, and who could only be made to understand what was passing by the signs of their friends. The cases were clear and simple; but if they had been circumstantial cases, in what a situation would the judge and jury be placed, when the prisoner could have no counsel to plead for him." The cases looked clear and simple to Mr. Denman; but how could he know they would not have looked otherwise, had the coloring of the prosecution been relieved by a counter-presentation for the defense? See Sydney Smith's article on Counsel for Prisoners, 45 Edinb. Rev. p. 74; Works, Vol. II. p. 353. The plausible objection to extending the right was, that the judge would be counsel for the prisoner, — a pure fallacy at the best, and, with some judges, a frightful mockery. Baron Garrow, in a charge to a grand jury, said: "It has been truly said that, in criminal cases, judges were counsel for the prisoners. So, undoubtedly, they were, as far as they could be, to prevent undue prejudice, to guard against improper influence being excited against prisoners; but it was impossible for them to go further than this, for they could not suggest the course of defense prisoners ought to pursue; for judges only saw the deposition so short a time before the accused appeared at the bar of their country, that it was quite impossible for them to act fully in that capacity."

If one would see how easily, and yet in what a shocking manner, a judge might pervert the law and the evi-

dence, and act the part of both prosecutor and king's counsel, while assuming to be counsel for the prisoner, he need not go further back than the early trials in our own country, and he is referred for a specimen to the trials of Robert Tucker and others for piracy, before Chief Justice *Trott* at Charleston, S. C., in 1718, as reported in 6 State Trials (Emlyn), 156 *et seq.* Especially may he there see how the statement of prisoners in one case, to which no credit was given for their exculpation, was used as hearsay evidence to condemn a prisoner in another case. All these abuses would have been checked, perhaps altogether prevented, had the prisoners had able and fearless counsel. But without counsel for the defense, and under such a judge, the witnesses were not free to testify, the prisoners could not safely make even the most honest explanation, and the jury, when they retired, could only feel that returning a verdict in accordance with the opinion of the judge was merely matter of form. Sydney Smith's lecture on "The judge that smites contrary to the law" is worthy of being carefully pondered in this connection. "If ever a nation was happy, if ever a nation was visibly blessed by God, if ever a nation was honored abroad, and left at home under a government (which we can now conscientiously call a liberal government) to the full career of talent, industry, and vigor, we are at this moment that people, and this is our happy lot. First, the Gospel has done it, and then justice has done it; and he who thinks it his duty that this happy condition of existence may remain, must guard the piety of these times, and he must watch over the spirit of justice which exists in these times. First, he must take care that the altars of God are not polluted, that the Christian faith is retained in purity and in perfection; and then, turning to human affairs, let him strive for spotless, incorruptible justice; praising, honoring, and loving the just judge, and abhorring as the worst enemy of mankind him who is placed there to 'judge after the law, and who smites contrary to the law.'"

was the same privilege extended to persons accused of other felonies.<sup>1</sup>

With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel.<sup>2</sup> And generally it will be found that the humanity of the law has provided that, if the prisoner is unable to employ counsel, the court may designate some one to defend him who shall be paid by the government;<sup>3</sup> but when no such provision is made, it is a duty which counsel so designated owes to his profession, to the court engaged in the trial, and to the cause of humanity and justice, not to withhold his assistance nor spare his best exertions, in the defense of one who has the double misfortune to be stricken by poverty and accused of crime. No one is at liberty to decline such an appointment,<sup>4</sup> and few, it is to be hoped, would be disposed to do so. In guaranteeing to parties accused of crime the right to the aid of counsel, the Constitution secures it with all its accustomed incidents.<sup>5</sup> Among these is that

<sup>1</sup> By statute 6 & 7 Wm. IV. c. 114; 4 Cooley's Bl. Com. 355; May's Const. Hist. c. 18.

<sup>2</sup> The right to counsel is permissive and conditional upon the pleasure of the accused. "Preferring the protection of the court, or choosing to rely upon his own skill and ability, he may not desire the assistance of counsel." *State v. Yoes*, 67 W. Va. 546, 68 S. E. 181, 140 Am. St. Rep. 978. See also *Dietz v. State*, 149 Wis. 462, 136 N. W. 166, Ann. Cas. 1913 C, 732.

<sup>3</sup> "When a court is called upon to appoint counsel for a defendant in a criminal case who is unable to employ counsel for himself, it is the duty of the court to see that counsel is assigned having sufficient ability and experience to fairly represent the defendant, present his defense, and protect him from undue oppression." *People v. Blevins*, 251 Ill. 381, 96 N. E. 214, Ann. Cas. 1912 C, 451.

<sup>4</sup> *Vice v. Hamilton County*, 19 Ill. 18; *Wayne Co. v. Waller*, 90 Pa. St. 99, 35 Am. Rep. 636; *House v. White*, 5 Baxt. 690; *Barnes v. Com.*, 92 Va. 794, 23 S. E. 784.

It has been held that, in the absence of express statutory provisions, counties are not obliged to compensate counsel assigned by the court to defend poor prisoners. *Bacon v. Wayne*

*County*, 1 Mich. 461; *Wayne Co. v. Waller*, 90 Pa. St. 99, 35 Am. Rep. 636. But there are several cases to the contrary. *Webb v. Baird*, 6 Ind. 13; *Hall v. Washington County*, 2 Greene (Iowa), 473; *Carpenter v. Dane County*, 9 Wis. 277. But we think a court has a right to require the service, whether compensation is to be made or not; and that counsel who should decline to perform it, for no other reason than that the law does not provide pecuniary compensation, is unworthy to hold his responsible office in the administration of justice. Said Chief Justice *Hale* in one case: "Although serjeants have a monopoly of practice in the Common Pleas, they have a right to practice, and do practice, at this bar; and if we were to assign one of them as counsel, and he was to refuse to act, we should make bold to commit him to prison." *Life of Chief Justice Hale*, in *Campbell's Lives of the Chief Justices*, Vol. II.

<sup>5</sup> The right to the aid of counsel includes the right to communication and consultation with him. *Ex parte Rider*, 50 Cal. App. 797, 195 Pac. 965; *A. C. Batchelor v. State*, 189 Ind. 69, 125 N. E. 773; *T. M. Batchelor v. State*, 189 Ind. 701, 125 N. E. 778; *Bielich v. State*, 189 Ind. 127, 126 N. E. 220; *Mays v. Com.*, 25 Ky. L. Rep. 646, 76 S. W. 162; *State ex rel.*

shield of protection which is thrown around the confidence the relation of counsel and client requires, and which does not permit the disclosure by the former, even in the courts of justice, of communications which may have been made to him by the latter, with a view to pending or anticipated litigation. This is the client's privilege; the counsel cannot waive it; and the court would not permit the disclosure even if the client were not present to take the objection.<sup>1</sup>

*Tucker v. Davis*, 9 Okla. Crim. Rep. 94, 130 Pac. 962, 44 L. R. A. (N. S.) 1083; *Com. v. Boyd*, 246 Pa. St. 529, 92 Atl. 705, Ann. Cas. 1916 D, 201; *Mothaf v. State*, 91 Tex. Crim. Rep. 378, 239 S. W. 215, 23 A. L. R. 1374; *Turner v. State*, 91 Tex. Crim. Rep. 627, 241 S. W. 162, 23 A. L. R. 1378.

Where a person is confined in jail pending a trial upon a criminal prosecution, he has the right to have an opportunity to consult freely with his counsel without having any person present to hear what passes between them, whose presence is objectionable to him. It is the duty of officers having custody of such a prisoner to afford him a reasonable opportunity to privately consult his counsel, and no officer has the right to be present and hear what is said during such consultation. As to just when and where consultations between prisoners and their attorneys may be had will vary with the circumstances of each case, within the discretion of the officer having the custody of the prisoner; but this discretion is subject to the review of the courts, and it must not be arbitrarily used. *State ex rel. Tucker v. Davis*, 9 Okla. Crim. 94, 130 Pac. 962, 44 L. R. A. (N. S.) 1083.

<sup>1</sup> The history and reason of the rule which exempts counsel from disclosing professional communications are well stated in *Whiting v. Barney*, 30 N. Y. 330. And see 1 Phil. Ev., by Cowen, Hill, and Edwards, 130 *et seq.*; *Wigmore on Evidence*, Vol. 5, §§ 2290, 2291; *Earle v. Grant*, 46 Vt. 113; *Machette v. Wanless*, 2 Col. 169; *Blackburn v. Crawford*, 3 Wall. 175, 18 L. ed. 186; *Standard Fire Ins. Co. v. Smithhart*, 183 Ky. 679, 211 S. W. 441, 5 A. L. R. 972; *Doherty v. O'Callaghan*, 157 Mass. 90, 31 N. E. 726,

34 Am. St. Rep. 258, 17 L. R. A. 188.

The privilege would not cover communications made, not with a view to professional assistance, but in order to induce the attorney to aid in a criminal act. *People v. Blakely*, 1 Park. Cr. R. 176; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 398; *Standard F. Ins. Co. v. Smithhart*, 183 Ky. 679, 211 S. W. 441, 5 A. L. R. 972. See also *State v. Wilcox*, 90 Kan. 80, 132 Pac. 982, 9 A. L. R. 1091; *Hewitt v. Prince*, 21 Wend. 79; *Wigmore on Evidence*, Vol. 5, § 2298. Nor communications before a crime with a view to being guided as to it. *Orman v. State*, 22 Tex. App. 604, 3 S. W. 468; *People v. Van Alstine*, 57 Mich. 69, 23 N. W. 594; *Standard Ins. Co. v. Smithhart*, 183 Ky. 679, 211 S. W. 441, 5 A. L. R. 972; *Wigmore on Evidence*, Vol. 5, § 2298. But it is not confined to cases where litigation is begun or contemplated: *Root v. Wright*, 84 N. Y. 72; *Alexander v. United States*, 138 U. S. 353, 34 L. ed. 954, 11 Sup. Ct. Rep. 350. See *Wigmore on Evidence*, Vol. 5, § 2294 *et seq.*; or to cases where a fee is received: *Andrews v. Simms*, 33 Ark. 771; *Bacon v. Fisher*, 80 N. Y. 394, 36 Am. Rep. 627; *Bruley v. Garvin*, 105 Wis. 625, 81 N. W. 1038, 48 L. R. A. 839; and is not waived by the party becoming a witness for himself: *Dettenhofer v. State*, 34 Ohio St. 91, 32 Am. Rep. 362; *Sutton v. State*, 16 Tex. App. 490; *Montgomery v. Pickering*, 116 Mass. 227; *Wigmore on Evidence*, Vol. 5, § 2327; but see *Jones v. State*, 65 Miss. 179, 3 So. 379; *In re Young's Estate*, 59 Oreg. 348, 116 Pac. 95, 1060, Ann. Cas. 1913 B, 1310. But if the party voluntarily introduces testimony in regard to his

communications to his attorney, or himself testifies in relation thereto, the privilege is waived. *Hunt v. Blackburn*, 128 U. S. 464, 32 L. ed. 488, 9 Sup. Ct. Rep. 125; *People v. Gerald*, 265 Ill. 448, 107 N. E. 165, Ann. Cas. 1916 A, 636; *Kelly v. Cummins*, 143 Iowa, 148, 121 N. W. 540, 20 Ann. Cas. 1283; *Ex parte Gfeller*, 178 Mo. 248, 77 S. W. 552; *Gick v. Stumpf*, 126 App. Div. 548, 110 N. Y. Supp. 712; *Yardley v. State*, 50 Tex. Crim. 644, 100 S. W. 399, 123 Am. St. Rep. 869; *Grant v. Harris*, 116 Va. 642, 82 S. E. 718, Ann. Cas. 1916 D, 1081; *Wigmore on Evidence*, Vol. 5, § 2327. See also *In re Burnette*, 73 Kan. 609, 85 Pac. 575.

Communications to a State's attorney with a view to a prosecution are privileged. *Vogel v. Gruaz*, 110 U. S. 311, 28 L. ed. 158, 4 Sup. Ct. Rep. 12; *Michael v. Matson*, 81 Kan. 360, 105 Pac. 537, L. R. A. 1915 D, 1. See also *Centoamore v. State*, 105 Neb. 452, 181 N. W. 182. But see *Fisher v. State*, 149 Ark. 48, 231 S. W. 181; *Riggins v. State*, 125 Md. 165, 93 Atl. 437, Ann. Cas. 1916 E, 1117.

Communications extraneous or impertinent to the subject-matter of the professional consultation are not privileged. *Dixon v. Parmelee*, 2 Vt. 185; *Denunzio v. Schlitz*, 117 Ky. 182, 77 S. W. 715, 4 Ann. Cas. 529. See *Brandon v. Gowing*, 7 Rich. 459. Compare *Surface v. Bentz*, 228 Pa. St. 610, 77 Atl. 922, 21 Ann. Cas. 215. On this subject, see also *Wigmore on Evidence*, Vol. 5, § 2310. Or communications publicly made in the presence of others. *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502; *Gallagher v. Williamson*, 23 Cal. 331, 83 Am. Dec. 114; *Scott v. Aultman Co.*, 211 Ill. 612, 71 N. E. 1112, 103 Am. St. Rep. 215; *Champion v. McCarthy*, 228 Ill. 87, 81 N. E. 808, 11 L. R. A. (N. S.) 1052, 10 Ann. Cas. 517; *Wigmore on Evidence*, Vol. 5, § 2311. See *Perkins v. Grey*, 55 Miss. 153; *Moffatt v. Hardin*, 22 S. C. 9; *Kramer v. Kister*, 187 Pa. 227, 40 Atl. 1008, 44 L. R. A. 432. Or communications made to or by the attorney when acting for both parties. *Hanlon*

*v. Doherty*, 109 Ind. 37, 9 N. E. 782; *Cady v. Walker*, 62 Mich. 157, 28 N. W. 805; *Goodwin, &c. Co.'s Appeal*, 117 Pa. St. 514, 12 Atl. 736; *Standard F. Ins. Co. v. Smithhart*, 183 Ky. 679, 211 S. W. 441, 5 A. L. R. 972; *In re Cunnion*, 201 N. Y. 123, 94 N. E. 648, Ann. Cas. 1912 A, 834; *Kirchner v. Smith*, 61 W. Va. 434, 58 S. E. 614, 11 Ann. Cas. 870. But see *Stewart v. Todd*, 190 Iowa, 283, 173 N. W. 619, 20 A. L. R. 1272. On this subject see *Wigmore on Evidence*, Vol. 5, § 2312. Or to an attorney if he acts as a mere scrivener. *Smith v. Long*, 106 Ill. 485; *Todd v. Munson*, 53 Conn. 579, 4 Atl. 99. See also *Turner v. Turner*, 123 Ga. 5, 50 S. E. 969, 107 Am. St. Rep. 76; *Wigmore on Evidence*, Vol. 5, § 2297. Or facts within the personal knowledge of counsel, such as the dating of a bond. *Rundle v. Foster*, 3 Tenn. Ch. 658.

The privilege extends to communications by other means than words: *State v. Dawson*, 90 Mo. 149, 1 S. W. 827; *Ex parte McDonough*, 170 Cal. 230, 149 Pac. 566, L. R. A. 1916 C, 593, Ann. Cas. 1916 E, 327; *Wigmore on Evidence*, Vol. 5, § 2306; and some cases hold that it extends to communications to a legal adviser, who is not a licensed attorney. *Benedict v. State*, 44 Ohio St. 679, 11 N. E. 125; *Ladd v. Rice*, 57 N. H. 374. See also *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. 501. But see *Schubkagel v. Dierstein*, 131 Pa. St. 46, 18 Atl. 1059, 6 L. R. A. 481; 1 *Greenleaf on Evidence*, ed. 16, § 239, and cases cited; *Wigmore on Evidence*, Vol. 5, § 2300 *et seq.* It is waived by asking the attorney who drew a will to be a witness to it. *Matter of Coleman*, 111 N. Y. 220, 19 N. E. 71.

It has been intimated in New York that the statute making parties witnesses has done away with the rule which protects professional communications. *Mitchell's Case*, 12 Abb. Pr. R. 249; note to 1 Phil. Ev., by Cowen, Hill, and Edwards, 159 (marg.). Supposing this to be so in civil cases, the protection would still be the same in the case of persons charged with crime, for such persons cannot be

[The accused has the right to have all his counsel represent him during his entire trial and it is reversible error to exclude them, or any one of them, from the courtroom at any stage of the trial.<sup>1</sup>]

Having once engaged in a cause, the counsel is not afterwards at liberty to withdraw from it without the consent of his client and of the court; and even though he may be impressed with a belief in his client's guilt, it will nevertheless be his duty to see that a conviction is not secured contrary to the law.<sup>2</sup> The worst criminal is entitled to be judged by the laws; and if his conviction is secured by means of a perversion of the law, the injury to the cause of public justice will be more serious and lasting in its results than his being allowed to escape altogether.<sup>3</sup>

compelled to give evidence against themselves, so that the reason for protecting professional confidence is the same as formerly.

<sup>1</sup> *Jackson v. State*, 55 Tex. Cr. 79, 115 S. W. 262, 131 Am. St. Rep. 792. In this case the court said: "The fact that appellant may have been ably defended by other counsel does not abridge his right to have counsel of his own selection and as many as he may see proper to employ to defend him. Nor can he be deprived of the advantage of his selected counsel by placing them under the rule as witnesses. If this rule should obtain, then the state could place counsel of accused under the rule as witnesses in behalf of the State and deprive him of such counsel as he might see proper to select or employ."

<sup>2</sup> If one would consider this duty and the limitations upon it fully, he should read the criticisms upon the conduct of Mr. Charles Phillips on the trial of Courvoisier for the murder of Lord William Russell. See Sharswood, *Legal Ethics*, 46; Littell, *Living Age*, Vol. XXIV. pp. 179, 230; Vol. XXV. pp. 289, 306; West. Rev. Vol. XXXV. p. 1.

<sup>3</sup> There may be cases in which it will become the duty of counsel to interpose between the court and the accused, and fearlessly to brave all consequences personal to himself, where it appears to him that in no other mode can the law be vindicated and justice done to his client; but these cases are so rare, that doubtless they will stand out in

judicial history as notable exceptions to the ready obedience which the bar should yield to the authority of the court. The famous scene between Mr. Justice Buller and Mr. Erskine, on the trial of the Dean of St. Asaph for libel, — 5 Campbell's *Lives of the Chancellors*, c. 158; Erskine's *Speeches*, by Jas. L. High, Vol. I. p. 242, — will readily occur to the reader as one of the exceptional cases. Lord Campbell says of Erskine's conduct: "This noble stand for the independence of the bar would alone have entitled Erskine to the statute which the profession affectionately erected to his memory in Lincoln's Inn Hall. We are to admire the decency and propriety of his demeanor during the struggle, no less than its spirit, and the felicitous precision with which he meted out the requisite and justifiable portion of defiance. His example has had a salutary effect in illustrating and establishing the relative duties of judge and advocate in England." And elsewhere, in speaking of Mr. Fox's Libel Act, he makes the following somewhat extravagant remark: "I have said, and I still think, that this great constitutional triumph is mainly to be ascribed to Lord Camden, who had been fighting in the cause for half a century, and uttered his last words in the House of Lords in its support; but had he not received the invaluable assistance of Erskine, as counsel for the Dean of St. Asaph, the *Star Chamber* might have been re-established in this country."

But how persistent counsel may be in pressing for the acquittal of his client, and to what extent he may be justified in throwing his own personal character as a weight in the scale of justice, are questions of ethics rather than of law. No counsel is justifiable who defends even a just cause with the weapons of fraud and falsehood, and no man on the other hand can excuse himself for accepting the confidence of the accused, and then betraying it by a feeble and heartless defense. And in criminal cases we think the court may sometimes have a duty to perform in seeing that the prisoner suffers nothing from inattention or haste on the part of his counsel, or impatience on the part of the prosecuting officer or of the court itself. Time may be precious to the court; but it is infinitely more so to him whose life or whose liberty may depend upon the careful and patient consideration of the evidence; when the counsel for the defense is endeavoring to sift the truth from the falsehood, and to subject the whole to logical analysis, so as to show that how suspicious soever the facts may be, they are nevertheless consistent with innocence. Often indeed it must happen that the impression of the prisoner's guilt, which the judge and the jury unavoidably receive when the case is opened to them by the prosecuting officer, will, insensibly to themselves, color all the evidence in the case, so that only a sense of duty will induce a due attention to the summing up for the prisoner, which after all may prove unexpectedly convincing. Doubtless the privilege of counsel is sometimes abused in these cases; we cannot think an advocate of high standing and character has a right to endeavor to rob the jury of their opinion by asseverating his own belief in the innocence of his client; and cases may arise in which the court will feel compelled to impose some reasonable restraints upon the address to the jury;<sup>1</sup> but it is better in these cases

And Lord *Brougham* says of *Erskine*: "He was an undaunted man; he was an undaunted advocate. To no court did he ever truckle, neither to the court of the King, neither to the court of the King's Judges. Their smiles and their frowns he disregarded alike in the fearless discharge of his duty. He upheld the liberty of the peers against the one; he defended the rights of the people against both combined to destroy them. If there be yet amongst us the power of freely discussing the acts of our rulers; if there be yet the privilege of meeting for the promotion of needful reforms; if he who desires wholesome changes in our Constitu-

tion be still recognized as a patriot, and not doomed to die the death of a traitor, — let us acknowledge with gratitude that to this great man, under Heaven, we owe this felicity of the times." *Sketches of Statesmen of the Time of George III.* A similar instance of the independence of counsel is narrated of that eminent advocate, Mr. Samuel Dexter, in the reminiscences of his life by "*Sigma*", published at Boston, 1857, p. 61. See *Story on Const.* (4th ed.) § 1064, note.

<sup>1</sup> Thus it has been held, that, even though the jury are the judges of the law in criminal cases, the court may refuse to allow counsel to read law-



to err on the side of liberality; and restrictions which do not leave to counsel, who are apparently acting in good faith, such reasonable time and opportunity as they may deem necessary for presenting their client's case fully, may possibly in some cases be so far erroneous in law as to warrant setting aside a verdict of guilty.<sup>1</sup>

Whether counsel are to address the jury on questions of law in criminal cases, generally, is a point which is still in dispute. If the jury in the particular case, by the Constitution or statutes of the State, are judges of the law, it would seem that counsel should be allowed to address them fully upon it,<sup>2</sup> though the contrary seems to have been held in Maryland:<sup>3</sup> while in Massachusetts where it is expected that the jury will receive the law from the court, it is nevertheless held that counsel has a right to address them upon the law.<sup>4</sup> It is unquestionably more decorous and more respectful to the bench that argument upon the law should always be addressed to the court; and such, we believe, is the general practice. The jury hear the argument, and they have a right to give it such weight as it seems to them properly to be entitled to.

For misconduct in their practice, the members of the legal profession may be summarily dealt with by the courts, who will not fail, in all proper cases, to use their power to protect clients or the public, as well as to preserve the profession from the contamination and dis-

books to the jury. *Murphy v. State*, 6 Ind. 490. And see *Lynch v. State*, 9 Ind. 541; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501; *Walkley v. State*, 133 Ala. 183, 31 So. 854; *New v. State*, 19 Ala. App. 140, 96 So. 720; *State v. Main*, 75 Conn. 55, 52 Atl. 257; *Clark v. State*, 8 Ga. App. 757, 70 S. E. 90; *Reed v. Com.*, 140 Ky. 736, 131 S. W. 776; *Smithson v. State*, 127 Tenn. 357, 155 S. W. 133; *Perkins v. State*, 65 Tex. Cr. 311, 144 S. W. 241.

<sup>1</sup> In *People v. Keenan*, 13 Cal. 581, a verdict in a capital case was set aside on this ground.

<sup>2</sup> *Lynch v. State*, 9 Ind. 541; *Murphy v. State*, 6 Ind. 490; *Bluett v. State*, 151 Ala. 41, 44 So. 84; *Mitchell v. State*, 18 Ala. App. 471, 93 So. 46; *People v. Hatch*, 163 Cal. 368, 125 Pac. 907; *People v. Routh*, 182 Cal. 561, 189 Pac. 436; *Henwood v. People*, 57 Colo. 544, 143 Pac. 373, Ann. Cas. 1916 A, 1111; *Cribb v. State*, 118 Ga. 316, 45 S. E. 396; *People v. Conners*, 246 Ill. 9, 92 N. E. 567; *Cavanaugh v. Com.*, 172 Ky. 799, 190 S. W. 123;

*Harris v. State*, 74 Tex. Cr. 652, 169 S. W. 657; *Goldsberry v. State*, 92 Tex. Cr. 108, 242 S. W. 221.

Counsel may read law to the jury, with so much of the facts stated in an opinion as may be necessary to illustrate the principle ruled, but it is not permissible, by such use of authority, to introduce evidence, or thus indirectly to establish facts which might influence the jury. *Cribb v. State*, 118 Ga. 316, 45 S. E. 396.

<sup>3</sup> *Franklin v. State*, 12 Md. 236. What was held there was, that counsel should not argue the constitutionality of a statute to the jury; and that the Constitution, in making the jury judges of the law, did not empower them to decide a statute invalid. This ruling corresponds to that of *Judge Chase in United States v. Callendar, Whart. State Trials*, 688, 710. But see remarks of *Perkins, J.*, in *Lynch v. State*, 9 Ind. 542.

<sup>4</sup> *Commonwealth v. Porter*, 10 Met. 263; *Commonwealth v. Austin*, 7 Gray, 51.

grace of a vicious associate.<sup>1</sup> A man of bad reputation may be expelled for that alone;<sup>2</sup> [and, speaking generally, misconduct indicative of moral unfitness for the profession, whether it be professional or nonprofessional, justifies disbarment;<sup>3</sup>] and counsel who

<sup>1</sup> "As a class, attorneys are supposed to be, and in fact have always been, the vindicators of individual rights, and the fearless assertors of the principles of civil liberty, existing, where alone they can exist, in a government, not of parties nor of men, but of laws. On the other hand, to declare them irresponsible to any power but public opinion and their consciences, would be incompatible with free government. Individuals of the class may, and sometimes do, forfeit their professional franchise by abusing it; and a power to exact the forfeiture must be lodged somewhere. Such a power is indispensable to protect the court, the administration of justice, and themselves. Abuses must necessarily creep in; and, having a deep stake in the character of their profession, they are vitally concerned in preventing it from being sullied by the misconduct of unworthy members of it. No class of the community is more dependent on its reputation for honor and integrity. It is indispensable to the purposes of its creation to assign it a high and honorable standing; but to put it above the judiciary, whose official tenure is good behavior and whose members are removable from office by the legislature, would render it intractable; and it is therefore necessary to assign it but an equal share of independence. In the absence of specific provision to the contrary, the power of removal is, from its nature, commensurate with the power of appointment, and it is consequently the business of the judges to deal with delinquent members of the bar, and withdraw their faculties when they are incorrigible." *Gibson, Ch. J., In re Austin et al.*, 5 Rawle, 191, 203, 28 Am. Dec. 657. See *State v. Kirke*, 12 Fla. 278; *Rice's Case*, 18 B. Monr. 472; *Walker v. State*, 4 W. Va. 749.

An attorney may be disbarred for a personal attack upon the judge for his

conduct as such; but the attorney is entitled to notice, and an opportunity to be heard in defense. *Beene v. State*, 22 Ark. 149; *Pittsburgh, etc., R. Co. v. Muncie, etc., Traction Co.*, 166 Ind. 466, 77 N. E. 941, 9 Ann. Cas. 165; *State Board of Law Examiners v. Hart*, 104 Minn. 88, 116 N. W. 212, 17 L. R. A. (N. S.) 585, 15 Ann. Cas. 197; *State Bar Commission v. Sullivan*, 35 Okla. 745, 131 Pac. 703, L. R. A. 1915 D, 1218; *In re Sherwood*, 259 Pa. St. 254, 103 Atl. 42, L. R. A. 1918 D, 447; *In re Hilton*, 48 Utah, 172, 158 Pac. 691, Ann. Cas. 1918 A, 271; *In re Robinson*, 48 Wash. 153, 92 Pac. 929, 15 L. R. A. (N. S.) 525, 15 Ann. Cas. 415. See *In re Wallace*, L. R. 1 P. C. 283; *Ex parte Bradley*, 7 Wall. 364, 19 L. ed. 214; *Withers v. State*, 35 Ala. 252; *Matter of Moore et al.*, 63 N. C. 397; *Ex parte Biggs*, 64 N. C. 202; *Bradley v. Fisher*, 13 Wall. 335; *Dickens's Case*, 67 Pa. St. 169.

<sup>2</sup> For example, one whose reputation for truth and veracity is such that his neighbors would not believe him when under oath. *Matter of Mills*, 1 Mich. 393. See *In re Percy*, 36 N. Y. 651; *People v. Ford*, 54 Ill. 520.

<sup>3</sup> *Wernimont v. State*, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913 D, 1156; *In re Durant*, 80 Conn. 140, 67 Atl. 497, 10 Ann. Cas. 539; *People v. Smith*, 200 Ill. 442, 66 N. E. 27, 93 Am. St. Rep. 206; *People v. Macauley*, 230 Ill. 208, 82 N. E. 612, 120 Am. St. Rep. 287; *People v. Baker*, 311 Ill. 66, 142 N. E. 554, 31 A. L. R. 737; *Nelson v. Com.*, 128 Ky. 779, 109 S. W. 337, 16 L. R. A. (N. S.) 272; *Lenihan v. Com.*, 165 Ky. 93, 176 S. W. 948, L. R. A. 1917 B, 1132; *In re Cary*, 146 Minn. 80, 177 N. W. 801, 9 A. L. R. 1272; *In re Reily*, 75 Okla. 192, 183 Pac. 728, 7 A. L. R. 89; *In re Sherwood*, 259 Pa. St. 254, 103 Atl. 42, L. R. A. 1918 D, 447; *In re Hilton*, 48 Utah, 172, 158 Pac. 691, Ann. Cas. 1918 A, 271. But see

has once taken part in litigation, and been the adviser or become intrusted with the secrets of one party, will not afterwards be suffered to engage for an opposing party, notwithstanding the original employment has ceased, and there is no imputation upon his motives.<sup>1</sup>

*In re Sherin*, 27 S. D. 232, 130 N. W. 761, 40 L. R. A. (N. S.) 801, Ann. Cas. 1913 D, 446.

An attorney convicted and punished for perjury, and disbarred, was refused restoration, notwithstanding his subsequent behavior had been unexceptionable. *Ex parte Garbett*, 18 C. B. 403. See *Matter of McCarthy*, 42 Mich. 71, 51 N. W. 963; *Ex parte Walls*, 64 Ind. 461. An attorney disbarred for collusion to procure false testimony. *Matter of Gale*, 75 N. Y. 526. See *Matter of Eldridge*, 82 N. Y. 161, 37 Am. Rep. 558. For inducing a commissioner to admit to bail without right a convicted prisoner. *State v. Burr*, 19 Neb. 593, 28 N. W. 261. For antedating jurat and acknowledgment. *Matter of Arcander*, 26 Minn. 25, 1 N. W. 43. For embezzlement of client's papers, though he has settled with client. *In re Davies*, 93 Pa. St. 116. For want of fidelity to client. *Matter of Wool*, 36 Mich. 299; *Strout v. Proctor*, 71 Me. 288; *Slemmer v. Wright*, 54 Iowa, 164, 6 N. W. 181; *People v. Murphy*, 119 Ill. 159, 6 N. E. 488; *People v. Sullivan*, 279 Ill. 634, 117 N. E. 134, L. R. A. 1918 A, 1136; *People v. Martin*, 288 Ill. 615, 124 N. E. 340, 14 A. L. R. 854; *In re Cary*, 146 Minn. 80, 177 N. W. 801, 9 A. L. R. 1272; *In re Marron*, 22 N. M. 252, 160 Pac. 391, L. R. A. 1917 B, 378. But see *In re Robertson*, 28 S. D. 70, 132 N. W. 684, 36 L. R. A. (N. S.) 442. If he commits a crime in his professional capacity he may be disbarred, though he has not been convicted of the crime. *State v. Winton*, 11 Oreg. 456, 5 Pac. 337; *In re Thresher*, 33 Mont. 441, 84 Pac. 876, 114 Am. St. Rep. 834, 8 Ann. Cas. 845. Even if it is not committed as an attorney. The rule is not inflexible that he must be convicted before disbarment. *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct.

Rep. 569; *Delano's Case*, 58 N. H. 5; *People v. Smith*, 290 Ill. 241, 124 N. E. 807, 9 A. L. R. 183; *In re Sherin*, 27 S. D. 232, 130 N. W. 761, 40 L. R. A. (N. S.) 801, Ann. Cas. 1913 D, 446. See *Ex parte Steinman*, 95 Pa. St. 220.

One may be disbarred for publishing a libel on the court unless some constitutional or statutory provision forbids. *State v. McClaugherty*, 33 W. Va. 250, 10 S. E. 407. But in South Dakota it has been held that an attorney should not be disbarred for acts of immorality, though such as to unfit him to be a member of the bar, if many years have since elapsed, during which he has lived an exemplary life. *In re Sherin*, 27 S. D. 232, 130 N. W. 761, 40 L. R. A. (N. S.) 801, Ann. Cas. 1913 D, 446.

<sup>1</sup>*Strong v. International Bldg. etc., Assoc.* 183 Ill. 97, 55 N. E. 675, 47 L. R. A. 792; *People v. Gerald*, 265 Ill. 448, 107 N. E. 165, Ann. Cas. 1916 A, 636; *Derlin v. Derlin*, 142 Md. 352, 121 Atl. 27; *Peirce v. Palmer*, 31 R. I. 432, 77 Atl. 201, Ann. Cas. 1912 B, 181; *Hasford v. Eno*, 41 S. D. 65, 168 N. W. 764, L. R. A. 1918 F, 831. See also *King Const. Co. v. Mary Helen Coal Corp.*, 194 Ky. 435, 239 S. W. 799, 22 A. L. R. 535.

In *Gaulden v. State*, 11 Ga. 47, the late solicitor-general was not suffered to assist in the defense of a criminal case, because he had, in the course of his official duty, instituted the prosecution, though he was no longer connected with it. And see *Wilson v. State*, 16 Ind. 392.

A late city attorney for accepting a retainer not to appear for the city in certain cases against it, appealed by him while such attorney, was suspended for six months from practice. *In re Cowdery*, 69 Cal. 32, 10 Pac. 47.

"The general rule that an attorney may not at the same time represent parties whose interests conflict is

And, on the other hand, the court will not allow counsel to be made the instrument of injustice, nor permit the client to exact of him services which are inconsistent with the obligation he owes to the court and to public justice, — a higher and more sacred obligation than any which can rest upon him to gratify a client's whims, or to assist in his revenge.<sup>1</sup>

subject to an exception, where he so acts with the full knowledge and consent of both." *Todd v. Rhodes*, 108 Kan. 64, 193 Pac. 894, 16 A. L. R. 423.

<sup>1</sup> Upon this subject the remarks of Chief Justice *Gibson* in *Rush v. Cavanaugh*, 2 Pa. St. 189, are worthy of being repeated in this connection. The prosecutor in a criminal case had refused to pay the charges of the counsel employed by him to prosecute in the place of the attorney-general, because the counsel, after a part of the evidence had been put in, had consented that the charge might be withdrawn. In considering whether this was sufficient reason for the refusal, the learned judge said: "The material question is, did the plaintiff violate his professional duty to his client in consenting to withdraw his charge, . . . instead of lending himself to the prosecution of one whom he then and has since believed to be an innocent man?"

"It is a popular but gross mistake to suppose that a lawyer owes no fidelity to any one except his client, and that the latter is the keeper of his professional conscience. He is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as to the client; and he violates it when he consciously presses for an unjust judgment; much more so when he presses for the conviction of an innocent man. But the prosecution was depending before an alderman, to whom, it may be said, the plaintiff was bound to no such fidelity. Still he was bound by those obligations which, without oaths, rest upon all men. The high and honorable office of a counsel would be degraded to that of a mercenary, were he compellable to do the bidding of his client against the dictates of his conscience. The origin

of the name proves the client to be subordinate to his counsel as his patron. Besides, had the plaintiff succeeded in having Crean held to answer, it would have been his duty to abandon the prosecution at the return of the recognizance. As the office of attorney-general is a public trust which involves, in the discharge of it, the exercise of an almost boundless discretion by an officer who stands as impartial as a judge, it might be doubted whether counsel retained by a private prosecutor can be allowed to perform any part of his duty; certainly not unless in subservience to his will and instructions. With that restriction, usage has sanctioned the practice of employing professional assistants, to whom the attorney-general or his regular substitute may, if he please, confide the direction of the particular prosecution; and it has been beneficial to do so where the prosecuting officer has been over-matched or overborne by numbers. In that predicament the ends of justice may require him to accept assistance. But the professional assistant, like the regular deputy, exercises not his own discretion, but that of the attorney-general, whose *locum tenens* at sufferance he is; and he consequently does so under the obligation of the official oath." And see *Meister v. People*, 31 Mich. 99; *In re Durant*, 80 Conn. 140, 67 Atl. 497, 10 Ann. Cas. 539; *People v. Martin*, 288 Ill. 615, 124 N. E. 340, 14 A. L. R. 854; *Hanson v. Grattan*, 84 Kan. 843, 115 Pac. 646, 34 L. R. A. (N. S.) 240; *In re Macy*, 109 Kan. 1, 196 Pac. 1095, 14 A. L. R. 848; *Huggins v. Field*, 196 Ky. 501, 244 S. W. 903, 29 A. L. R. 1268; *In re Bergeron*, 220 Mass. 472, 107 N. E. 1007, Ann. Cas. 1917 A, 549; *Berman v. Coakley*, 243 Mass. 348, 137 N. E. 667, 26 A. L. R. 92;

*The Right of Compulsory Process to Secure Witnesses.*

[The right to compulsory process by which to secure witnesses in his favor is also an important right of the accused.<sup>1</sup> Where the Constitution secures this right, the witnesses thus compelled to appear do not thereby become entitled to claim their fees of the county.<sup>2</sup> Where important witnesses for the accused are absent from the court without his fault, a continuance must be granted until they can be brought in.<sup>3</sup> But after a reasonable time and opportunity have been allowed for this purpose, the prosecution may be allowed to proceed upon the admission of the prosecutor that the witnesses for the accused would, if present, testify as accused alleges they would. It is not necessary to admit that such testimony is true.<sup>4</sup>]

*The Writ of Habeas Corpus.*

It still remains to mention one of the principal safeguards to personal liberty, and the means by which illegal restraints upon it are most speedily and effectually remedied. To understand this guaranty, and the instances in which the citizen is entitled to appeal to the law for its enforcement, we must first have a correct idea of

*Lynde v. Lynde*, 64 N. J. Eq. 736, 52 Atl. 694, 97 Am. St. Rep. 692, 58 L. R. A. 471; *Ingersoll v. Coal Creek Coal Co.*, 117 Tenn. 263, 98 S. W. 1178, 119 Am. St. Rep. 1003, 9 L. R. A. (N. S.) 282, 10 Ann. Cas. 829; *Cooper v. Bell*, 127 Tenn. 142, 153 S. W. 844, Ann. Cas. 1914 B, 980 *Armstrong v. Morrow*, 166 Wis. 1, 163 N. W. 179, Ann. Cas. 1918 E, 1156.

In furtherance of the full discharge of the duties which an attorney owes to his client and to the court, he is granted certain privileges. One is to be exempt from the service of process while attending upon the court and in going to and returning from the same. *Hoffman v. Judge of Circuit Court*, 113 Mich. 109, 71 N. W. 480; 38 L. R. A. 663; 67 Am. St. 458. Similar exemption in regard to service of summons and other civil process extends to parties and witnesses. *Mulhearn v. Press Publishing Co.*, 53 N. J. L. 153, 21 Atl. 186, 11 L. R. A. 101.

<sup>1</sup> *Pitman v. State*, 51 Fla. 94, 41 So. 385, 8 L. R. A. (N. S.) 509; *Lee*

*v. State*, 2 Ga. App. 481, 58 S. E. 676; *State v. Rice*, 7 Idaho, 762, 66 Pac. 87; *State v. Campbell*, 73 Kan. 688, 85 Pac. 784, 9 L. R. A. (N. S.) 533, 9 Ann. Cas. 1203; *State v. Hornsby*, 8 Rob. (La.) 554, 41 Am. Dec. 305; *State v. Furco*, 51 La. Ann. 1082, 25 So. 951; *Commonwealth v. Haskell*, 140 Mass. 128, 2 N. E. 773; *State v. Sheltrey*, 100 Minn. 107, 110 N. W. 353, 10 Ann. Cas. 245; *State v. Hensley*, 75 Ohio St. 255, 79 N. E. 462, 116 Am. St. Rep. 734, 9 L. R. A. (N. S.) 277, 9 Ann. Cas. 108; *McCrear v. State*, 49 Tex. Cr. 228, 94 S. W. 899.

<sup>2</sup> *Henderson*, Petitioner, in *State v. Evans*, 51 S. C. 331, 29 S. E. 5, 40 L. R. A.; *Whittle v. Saluda Co.*, 59 S. C. 554, 38 S. E. 168.

<sup>3</sup> *Ryder v. State*, 100 Ga. 528, 28 S. E. 246, 38 L. R. A. 721, 62 Am. St. 334.

<sup>4</sup> *Atkins v. Commonwealth*, 98 Ky. 539, 33 S. W. 948, 32 L. R. A. 108; *Hoyt v. People*, 140 Ill. 588, 30 N. E. 315, 16 L. R. A. 239, and note; *State v. Gibbs*, 10 Mont. 213, 25 Pac. 289, 10 L. R. A. 749, and note.

what is understood by personal liberty in the law, and inquire what restraints, if any, must exist to its enjoyment.

Sir William Blackstone says, personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law.<sup>1</sup> It appears, therefore, that this power of locomotion is not entirely unrestricted, but that by due course of law certain qualifications and limitations may be imposed upon it without infringing upon constitutional liberty. Indeed, in organized society, liberty is the creature of law, and every man will possess it in proportion as the laws, while imposing no unnecessary restraints, surround him and every other citizen with protections against the lawless acts of others.<sup>2</sup>

In examining the qualifications and restrictions which the law imposes upon personal liberty, we shall find them classed, according to their purpose, as, first, those of a public, and, second, those of a private nature.

The first class are those which spring from the relative duties and obligations of the citizen to society and to his fellow-citizens. These may be arranged into sub-classes as follows: (1) Those imposed to prevent the commission of crime which is threatened; (2) those in punishment of crime committed; (3) those in punishment of contempts of court or legislative bodies, or to render their jurisdiction effectual; (4) those necessary to enforce the duty citizens owe in defense of the State; <sup>3</sup> (5) those which may become important to

<sup>1</sup> 1 Bl. Com. 134.

Montesquieu says: "In governments, that is, in societies directed by laws, liberty can consist only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will. We must have continually present to our minds the difference between independence and liberty. Liberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid, he would no longer be possessed of liberty, because all his fellow-citizens would enjoy the same power." *Spirit of the Laws*, Book 11, c. 3.

<sup>2</sup> "Liberty," says Mr. Webster, "is the creature of law, essentially different from that authorized licentiousness that trespasses on right. It is a legal and a refined idea, the offspring of high civilization, which the savage never understood, and never can under-

stand. Liberty exists in proportion to wholesome restraint; the more restraint on others to keep off from us, the more liberty we have. It is an error to suppose that liberty consists in a paucity of laws. If one wants few laws let him go to Turkey. The Turk enjoys that blessing. The working of our complex system, full of checks and restraints on legislative, executive, and judicial power, is favorable to liberty and justice. Those checks and restraints are so many safeguards set around individual rights and interests. That man is free who is protected from injury." *Works*, Vol. II. p. 393.

<sup>3</sup> In *Judson v. Reardon*, 16 Minn. 431, a statute authorizing the members of a municipal council to arrest and imprison without warrant persons refusing to obey the orders of fire wardens at a fire was held unwarranted and void.

protect the community against the acts of those who, by reason of mental infirmity, are incapable of self-control. All these limitations are well recognized and generally understood, but a particular discussion of them does not belong to our subject. The second class are those which spring from the helpless or dependent condition of individuals in the various relations of life.

1. The husband, at the common law, is recognized as having legal custody of and power of control over the wife, with the right to direct as to her labor, and to insist upon its performance. The precise nature of the restraints which may be imposed by the husband upon the wife's actions, it is not easy, from the nature of the case, to point out and define; but at most they can only be such gentle restraints upon her liberty as improper conduct on her part may appear to render necessary;<sup>1</sup> and the general tendency of public sentiment, as well as of the modern decisions, has been in the direction of doing away with the arbitrary power which the husband was formerly supposed to possess, and of placing the two sexes in the marriage relation upon a footing nearer equality. It is believed that the right of the husband to chastise the wife, under any circumstances, would not be recognized in this country; and such right of control as the law gives him would in any case be forfeited by such conduct towards the wife as was not warranted by the relation, and which should render it improper for her to live and cohabit with him, or by such conduct as, under the laws of the State, would entitle her to a divorce.<sup>2</sup> And he surrenders his right of control also, when he consents to her living apart under articles of separation.<sup>3</sup>

2. The father of an infant, being obliged by law to support his child, has a corresponding right to control his actions, and to employ his services during the continuance of legal infancy. The child may be emancipated from this control before coming of age, either by

<sup>1</sup> 2 Kent, 181. See *Cochran's Case*, 8 Dowl. P. C. 630.

The husband, however, is under no obligation to support his wife except at his own home; and it is only when he wrongfully sends her away, or so conducts himself as to justify her in leaving him, that he is bound to support her elsewhere. *Rumney v. Keyes*, 7 N. H. 570; *Allen v. Aldrich*, 29 N. H. 63; *Shaw v. Thompson*, 16 Pick. 198; *Clement v. Mattison*, 3 Rich. 93; *Denver Dry Goods Co. v. Jester*, 60 Colo. 290, 152 Pac. 903, L. R. A. 1917 A, 957; *Brown v. Durepo*, 121 Me. 226, 116 Atl. 451, 27 A. L. R. 551;

*Martilla v. Quincy Min. Co.*, 221 Mich. 525, 191 N. W. 193, 30 A. L. R. 1249; *Grimsted v. Johnson*, 61 Mont. 18, 201 Pac. 314, 25 A. L. R. 351. In such a case his liability to supply her with necessaries cannot be restricted by giving notice to particular persons not to trust her. *Bolton v. Prentice*, 2 Strange, 1214; *Harris v. Morris*, 4 Esp. 41; *Watkins v. De Armond*, 89 Ind. 553.

<sup>2</sup> *Hutcheson v. Peck*, 5 Johns. 196; *Love v. Moynahan*, 16 Ill. 277.

<sup>3</sup> *Saunders v. Rodway*, 16 Jur. 1005, 13 Eng. L. & Eq. 463.

the express assent of the father, or by being turned away from his father's house, and left to care for himself;<sup>1</sup> though in neither case would the father be released from an obligation which the law imposes upon him to prevent the child becoming a public charge, and which the State may enforce whenever necessary. The mother, during the father's life, has a power of control subordinate to his; but on his death,<sup>2</sup> or conviction and sentence to imprisonment for felony,<sup>3</sup> she succeeds to the relative rights which the father possessed before.<sup>4</sup> [A statute which declares the consent of public officers, or any guardian, to the adoption of a child a legal substitute for the consent of living, natural parents is an unconstitutional deprivation of rights.<sup>5</sup>]

<sup>1</sup> *Whiting v. Earle*, 3 Pick. 201, 15 Am. Dec. 207; *McCoy v. Huffman*, 8 Cow. 841; *State v. Barrett*, 45 N. H. 15; *Wolcott v. Rickey*, 22 Iowa, 171; *Fairhurst v. Lewis*, 23 Ark. 435; *Hardwick v. Pawlet*, 36 Vt. 320; *Swift v. Johnson*, 138 Fed. 867, 71 C. C. A. 619, 1 L. R. A. (N. S.) 1161; *Vance v. Calhoun*, 77 Ark. 35, 90 S. W. 619, 113 Am. St. Rep. 111; *Smith v. Gilbert*, 80 Ark. 525, 98 S. W. 115, 8 L. R. A. (N. S.) 1098; *Rounds v. McDaniel*, 133 Ky. 669, 118 S. W. 956, 134 Am. St. Rep. 482, 19 Ann. Cas. 326; *Lufkin v. Harvey*, 131 Minn. 238, 154 N. W. 1097, L. R. A. 1916 B, 1111; *Hunycut v. Thompson*, 159 N. C. 29, 74 S. E. 628, 40 L. R. A. (N. S.) 488, Ann. Cas. 1913 E. 928.

<sup>2</sup> *Dedham v. Natick*, 16 Mass. 135; *Com'rs Harford Co. v. Hamilton*, 60 Md. 340; *McGarr v. National, etc., Worsted Mills*, 24 R. I. 447, 53 Atl. 320, 96 Am. St. Rep. 749, 60 L. R. A. 122.

<sup>3</sup> *Bailey's Case*, 6 Dowl. P. C. 311. If, however, there be a guardian appointed for the child by the proper court, his right to the custody of the child is superior to that of the parent. *Macready v. Wolcott*, 33 Conn. 321.

<sup>4</sup> Upon the principle that an ounce of prevention is worth a pound of cure, the State is asserting more and more control over children allowed by their parents to grow up in evil associations, and for the prevention of crime to which such courses so strongly tend recent statutes authorize the summary arrest and detention, in reform schools

and like institutions, of youth of incorrigibly vicious habits. Such detention is not looked upon as imprisonment and punishment to the validity of which a jury trial is necessary. *State v. Brown*, 50 Minn. 353, 52 N. W. 935, 36 Am. St. 651, 16 L. R. A. 691, and note on commitment of minors to reformatories without conviction of crime. To the same effect, see *Lee v. McClelland*, 157 Ind. 84, 60 N. E. 692.

<sup>5</sup> *Lacher v. Venus*, 177 Wis. 558, 188 N. W. 613, 24 A. L. R. 403. The court said: "The unit of the State is the individual, its foundation the family. To protect the unit in his constitutionally guaranteed right to form and preserve the family is one of the basic principles for which organized government is established. *Cooley, Torts*, 3d ed. p. 27. That natural parenthood implies both substantial responsibilities and gives substantial rights needs no discussion. That willful neglect to perform the one may properly result in the forfeiture of the other is also not open to debate, and not here for consideration. A natural affection between the parents and offspring, though it may be naught but a refined animal instinct and stronger from the parent down than from the child up, has always been recognized as an inherent natural right, for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and pursuit of happiness, our government is founded."



3. The guardian has a power of control over his ward, corresponding in the main to that which the father has over his child, though in some respects more restricted, while in others it is broader. The appointment of guardian, when made by the courts, is of local force only, being confined to the State in which it is made, and the guardian would have no authority to change the domicile of the ward to another State or country. But the appointment commonly has reference to the possession of property by the ward, and over this property the guardian is given a power of control which is not possessed by the father, as such, over the property owned by his child.<sup>1</sup>

4. The relation of master and apprentice is founded on a contract between the two, generally with the consent of the parent or party standing *in loco parentis* to the latter, by which the master is to teach the apprentice some specified trade or means of living, and the apprentice, either wholly or in part in consideration of the instruction, is to perform services for the master while receiving it. This relation is also statutory and local, and the power to control the apprentice is assimilated to that of the parent by the statute law.<sup>2</sup>

5. The power of the master to impose restraints upon the action of the servant he employs is of so limited a nature that practically it may be said to rest upon continuous voluntary assent. If the servant misconducts himself, or refuses to submit to proper control, the master may discharge him, but cannot resort to confinement or personal chastisement.

6. The relation of teacher and scholar places the former more nearly in the place of the parent than either of the two preceding relations places the master. While the pupil is under his care, he has a right to enforce obedience to his commands lawfully given in his capacity of teacher, even to the extent of bodily chastisement or confinement. And in deciding questions of discipline he acts judicially, and is not to be made liable, either civilly or criminally, unless he has acted with express malice, or been guilty of such excess in punishment that malice may fairly be implied. All presumptions favor the correctness and justice of his action.<sup>3</sup>

<sup>1</sup> Cooley's Bl. Com. 462, and cases cited.

<sup>2</sup> The relation is one founded on personal trust and confidence, and the master cannot assign the articles of apprenticeship except by consent of the apprentice and of his proper guardian. *Haley v. Taylor*, 3 Dana,

222; *Nickerson v. Howard*, 19 Johns. 113; *Tucker v. Magee*, 18 Ala. 99.

<sup>3</sup> *State v. Pendergrass*, 2 Dev. & Bat. 365; *Cooper v. McJunkin*, 4 Ind. 290; *Commonwealth v. Randall*, 4 Gray, 38; *Anderson v. State*, 3 Head, 455; *Lander v. Seaver*, 32 Vt. 114; *Morrow v. Wood*, 35 Wis. 59; *Patterson v.*

7. Where parties bail another, in legal proceedings, they are regarded in law as his jailers, selected by himself, and with the right to his legal custody for the purpose of seizing and delivering him up to the officers of the law at any time before the liability of the bail has become fixed by a forfeiture being judicially declared on his failure to comply with the condition of the bond.<sup>1</sup> This is a right which the bail may exercise in person or by agent, and without resort to judicial process.<sup>2</sup>

8. The control of the creditor over the person of his debtor, through the process which the law gives for the enforcement of his demand, is now very nearly abolished, thanks to the humane provisions which have been made of late by statute or by constitution. In cases of torts and where debts were fraudulently contracted, or where there is an attempt at a fraudulent disposition of property with intent to delay the creditor, or to deprive him of payment, the body of the debtor is allowed to be seized and confined; but the reader must be referred to the constitution and statutes of his State for specific information on this subject.<sup>3</sup>

Nutter, 78 Me. 509, 7 Atl. 273; Sheehan v. Sturges, 53 Conn. 481, 2 Atl. 841; Vanvactor v. State, 113 Ind. 276, 15 N. E. 341.

<sup>1</sup> Harp v. Osgood, 2 Hill, 216; Commonwealth v. Brickett, 8 Pick. 138; Worthen v. Prescott, 60 Vt. 68, 11 Atl. 690; Metograph Mfg. Co. v. Scrugham, 197 N. Y. 377, 90 N. E. 962, 134 Am. St. Rep. 886, 27 L. R. A. (N. S.) 333; Carr v. Sutton, 70 W. Va. 417, 74 S. E. 239, Ann. Cas. 1913 E, 453.

The principal may be followed, if necessary, out of the jurisdiction of the court in which the bail was taken, and arrested wherever found. Parker v. Bidwell, 3 Conn. 84. Even though it be out of the State. Harp v. Osgood, *supra*; Sallee v. Werner, 171 Ill. App. 96. And doors, if necessary, may be broken in order to make the arrest. Read v. Case, 4 Conn. 166, 10 Am. Dec. 110; Nicolls v. Ingersoll, 7 Johns. 145. After the recognizance is defaulted, surrender does not discharge the bail. State v. McGuire, 16 R. I. 519, 17 Atl. 918. Nor will surrender discharge surety on bond for the support of a deserted wife. Miller v. Com., 127 Pa. St. 122, 17 Atl. 864.

<sup>2</sup> Parker v. Bidwell, 3 Conn. 84; Nicolls v. Ingersoll, 7 Johns. 145;

Worthen v. Prescott, 60 Vt. 68, 11 Atl. 690; Carr v. Sutton, 70 W. Va. 417, 74 S. E. 239, Ann. Cas. 1913 E, 453.

<sup>3</sup> A statute making it a punishable offense to issue a check with no funds to meet it does not impose imprisonment for debt. Hollis v. State, 152 Ga. 182, 108 S. E. 783; State v. Avery, 111 Kan. 588, 207 Pac. 838, 23 A. L. R. 453; State v. Pilling, 53 Wash. 464, 102 Pac. 230, 132 Am. St. Rep. 1080.

Obligation arising under order of court to pay money for support of a husband, is not a debt. Livingston v. Los Angeles Sup. Ct., 117 Cal. 633, 49 Pac. 836, 38 L. R. A. 175. And a defendant may be imprisoned for refusing to pay alimony as ordered. Barclay v. Barclay, 184 Ill. 375, 56 N. E. 636, 51 L. R. A. 351; State v. Cook, 66 Ohio, 566, 64 N. E. 567; Lane v. Lane, 27 App. D. C. 171; Lamar v. Lamar, 123 Ga. 827, 51 S. E. 763, 107 Am. St. Rep. 169, 3 Ann. Cas. 294; Perry v. Pernet, 165 Ind. 57, 74 N. E. 609, 6 Ann. Cas. 533; Bowman v. Wayne Circuit Judge, 214 Mich. 518, 183 N. W. 232; Cain v. Miller, 109 Neb. 441, 191 N. W. 704, 30 A. L. R. 125; *In re Phillips*, 43 Nev. 368, 187

These, then, are the legal restraints upon personal liberty. For any other restraint, or for any abuse of the legal rights which have been specified, the party restrained is entitled to immediate process from the courts, and to speedy relief.

The right to personal liberty did not depend in England on any statute, but it was the birthright of every freeman. As slavery ceased it became universal, and the judges were bound to protect it by proper writ when infringed. But in those times when the power of Parliament was undefined and in dispute, and the judges held their offices only during the king's pleasure, it was almost a matter of course that rights should be violated, and that legal redress should be impracticable, however clear those rights might be. But in many cases it was not very clear what the legal rights of parties were. The courts which proceeded according to the course of the common law, as well as the courts of chancery, had limits to their authority which could be understood, and a definite course of proceeding was marked out for them by statute or by custom; and if they exceeded their jurisdiction and invaded the just liberty of the subject, the illegality of the process would generally appear in the proceedings. But there were two tribunals unknown to the common law, but exercising a most fearful authority, against whose abuses it was not easy for the most upright and conscientious judge in all cases to afford relief. These were, 1. The Court of Star Chamber, which became fully recognized and established in the time of Henry VII., though originating long before. Its jurisdiction extended to all sorts of offenses, contempts of authority and disorders, the punishment of which was not supposed to be adequately provided for by the common law; such as slanders of persons in authority, the propagation of seditious news, refusal to lend money to the king, disregard of executive proclamations, etc. It imposed fines without limit, and inflicted any punishment in the discretion of its judges short of death. Even jurors were punished in this court for verdicts in State trials not satisfactory to the authorities. Although the king's chancellor and judges were entitled to seats in this court, the actual exercise of its powers appears to have fallen into the

Pac. 311; *Adams v. Adams*, 80 N. J. Eq. 175, 83 Atl. 190; *Hoffman v. Hoffman*, 28 Ohio C. C. 658; *In re Whallon*, 6 Ohio App. 80; *State v. English*, 101 S. C. 304, 85 S. E. 721, L. R. A. 1915 F, 979; *Fritz v. Fritz*, 45 S. D. 392, 187 N. W. 719; *Ex parte Davis*, 101 Tex. 607, 111 S. W. 394, 17 L. R. A. (N. S.) 1140; *West v.*

*West*, 126 Va. 696, 101 S. E. 876; *Smith v. Smith*, 81 W. Va. 761, 95 S. E. 199, 8 A. L. R. 1149.

Person removing baggage from hotel or lodging-house when such baggage is subject to lien for unpaid bills may be punished by imprisonment. *State v. Engle*, 156 Ind. 339, 58 N. E. 698.

hands of the king's privy council, which sat as a species of inquisition, and exercised almost any authority it saw fit to assume.<sup>1</sup> The court was abolished by the Long Parliament in 1641. 2. The Court of High Commission, established in the time of Elizabeth, and which exercised a power in ecclesiastical matters corresponding to that which the Star Chamber assumed in other cases, and in an equally absolute and arbitrary manner. This court was also abolished in 1641, but was afterwards revived for a short time in the reign of James II.

It is evident that while these tribunals existed there could be no effectual security to liberty. A brief reference to the remarkable struggle which took place during the reign of Charles I. will perhaps the better enable us to understand the importance of those common-law protections to personal liberty to which we shall have occasion to refer, and also of those statutory securities which have since been added.

When the king attempted to rule without the Parliament, and in 1625 dissolved that body, and resorted to forced loans, the grant of monopolies, and the levy of ship moneys, as the means of replenishing a treasury that could only lawfully be supplied by taxes granted by the commons, the privy council was his convenient means of enforcing compliance with his will. Those who refused to contribute to the loans demanded were committed to prison. When they petitioned the Court of the King's Bench for their discharge, the warden of the Fleet made return to the writ of *habeas corpus* that they were detained by warrant of the privy council, informing him of no particular cause of imprisonment, but that they were committed by the special command of his majesty. Such a return presented for the decision of the court the question, "Is such a warrant, which does not specify the cause of detention, valid by the laws of England?" The court held that it was, justifying their decision upon supposed precedents, although, as Mr. Hallam says, "it was evidently the consequence of this decision that every statute from the time of Magna Charta, designed to protect the personal liberties of Englishmen, became a dead letter, since the insertion of four words in a warrant (*per speciale mandatum regis*), which might become matter of form, would control their remedial efficacy. And

<sup>1</sup> See Hallam, Constitutional History, c. 1 and 8; Todd, Parliamentary Government in England, Vol. II. c. 1. The rise and extension of authority of this court, and its arbitrary character, are very fully set forth in Brodie's Constitutional History of the British

Empire, to which the reader is referred for more particular information. As to the origin of this court, its history, membership, procedure, jurisdiction and abolition, see also Holdsworth's History of English Law, Vol. I, pp. 493-516.

this wound was the more deadly in that the notorious cause of these gentlemen's imprisonment was their withstanding an illegal exaction of money. Everything that distinguished our constitutional laws, all that rendered the name of England valuable, was at stake in this issue."<sup>1</sup> This decision, among other violent acts, led to the Petition of Right, one of the principal charters of English liberty, but which was not assented to by the king until the judges had intimated that if he saw fit to violate it by arbitrary commitments, they would take care that it should not be enforced by their aid against his will. And four years later, when the king committed members of Parliament for words spoken in debate offensive to the royal prerogative, the judges evaded the performance of their duty on *habeas corpus*, and the members were only discharged when the king gave his consent to that course.<sup>2</sup>

The Habeas Corpus Act was passed in 1679, mainly to prevent such abuses and other evasions of duty by judges and ministerial officers, and to compel prompt action in any case in which illegal imprisonment was alleged. That act gave no new right to the subject, but it furnished the means of enforcing those which existed before.<sup>3</sup> The preamble recited that "whereas great delays have been used by sheriffs, jailers, and other officers to whose custody any of the king's subjects have been committed for criminal or supposed criminal matters, in making returns of writs of *habeas corpus*, to them directed, by standing out on *alias* or *pluries habeas corpus*, and sometimes more, and by other shifts to avoid their yielding obedience to such writs, contrary to their duty and the known laws of the land, whereby many of the king's subjects have been and hereafter may be long detained in prison in such cases, where by law they are bailable, to their great charge and vexation. For the prevention whereof, and the more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters", the act proceeded to make elaborate and careful provisions for the future. The important provisions of the act may be summed up as follows: That the writ of *habeas corpus* might be issued by any court of record or judge thereof, either in term-time or vacation, on the application of any person confined, or of any person for him; the application to be in writing and on oath, and with a copy of the warrant of commitment attached, if procurable; the writ to be returnable either in court

<sup>1</sup> Hallam, Const. Hist. c. 7. See also Brodie, Const. Hist. Vol. II. c. 1.

<sup>2</sup> Hallam, Const. Hist. c. 8; Brodie, Const. Hist. Vol. I. c. 8.

<sup>3</sup> Hallam, Const. Hist. c. 13;

Beeching's Case, 4 B. & C. 136; Matter of Jackson, 15 Mich. 436. For a valuable article on the History of the Writ of Habeas Corpus, see 18 Law Quar. Rev. 64.

or at chambers; the person detaining the applicant to make return to the writ by bringing up the prisoner with the cause of his detention, and the court or judge to discharge him unless the imprisonment appeared to be legal, and in that case to take bail if the case was bailable; and performance of all these duties was made compulsory, under heavy penalties. Thus the duty which the judge or other officer might evade with impunity before, he must now perform or suffer punishment. The act also provided for punishing severely a second commitment for the same cause, after a party had once been discharged on *habeas corpus*, and also made the sending of inhabitants of England, Wales, and Berwick-upon-Tweed abroad for imprisonment illegal, and subject to penalty. Important as this act was,<sup>1</sup> it was less broad in its scope than the remedy had been before, being confined to cases of imprisonment for criminal or supposed criminal matters;<sup>2</sup> but the attempt in Parliament nearly a century later to extend its provisions to other cases was defeated by the opposition of Lord *Mansfield*, on the express ground that it was unnecessary, inasmuch as the common-law remedy was sufficient;<sup>3</sup> as perhaps it might have been, had officers been always disposed to perform their duty. Another attempt in 1816 was successful.<sup>4</sup>

The Habeas Corpus Act was not made, in express terms, to extend to the American colonies, but it was in some expressly, and in others by silent acquiescence, adopted and acted upon, and all the subsequent legislation in the American States has been based upon it, and has consisted in little more than a re-enactment of its essential provisions.

### *What Courts Issue the Writ.*

The protection of personal liberty is for the most part confided to the State authorities, and to the State courts the party must apply for relief on *habeas corpus* when illegally restrained. There are only a few cases in which the Federal courts can interfere; and those are cases in which either the illegal imprisonment is under pretense of national authority, or in which this process becomes important or convenient in order to enforce or vindicate some right, or authority under the Constitution or laws of the United States.

<sup>1</sup> Mr. Hurd, in the appendix to his excellent treatise on the Writ of Habeas Corpus, gives a complete copy of the act. See also appendix to Lieber, *Civil Liberty and Self-Government*; Broom, *Const. Law*, 218.

<sup>2</sup> See *Mayor of London's Case*, 3

Wils. 198; *Wilson's Case*, 7 Queen's Bench Rep. 984.

<sup>3</sup> *Life of Mansfield by Lord Campbell*, 2 *Lives of Chief Justices*, c. 35; 15 *Hansard's Debates*, 897 *et seq.*

<sup>4</sup> By Stat. 56 Geo. III. c. 100. See Broom, *Const. Law*, 224.

The Judiciary Act of 1789 provided that each of the several Federal courts should have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which might be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law; and that either of the justices of the Supreme Court, as well as the district judges, should have power to grant writs of *habeas corpus* for the purposes of an inquiry into the cause of commitment; provided that in no case should such writs extend to prisoners in jail, unless where they were in custody under or by color of the authority of the United States, or were committed to trial before some court of the same, or were necessary to be brought into court to testify.<sup>1</sup> Under this statute no court of the United States or judge thereof could issue a *habeas corpus* to bring up a prisoner in custody under a sentence or execution of a State court, for any other purpose than to be used as a witness. And this was so whether the imprisonment was under civil or criminal process.<sup>2</sup>

During what were known as the nullification troubles in South Carolina, the defect of Federal jurisdiction in respect to this writ became apparent, and another act was passed, having for its object, among other things, the protection of persons who might be prosecuted under assumed State authority for acts done under the laws of the United States. This act provided that either of the justices of the Supreme Court, or a judge of any District Court of the United States, in addition to the authority already conferred by law, should have power to grant writs of *habeas corpus* in all cases of a prisoner or prisoners in jail or confinement, where he or they shall be committed or confined on or by any authority of law, for any act done or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree of any judge or court thereof.<sup>3</sup>

<sup>1</sup> 1 Statutes at Large, 81.

<sup>2</sup> *Ex parte Dorr*, 3 How. 103, 11 L. ed. 514.

<sup>3</sup> 4 Stat. at Large, 634. See *Ex parte Robinson*, 6 McLean, 355, 1 Bond, 39. Robinson was United States marshal, and was imprisoned under a warrant issued by a State court for executing process under the Fugitive Slave Law, and was discharged by a justice of the Supreme Court of the United States under this act. See also *United States v. Jailer of Fayette Co.*, 2 Abb. U. S. 265. The relator in that case was in custody of the jailer under a regular commit-

ment charging him under the laws of Kentucky with murder. He averred and offered to show that the act with which he was charged was done by him under the authority of the United States, and in execution of its laws. The Federal district judge entered upon an examination of the facts on *habeas corpus*, and ordered the relator discharged.

A similar ruling has been made where a marshal was charged in a State court with murder committed while protecting a Justice of the Supreme Court from an attack. *In re Neagle*, 39 Fed. Rep. 833, aff. 135 U.

In 1842 further legislation seemed to have become a necessity, in order to give to the Federal courts authority upon this writ over cases in which questions of international law were involved, and which, consequently, could properly be disposed of only by the jurisdiction to which international concerns were by the Constitution committed. The immediate occasion for this legislation was the arrest of a subject of Great Britain by the authorities of the State of New York, for an act which his government avowed and took the responsibility of, and which was the subject of diplomatic correspondence between the two nations. An act of Congress was consequently passed, which provides that either of the justices of the Supreme Court, or any judge of any District Court of the United States in which a prisoner is confined, in addition to the authority previously conferred by law, shall have power to grant writs of *habeas corpus* in all cases of any prisoner or prisoners in jail or confinement, where he, she, or they, being subjects or citizens of a foreign State, and domiciled therein, shall be committed, or confined, or in custody, under, or by any authority, or law, or process founded thereon, of the United States or of any one of them, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, or order, or sanction of any foreign State or sovereignty, the validity or effect whereof depends upon the law of nations, or under color thereof.<sup>1</sup>

In 1867 a further act was passed, which provided that the several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or

S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658. See also *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Ex parte Clark*, 100 U. S. 399, 25 L. ed. 715; *Ex parte Bridges*, 2 Woods, 428; *Ex parte McKean*, 3 Hughes, 23; *Ex parte Jenkins*, 2 Wall. Jr. 521; *United States v. Lewis*, 200 U. S. 1, 50 L. ed. 343, 26 Sup. Ct. Rep. 229; *Hunter v. Wood*, 209 U. S. 205, 52 L. ed. 747, 28 Sup. Ct. Rep. 272; *West Virginia v. Laing*, 133 Fed. 887, 66 C. C. A. 617, affirming 127 Fed. 213; *In re Leaken*, 137 Fed. 680; *United States v. Lipsett*, 156 Fed. 65; *In re*

*Wulzen*, 235 Fed. 362, Ann. Cas. 1917 A, 274; *Castle v. Lewis*, 254 Fed. 917, 166 C. C. A. 279.

<sup>1</sup> 5 Stat. at Large, 539. McLeod's Case, which was the immediate occasion of the passage of this act, will be found reported in 25 Wend. 482, and 1 Hill, 377, 37 Am. Dec. 328. It was reviewed by Judge Talmadge in 26 Wend. 663, and a reply to the review appears in 3 Hill, 635. For a construction of the act see also *Horn v. Mitchell*, 223 Fed. 549, affirmed 232 Fed. 819, 147 C. C. A. 13, and appeal dismissed, 243 U. S. 247, 61 L. ed. 700, 37 Sup. Ct. Rep. 293.



law of the United States.<sup>1</sup> [The Circuit Court of Appeals is a court created by statute, and is not endowed with original jurisdiction, and since there is no language in the statute which can be construed into a grant of power to issue a writ of *habeas corpus*, unless it is one in aid of the jurisdiction already existing, the court is not authorized to issue original or independent writs of *habeas corpus*.<sup>2</sup>]

These are the cases in which the national courts and judges have

<sup>1</sup> R. S. U. S. § 751 *et seq.* See *In re Brosnahan*, 18 Fed. Rep. 62; *In re Ah Jow*, 29 Fed. Rep. 181; *In re Chow Goo Pooi*, 25 Fed. Rep. 77; *Ex parte Terry*, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77; *Howard v. Fleming*, 191 U. S. 126, 48 L. ed. 121, 24 Sup. Ct. Rep. 49; *Carfer v. Caldwell*, 200 U. S. 293, 50 L. ed. 488, 26 Sup. Ct. Rep. 264; *Rogers v. Peck*, 199 U. S. 425, 26 Sup. Ct. Rep. 87, 50 L. ed. 256; *Pettibone v. Nichols*, 203 U. S. 192, 51 L. ed. 148, 27 Sup. Ct. Rep. 111, 7 Ann. Cas. 1047; *Frank v. Mangum*, 237 U. S. 309, 59 L. ed. 969, 35 Sup. Ct. Rep. 582; *Collins v. Johnston*, 237 U. S. 502, 59 L. ed. 1071, 35 Sup. Ct. Rep. 649; *Ex parte Green*, 114 Fed. 959; *Ex parte Moebus*, 137 Fed. 154; *Ex parte Brown*, 140 Fed. 461; *Ex parte Munn*, 140 Fed. 782; *Ex parte Moebus*, 148 Fed. 39; *Connella v. Haskell*, 158 Fed. 285, 87 C. C. A. 111; *Ex parte Connort*, 188 Fed. 398; *Ex parte Jaunszewski*, 196 Fed. 123; *Ex parte Larsen*, 233 Fed. 708; *Ex parte Ramsey*, 265 Fed. 950; *United States v. Briggs*, 266 Fed. 434.

Except in cases of peculiar emergency the Federal courts should not exercise the power to grant writs of *habeas corpus* to inquire into the cause of the restraint of liberty of any person under authority of a State, in violation of the constitution, laws or treaties of the United States, but should leave the person to pursue his remedy by writ of error to the Federal Supreme Court, after final determination of his case in the State courts. *Tinsley v. Anderson*, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805.

While in advance of trial in a State court for an offense against a State law which is void under the Federal Constitution, a Federal court may discharge a defendant, yet ordinarily when

bail is granted it will not do so. *Ex parte Royall*, 117 U. S. 241, 254, 29 L. ed. 868, 872, 6 Sup. Ct. Rep. 734, 742.

"In cases involving the deportation of aliens the district courts of the United States may issue the writ of *habeas corpus* to determine whether the alien who is held by the immigration officials of the government for deportation, as not being entitled to enter or remain in this country, has had a fair hearing under the immigration acts." *United States ex rel. Carapa v. Curran*, 297 Fed. 946, 36 A. L. R. 877. See also *Ng Fung Ho v. White*, 259 U. S. 276, 66 L. ed. 938, 42 Sup. Ct. Rep. 492.

<sup>2</sup> *Whitney v. Dick*, 202 U. S. 132, 50 L. ed. 963, 26 Sup. Ct. Rep. 584. The court said: "The writ of *habeas corpus* is not the equivalent of an appeal or writ of error. It is not a proceeding to correct errors which may have occurred in the trial of the case below. It is an attack directly upon the validity of the judgment, and, as has been frequently said, it cannot be transformed into a writ of error. It is doubtless true that if the language of the Court of Appeals Act was fairly susceptible of two constructions, one granting and one omitting to grant power to issue a writ of *habeas corpus*, the great importance of the writ might justify a construction upholding the grant. . . . But in the Court of Appeals Act there is no mention of *habeas corpus*, no language which can be tortured into a grant of power to issue the writ, except in cases where it may be necessary for the exercise of a jurisdiction already existing." See also *Ex parte Lamar*, 274 Fed. 160, 24 A. L. R. 864, affirmed 260 U. S. 711, 43 Sup. Ct. Rep. 251, 67 L. ed. 476.

jurisdiction of this writ: in other cases the party must seek his remedy in the proper State tribunal.<sup>1</sup> And although the State courts formerly claimed and exercised the right to inquire into the lawfulness of restraint under the national authority,<sup>2</sup> it is now settled by the decision of the Supreme Court of the United States, that the question of the legality of the detention in such cases is one for the determination, exclusively, of the Federal judiciary, so that, although a State court or judge may issue this process in any case where illegal restraint upon liberty is alleged, yet when it is served upon any officer or person who detains another in custody under the national authority, it is his duty, by proper return, to make known to the State court or judge the authority by which he holds such person, but not further to obey the process; and that as the State judiciary have no authority within the limits of the sovereignty assigned by the Constitution to the United States, the State court or judge can proceed no further with the case.<sup>3</sup>

<sup>1</sup> *Ex parte Dorr*, 3 How. 103, 11 L. ed. 514; *Barry v. Mercein*, 5 How. 103, 12 L. ed. 70; *De Krafft v. Barney*, 2 Black, 704, 17 L. ed. 350. See *United States v. French*, 1 Gall. 1; *Ex parte Barry*, 2 How. 65, 11 L. ed. 181. For valuable note upon *habeas corpus*, collecting many cases, see 43 L. ed. U. S. 92.

<sup>2</sup> See the cases collected in Hurd on Habeas Corpus, B. 2, c. 1, § 5, and in Abb. Nat. Dig. 609, note.

<sup>3</sup> *Ableman v. Booth*, 21 How. 506, 16 L. ed. 169; *In re Lee Loak*, 146 Cal. 567, 80 Pac. 858; *In re Thompson*, 85 N. J. Eq. 221, 96 Atl. 102. See *Norris v. Newton*, 5 McLean, 92; *United States v. Rector*, 5 McLean, 174; *Spangler's Case*, 11 Mich. 298; *In re Hopson*, 40 Barb. 34; *Ex parte Hill*, 5 Nev. 154; *Ex parte Le Bur*, 49 Cal. 159.

Notwithstanding the decision of *Ableman v. Booth*, the State courts have frequently since assumed to pass definitely upon cases of alleged illegal restraint under Federal authority, and this, too, by the acquiescence of the Federal officers. As the remedy in the State courts is generally more expeditious and easy than can be afforded in the national tribunals, it is possible that the Federal authorities may still continue to acquiesce in such action of the State courts, in cases where

there can be no reason to fear that they will take different views of the questions involved from those likely to be held by the Federal courts. Nevertheless, while the case of *Ableman v. Booth* stands unreversed, the law must be held to be as there declared. It has been approved in *Tarble's Case*, 13 Wall. 397, 20 L. ed. 597, Chief Justice *Chase* dissenting.

An agent of a State to receive from another State a person under extradition proceedings is not an officer of the United States, nor is his detention of the prisoner so far under national authority that a State court may not compel him to bring in the prisoner for an inquiry into the legality of his detention; that is, whether the warrant and the delivery to the agent were in conformity to the Federal statutes. In summing up the discussion *Harlan, J.*, says: "Subject, then, to the exclusive and paramount authority of the national government, by its own judicial tribunals, to determine whether persons held in custody by authority of the courts of the United States, or by the commissioners of such courts, or by officers in the general government, acting under its laws, are so held in conformity with law, the States have the right, by their own courts, or by the judges thereof, to inquire into the

The State constitutions recognize the writ of *habeas corpus* as an existing remedy in the cases to which it is properly applicable, and designate the courts or officers which may issue it; but they do not point out the cases in which it may be employed. Upon this subject the common law and the statutes must be our guide; and although the statutes will be found to make specific provision for particular cases, it is believed that in no instance which has fallen under our observation has there been any intention to restrict the remedy, and make it less broad and effectual than it was at the common law.<sup>1</sup>

We have elsewhere referred to certain rules regarding the validity of judicial proceedings.<sup>2</sup> In the great anxiety on the part of our legislatures to make the most ample provision for speedy relief from unlawful confinement, authority to issue the writ of *habeas corpus* has been conferred upon inferior judicial officers, who make use of it sometimes as if it were a writ of error, under which they might correct the errors and irregularities of other judges and courts, whatever their relative jurisdiction and dignity. Any such employment of the writ is an abuse.<sup>3</sup> Where a party who is in confinement under

grounds upon which any person, within their respective territorial limits, is restrained of his liberty, and to discharge him, if it be ascertained that such restraint is illegal; and this, notwithstanding such illegality may arise from a violation of the Constitution or the laws of the United States." *Robb v. Connolly*, 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544.

<sup>1</sup> See *Matter of Jackson*, 15 Mich. 417, where this whole subject is fully considered.

"Statutes regulating the use of the writ do not preclude the operation of common law principles in the use of the writ unless such intent is manifest in the statutes." *Porter v. Porter*, 60 Fla. 407, 53 So. 546, Ann. Cas. 1912 C, 867.

The application for the writ is not necessarily made by the party in person, but may be made by any other person on his behalf, if a sufficient reason is stated for its not being made by him personally. *The Hottentot Venus Case*, 13 East, 195; *Child's Case*, 29 Eng. L. & Eq. 259; *Ex parte Dostal*, 243 Fed. 664; *Addis v. Applegate*, 171 Iowa, 150, 154 N. W. 168, Ann. Cas. 1917 E, 332; *In re Mould*,

162 Mich. 1, 126 N. W. 1049; *People v. Bond*, 104 App. Div. 47, 93 N. Y. Supp. 277; *Winnovich v. Emery*, 33 Utah, 345, 93 Pac. 988.

A wife may have the writ to release her husband from unlawful imprisonment, and may herself be heard on the application. *Cobbett's Case*, 15 Q. B. 181, note; *Cobbett v. Hudson*, 10 Eng. L. & Eq. 318; s. c. 15 Q. B. 988. Lord *Campbell* in this case cites the case of the wife of John Bunyan, who was heard on his behalf when in prison. See note to 43 L. ed. U. S. 92.

<sup>2</sup> See *post*, p. 845 *et seq.*

<sup>3</sup> *Ex parte Clay*, 98 Mo. 578, 11 S. W. 998; *State v. Hayden*, 35 Minn. 283, 28 N. W. 659; *Willis v. Bayles*, 105 Ind. 363, 5 N. E. 8; *State v. Orton*, 67 Iowa, 554, 25 N. W. 775; *People v. Liscomb*, 60 N. Y. 559, 574; *Petition of Crandall*, 34 Wis. 177; *Ex parte Van Hagan*, 25 Ohio St. 426; *Ex parte Shaw*, 7 Ohio St. 81; *Ex parte Parks*, 93 U. S. 18, 23, 23 L. ed. 787; *Perry v. State*, 41 Tex. 488; *Matter of Underwood*, 30 Mich. 502; *Matter of Eaton*, 27 Mich. 1; *In re Burger*, 39 Mich. 203; *Ex parte Simmons*, 62 Ala. 416; *Re Stupp*, 12 Blatch. 501; *Ex parte Winslow*, 9

Nev. 71; *Ex parte* Hartman, 44 Cal. 32; *In re* Falvey, 7 Wis. 630; *Petition of Semler*, 41 Wis. 517; *In re* Stokes, 5 Sup. Ct. (N. Y.) 71; *Prohibitory Amendment Cases*, 24 Kan. 700; *Ex parte* Thompson, 93 Ill. 89; *Ex parte* Fernandez, 10 C. B. (N. S.) 2, 37; *Dimmick v. Tompkins*, 194 U. S. 540, 48 L. ed. 1110, 24 Sup. Ct. Rep. 780; *Felts v. Murphy*, 201 U. S. 123, 50 L. ed. 689, 26 Sup. Ct. Rep. 366; *Whitney v. Dick*, 202 U. S. 132, 50 L. ed. 963, 26 Sup. Ct. Rep. 584; *In re* Lincoln, 202 U. S. 178, 50 L. ed. 984, 26 Sup. Ct. Rep. 602; *Toy Toy v. Hopkins*, 212 U. S. 542, 53 L. ed. 644, 29 Sup. Ct. Rep. 416; *Peckham v. Henkel*, 216 U. S. 483, 54 L. ed. 579, 30 Sup. Ct. Rep. 255; *Wise v. Henkel*, 220 U. S. 556, 55 L. ed. 581, 31 Sup. Ct. Rep. 599; *Williams v. Walsh*, 222 U. S. 415, 56 L. ed. 253, 32 Sup. Ct. Rep. 137; *Johnson v. Hoy*, 227 U. S. 245, 57 L. ed. 497, 33 Sup. Ct. Rep. 240; *Ex parte* Spencer, 228 U. S. 652, 57 L. ed. 1010, 33 Sup. Ct. Rep. 709; *Charlton v. Kelly*, 229 U. S. 447, 57 L. ed. 1274, 33 Sup. Ct. Rep. 945, 46 L. R. A. (N. S.) 397; *Collins v. Johnston*, 237 U. S. 505, 59 L. ed. 1071, 35 Sup. Ct. Rep. 649; *York v. Willingham*, 205 Ala. 303, 88 So. 219; *In re* Silvas, 16 Ariz. 41, 140 Pac. 988; *Ex parte* Williams, 99 Ark. 475, 138 S. W. 985; *Ex parte* Smith, 161 Cal. 208, 118 Pac. 710; *Crooke v. Van Pelt*, 76 Fla. 20, 79 So. 166; *Blackstone v. Nelson*, 151 Ga. 706, 108 S. E. 114; *In re* Davis, 23 Idaho, 473, 130 Pac. 786; *Busse v. Barr*, 132 Iowa, 463, 109 N. W. 920; *In re* Sellers, 186 Mass. 301, 71 N. E. 542; *In re* Joseph, 206 Mich. 659, 173 N. W. 358; *State v. Rice*, 145 Minn. 359, 177 N. W. 348; *Buckley v. Hall*, 215 Mo. 93, 114 S. W. 954; *In re* Gomez, 52 Mont. 189, 156 Pac. 1078; *Ex parte* Tani, 29 Nev. 385, 91 Pac. 137, 13 L. R. A. (N. S.) 518; *Ex parte* Cica, 18 N. M. 452, 137 Pac. 589, 51 L. R. A. (N. S.) 373; *People v. Atwell*, 232 N. Y. 96, 133 N. E. 364, 25 A. L. R. 107; *State v. Dunn*, 159 N. C. 470, 74 S. E. 1014; *State v. West*, 139 Tenn. 522, 201 S. W. 743, Ann. Cas. 1918 D, 749; *Ex parte* Gordon, 89 Tex. Cr. 125, 232 S. W. 520; *Winnovich v. Emery*, 33 Utah,

345, 93 Pac. 988; *Smith v. Sullivan*, 33 Wash. 30, 73 Pac. 793; *Franklin v. Brown*, 73 W. Va. 727, 81 S. E. 405, L. R. A. 1915 C, 557; *Ex parte* Beavers, 80 W. Va. 34, 91 S. E. 1076; *Arnold v. Schmidt*, 155 Wis. 55, 143 N. W. 1055. See also *Ex parte* Lamar, 274 Fed. 160, 24 A. L. R. 864, affirmed, 260 U. S. 711, 67 L. ed. 476, 43 Sup. Ct. Rep. 251.

This is so, even though there be no appellate tribunal in which the judgment may be reviewed in the ordinary way. *Ex parte* Plante, 6 Lower Can. Rep. 106.

The writ cannot be used to prevent the commission upon a trial of anticipated errors. *Ex parte* Crouch, 112 U. S. 178, 28 L. ed. 690, 5 Sup. Ct. Rep. 96.

"*Habeas Corpus* and supervisory control are not concurrent remedies, and one cannot be invoked in aid of the other. The former challenges the jurisdiction of the lower court, while the latter concedes jurisdiction." *State v. Fergus County Tenth Judicial Dist. Ct.*, 51 Mont. 195, 149 Pac. 973.

It is worthy of serious consideration whether, in those States where the whole judicial power is by the constitution vested in certain specified courts, it is competent by law to give to judicial officers not holding such courts authority to review, even indirectly, the decisions of the courts, and to discharge persons committed under their judgments. Such officers could exercise only a special statutory authority. Yet its exercise in such cases is not only judicial, but it is in the nature of appellate judicial power. The jurisdiction of the Supreme Court of the United States to issue the writ in cases of confinement under the order of the District Courts, was sustained in *Ex parte* Bollman & Swartwout, 4 Cranch, 75, 2 L. ed. 554, and *Matter of Metzger*, 5 How. 176, 12 L. ed. 104, on the ground that it was appellate. It is original only where a State is a party, or an ambassador, minister, or consul. *Ex parte* Hung Hang, 108 U. S. 552, 27 L. ed. 811, 2 Sup. Ct. Rep. 863. See also *Ex parte* Kearney, 7 Wheat. 38, 5 L. ed. 391; *Ex parte* Watkins, 7 Pet. 568, 8 L. ed. 786; *Ex*

judicial process is brought up on *habeas corpus*, the court or judge before whom he is returned will inquire: 1. Whether the court or officer issuing the process under which he is detained had jurisdiction of the case, and has acted within that jurisdiction in issuing such process.<sup>1</sup> If so, mere irregularities or errors of judgment in the exercise of that jurisdiction must be disregarded on this writ, and must be corrected either by the court issuing the process, or on regular appellate proceedings.<sup>2</sup> 2. If the process is not void for

*parte* Milburn, 9 Pet. 704, 9 L. ed. 280; Matter of Kaine, 14 How. 103, 14 L. ed. 345; Matter of Eaton, 27 Mich. 1; Matter of Buddington, 29 Mich. 472.

<sup>1</sup> People *ex rel.* Doyle v. Atwell, 232 N. Y. 96, 133 N. E. 364, 25 A. L. R. 107.

The validity of the appointment or election of an officer *de facto* cannot be inquired into on *habeas corpus*. *Ex parte* Strahl, 16 Iowa, 369; Russell v. Whiting, 1 Wins. (N. C.) 463; *Ex parte* Ward, 173 U. S. 452, 43 L. ed. 765, 19 Sup. Ct. Rep. 459; Shore v. Splain, 258 Fed. 150, 49 App. (D. C.) 6; *Ex parte* Washington, 13 Ala. App. 609, 68 So. 686; *Ex parte* Gerino, 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249; Allen's Application, 31 Idaho, 295, 170 Pac. 921; State v. Robinson, 132 La. 1017, 62 So. 126; State v. Bailey, 106 Minn. 138, 118 N. W. 676, 130 Am. St. Rep. 592, 19 L. R. A. (N. S.) 775, 16 Ann. Cas. 338; *Ex parte* Simmons, 34 Nev. 493, 125 Pac. 697; State v. Ely, 16 N. D. 569, 113 N. W. 711, 14 L. R. A. (N. S.) 638; *Ex parte* Douros, 97 Ore. 39, 191 Pac. 319; *Ex parte* Settle, 114 Va. 715, 77 S. E. 496; Smith v. Sullivan, 33 Wash. 30, 73 Pac. 793. Otherwise if a mere usurper issues process for the imprisonment of a citizen. *Ex parte* Strahl, *supra*; State v. Bailey, 106 Minn. 138, 118 N. W. 676, 130 Am. St. Rep. 592, 19 L. R. A. (N. S.) 775, 16 Ann. Cas. 338; People v. Hayes, 86 Misc. 88, 149 N. Y. Supp. 115.

If the record shows that relator stands convicted of that which is no crime, he is of course entitled to his discharge. *Ex parte* Kearney, 55 Cal. 212; Henry v. Henkel, 235 U. S. 219, 59 L. ed. 203, 35 Sup. Ct. Rep. 54; *In re* Robinson, 73 Fla. 1068, 75 So. 604, L. R. A. 1918 B, 1148; *In re*

Siegel, 263 Mo. 375, 173 S. W. 1, Ann. Cas. 1917 C, 684; *Ex parte* Rickey, 31 Nev. 82, 100 Pac. 134, 135 Am. St. Rep. 651; Miskimmins v. Shaver, 8 Wyo. 392, 58 Pac. 411, 49 L. R. A. 831. So if punished for contempt in disobeying a void order of court. *In re* Ayers, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Ex parte* Fisk, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724. So if he is held under a sentence which contravenes an express constitutional immunity, as when sentenced a second time for the same offense. Nielsen, Petitioner, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672. See, also, *Ex parte* Royall, 117 U. S. 241, 254, 29 L. ed. 868, 6 Sup. Ct. Rep. 734, 742; *In re* Dill, 32 Kan. 648, 5 Pac. 39; Brown v. Duffus, 66 Iowa, 193, 23 N. W. 396; *Ex parte* Rollins, 80 Va. 314; *Ex parte* Rosenblatt, 19 Nev. 439, 14 Pac. 298.

The question of jurisdiction of a court of limited jurisdiction is open upon this writ. People v. The Warden, &c., 100 N. Y. 20, 2 N. E. 870.

<sup>2</sup> People v. Cassels, 5 Hill, 164; Bushnell's Case, 9 Ohio St. 183; *Ex parte* Watkins, 7 Pet. 568, 8 L. ed. 786; Matter of Metzger, 5 How. 176, 12 L. ed. 104; *Ex parte* Yarbrough, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Ex parte* Harding, 120 U. S. 782, 30 L. ed. 824, 7 Sup. Ct. Rep. 780; Petition of Smith, 2 Nev. 338; *Ex parte* Gibson, 31 Cal. 619; Hammond v. People, 32 Ill. 472, per Breese, J.; Hoadly v. Chase, 126 Fed. 818; State v. Gunter, 11 Ala. App. 399, 66 So. 844; *In re* Farrell, 22 Colo. 461, 45 Pac. 428; State v. Callahan, 93 Kan. 172, 144 Pac. 189; State v. Theisen, (Mo. App.) 142 S. W. 1088; State v. Buckner, 198 Mo. App. 230, 200 S. W. 94; People *ex rel.* Doyle v.

want of jurisdiction, the further inquiry will be made, whether, by law, the case is bailable, and if so, bail will be taken if the party offers it; otherwise he will be remanded to the proper custody.<sup>1</sup> This writ is also sometimes employed to enable a party to enforce a right of control which by law he may have, springing from some one of the domestic relations; especially to enable a parent to obtain the custody and control of his child, where it is detained from him by

Atwell, 232 N. Y. 96, 133 N. E. 364, 25 A. L. R. 107; *Children's Home v. Fetter*, 90 Ohio St. 110, 106 N. E. 761; *Ex parte Barnett*, 74 Tex. Cr. 136, 167 S. W. 845; *State v. Yakima County Super. Ct.*, 108 Wash. 15, 183 Pac. 63.

In *State v. Shattuck*, 45 N. H. 211, *Bellows, J.*, states the rule very correctly as follows: "If the court had jurisdiction of the matter embraced in these causes, this court will not, on *habeas corpus*, revise the judgment. *State v. Towle*, 42 N. H. 541; *Ross's Case*, 2 Pick. 166; and *Riley's Case*, 2 Pick. 171; *Adams v. Vose*, 1 Gray, 51. If in such case the proceedings are irregular or erroneous, the judgment is voidable and not void, and stands good until revised or annulled in a proper proceeding instituted for that purpose; but when it appears that the magistrate had no jurisdiction, the proceedings are void, and the respondent may be discharged on *habeas corpus*. *State v. Towle*, before cited; *Ex parte Kellogg*, 6 Vt. 509. See also *State v. Richmond*, 6 N. H. 232; *Burnham v. Stevens*, 33 N. H. 247; *Hurst v. Smith*, 1 Gray, 49."

"A writ of *habeas corpus* cannot take the place or perform the functions of an appeal from a judgment of conviction. The court before which a person is brought under such writ simply inquires whether the court rendering the judgment had jurisdiction to do so. If that fact appears, and the mandate under which the defendant is held be regular upon its face the writ must be dismissed. *People ex rel. Hubert v. Kaiser*, 206 N. Y. 46, 99 N. E. 195." *People ex rel. Doyle v. Atwell*, 232 N. Y. 96, 133 N. E. 364, 25 A. L. R. 107.

If the court has jurisdiction of an offense, its judgment as to what acts are necessary to constitute it cannot

be reviewed. *In re Coy*, 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263.

<sup>1</sup> *State v. Bauman*, 87 Neb. 273, 126 N. W. 857; *State v. Burnette*, 173 N. C. 734, 91 S. E. 634; *Ex parte Burdine*, (Tex. Cr.) 117 S. W. 152.

It is not a matter of course that the party is to be discharged even where the authority under which he is held is adjudged illegal. For it may appear that he should be lawfully confined in different custody; in which case the proper order may be made for the transfer. *Matter of Mason*, 8 Mich. 70; *Matter of Ring*, 28 Cal. 247; *Ex parte Gibson*, 31 Cal. 619; *Givens v. Zerbst*, 255 U. S. 11, 65 L. ed. 475, 41 Sup. Ct. Rep. 227; *State v. Megs*, 165 Ala. 136, 51 So. 758; *Ex parte McGuire*, 135 Cal. 339, 67 Pac. 327, 87 Am. St. Rep. 105; *State v. Ross*, 24 N. D. 586, 139 N. W. 1051; *Ex parte Vass*, 90 W. Va. 220, 110 S. E. 558. See *People v. Kelly*, 97 N. Y. 212. And where he is detained for trial on an imperfect charge of crime, the court, if possessing power to commit *de novo*, instead of discharging him, should proceed to inquire whether there is probable cause for holding him for trial, and if so, should order accordingly. *Hurd on Habeas Corpus*, 416. See also *Iasigi v. Van de Carr*, 166 U. S. 391, 41 L. ed. 1045, 17 Sup. Ct. Rep. 595; *Ex parte Severin*, 188 Cal. 348, 205 Pac. 101; *Lanford v. Alfriend*, 147 Ga. 799, 95 S. E. 688; *Ex parte Moody*, 104 Miss. 836, 61 So. 741; *In re Jones*, 46 Mont. 122, 126 Pac. 929; *Eureka County Bank Habeas Corpus Cases*, 35 Nev. 80, 126 Pac. 655, 129 Pac. 308; *Connors v. Pratt*, 38 Utah, 258, 112 Pac. 399.

A discharge on *habeas corpus* is, apart from statute, conclusive upon the State. *People v. Fairman*, 59

some other person. The courts, however, do not generally go farther in these cases than to determine what is for the best interest of the child; and they do not feel compelled to remand him to any custody where it appears not to be for the child's interest. The theory of the writ is, that it relieves from improper restraint; and if the child is of an age to render it proper to consult his feelings and wishes, this may be done in any case;<sup>1</sup> and it is especially proper in many cases where the parents are living in separation and both desire his custody. The right of the father, in these cases, is generally recognized as best; but this must depend very much upon circumstances, and the tender age of the child may often be a controlling consideration against his claim. The courts have large discretionary power in these cases, and the tendency of modern decisions has been to extend, rather than restrict it.<sup>2</sup>

Mich. 568, 26 N. W. 569; *State v. Miller*, 97 N. C. 451; *Gagnet v. Reese*, 20 Fla. 438; *Turgeon v. Bean*, 109 Me. 189, 83 Atl. 557, Ann. Cas. 1913 E, 567. A refusal to discharge is not conclusive. Application may be made to another judge. *In re Snell*, 31 Minn. 110, 16 N. W. 692; *In re Kopel*, 148 Fed. 505; *Rogers v. San Francisco Super. Ct.*, 145 Cal. 88, 78 Pac. 344; *People v. Siman*, 284 Ill. 28, 119 N. E. 940; *In re Clark*, 208 Mo. 121, 106 S. W. 990, 15 L. R. A. (N. S.) 389; *In re Webers*, 275 Mo. 677, 205 S. W. 620; *Notestine v. Rogers*, 18 N. M. 462, 138 Pac. 207; *Knapp v. Tolan*, 26 N. D. 23, 142 N. W. 915, 49 L. R. A. (N. S.) 83; *Ex parte Burton*, 58 Okla. 754, 161 Pac. 532; *Ex parte Justus*, 3 Okla. Cr. 111, 104 Pac. 933, 25 L. R. A. (N. S.) 483; *In re Turner*, 92 Vt. 210, 102 Atl. 943. *Contra*, *Perry v. McLendon*, 62 Ga. 598; *McMahon v. Mead*, 30 S. D. 515, 139 N. W. 122. But a statute making such refusal conclusive, unless reversed on appeal, is valid. *Ex parte Hamilton*, 65 Miss. 98, 3 So. 68; *Ford v. Dilley*, 174 Iowa, 243, 156 N. W. 513; *State v. Whitacher*, 117 Wis. 668, 94 N. W. 787, 98 Am. St. Rep. 968; *Heller v. Franke*, 146 Wis. 517, 131 N. W. 991. See *Ex parte Cuddy*, 40 Fed. 62.

<sup>1</sup> *Commonwealth v. Aves*, 18 Pick. 193; *Shaw v. Nachwes*, 43 Iowa, 653; *Garner v. Gordan*, 41 Ind. 92; *People*

*v. Weissenbach*, 60 N. Y. 385; *State v. West*, 139 Tenn. 522, 201 S. W. 743, Ann. Cas. 1918 D, 749.

<sup>2</sup> *Barry's Case* may almost be said to exhaust all the law on this subject. We refer to the various judicial decisions made in it, so far as they are reported in the regular reports. 8 Paige, 47, 25 Wend. 64; *People v. Mercein*, 3 Hill, 399; 2 How. 65, 11 L. ed. 181; *Barry v. Mercein*, 5 How. 104, 12 L. ed. 70. See also *Adams v. Adams*, 1 Duv. 167. For the former rule, see *The King v. De Manneville*, 5 East, 221; *Ex parte Skinner*, 9 J. B. Moore, 278.

The rules of equity prevail at present in England on the question of custody. *In re Brown*, L. R. 13 Q. B. D. 614. Cases illustrating the doctrine that the good of the child will control: *Com. v. Hart*, 14 Phila. 352; *Ex parte Murphy*, 75 Ala. 409; *Sturtevant v. State*, 15 Neb. 459; *Bonnett v. Bonnett*, 61 Iowa, 199, 16 N. W. 91; *Jones v. Darnall*, 103 Ind. 569, 2 N. E. 229.

Where the court is satisfied that the interest of the child would be subserved by refusing the custody to either of the parents, it may be confided to a third party. *Chetwynd v. Chetwynd*, L. R. 1 P. & D. 39; *In re Goodenough*, 19 Wis. 274. See *Matter of Heather Children*, 50 Mich. 261, where the guardian of their estate was refused the custody of their persons.

There is no common-law right to a trial by jury of the questions of fact arising on *habeas corpus*; but the issues both of fact and of law are tried by the court or judge before whom the proceeding is had;<sup>1</sup> though without doubt a jury trial might be provided for by statute, and perhaps even ordered by the court in some cases.<sup>2</sup>

### *Right of Discussion and Petition.*

The right of the people peaceably to assemble, and to petition the government for a redress of grievances is one which "would seem unnecessary to be expressly provided for in a republican government, since it results from the very nature and structure of its institutions. It is impossible that it could be practically denied until the spirit of liberty had wholly disappeared, and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen."<sup>3</sup> But it has not been thought unimportant to protect this right by statutory enactments in England; and indeed it will be remembered that one of the most notable attempts to crush the liberties of the kingdom made the right of petition the point of attack, and selected for its contemplated victims the chief officers in the Episcopal hierarchy. The trial and acquittal of the seven bishops in the reign of James II. constituted one of the decisive battles in English constitutional history;<sup>4</sup> and the right which was then vindicated is "a sacred right which in difficult times shows itself in its full magnitude, frequently serves as a safety-valve if judiciously treated by the recipients, and may give to the representatives or other bodies the most valuable information. It may right many a wrong, and the deprivation of it would at once be felt by every freeman as a degradation. The right of petitioning is indeed a necessary consequence of the right of free speech and deliberation, — a simple, primitive, and natural right. As a privi-

<sup>1</sup> See Hurd on Habeas Corpus, 297–302, and cases cited; *Baker v. Gordon*, 23 Ind. 209; *In re Neagle*, 135 U. S. 1, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; *United States v. Lipsett*, 156 Fed. 65; *Robertson v. Bass*, 52 Fla. 420, 42 So. 243; *Belch v. Manning*, 55 Fla. 229, 46 So. 91; *Sumner v. Sumner*, 117 Ga. 229, 43 S. E. 485; *Graves' Case*, 236 Mass. 493, 128 N. E. 867; *In re Palmer*, 26 R. I. 222, 58 Atl. 660; *Pittman v. Byars*, 51 Tex. Civ. App. 83, 112 S. W. 102; *Ex parte Fuller*, 58 Tex. Civ. App. 217, 123 S. W. 204.

<sup>2</sup> See *Matter of Hakewell*, 22 Eng. L. & Eq. 395; s. c. 12 C. B. 232; *People v. Hendrick*, 215 N. Y. 339, 109 N. E. 486; *In re Palmer*, 26 R. I. 222, 58 Atl. 660. Compare *Ex parte Crowley*, 268 Fed. 1016.

<sup>3</sup> Story on the Constitution, § 1894.

<sup>4</sup> See this case in 12 Howell's State Trials, 183: 3 Mod. 212. Also in Broom, Const. Law, 408. See also the valuable note appended by Mr. Broom, p. 493, in which the historical events bearing on the right of petition are noted. Also, May, Const. Hist. c. 7; 1 Bl. Com. 143.



lege it is not even denied the creature in addressing the Deity.”<sup>1</sup> Happily the occasions for discussing and defending it have not been numerous in this country, and have been largely confined to an exciting subject now disposed of.<sup>2</sup>

### *Right to Bear Arms.*

Among the other safeguards to liberty should be mentioned the right of the people to keep and bear arms.<sup>3</sup> A standing army is peculiarly obnoxious in any free government, and the jealousy of such an army has at times been so strongly manifested in England as to lead to the belief that even though recruited from among themselves, it was more dreaded by the people as an instrument of oppression than a tyrannical monarch or any foreign power. So impatient did the English people become of the very army that liberated them from the tyranny of James II. that they demanded its reduction even before the liberation became complete; and to this day the British Parliament render a standing army practically impossible by only passing a mutiny act from session to session. The alternative to a standing army is “a well-regulated militia”; but this cannot exist unless the people are trained to bearing arms. The Federal and State constitutions therefore provide that the right of the people to bear arms shall not be infringed; but how far it may be in the power of the legislature to regulate the right we shall not undertake to say.<sup>4</sup> Happily there neither has been, nor, we may hope, is

<sup>1</sup> Lieber, *Civil Liberty and Self-Government*, c. 12.

<sup>2</sup> For the discussions on the right of petition in Congress, particularly with reference to slavery, see 1 Benton's *Abridgement of Debates*, 397; 2 Benton's *Abridgement of Debates*, 57-60, 182-188, 209, 436-444; 12 Benton's *Abridgement of Debates*, 660-679, 705-743; 13 Benton's *Abridgement of Debates*, 5-28, 266-290, 557-562. Also Benton's *Thirty Years' View*, Vol. I. c. 135, Vol. II. c. 32, 33, 36, 37. Also the current political histories and biographies.

The right to petition Congress is one of the attributes of national citizenship, and as such is under the protection of the national authority. *United States v. Cruikshank*, 92 U. S. 542, 552, 23 L. ed. 588, 591, per *Waite*, Ch. J.

In *Spoysd v. Ringing Rock Lodge*, 270 Pa. St. 67, 113 Atl. 70, 14 A. L. R.

1443, it was held that a provision in the by-laws of a beneficial association which provided for the expulsion of a member, if he used his “influence to defeat any action by the national legislative representative” of the association, was void in so far as it restricted the right of a member to petition the legislature to repeal an act of assembly.

No such proceeding as a petition of right to a court to determine the constitutionality of a statute is now recognized. *In re Miller*, 5 Mackey, 507.

A political convention is an assemblage within the meaning of a constitutional provision that the right of the people to assemble to consult for the common good shall never be abridged. *State v. Junkin*, 85 Neb. 1, 122 N. W. 473, 23 L. R. A. (N. S.) 839.

<sup>3</sup> 1 Bl. Com. 143.

<sup>4</sup> See *Wilson v. State*, 33 Ark. 557.

likely to be, much occasion for an examination of that question by the courts.<sup>1</sup>

<sup>1</sup> In *Bliss v. Commonwealth*, 2 Lit. 90, the statute to "prevent persons wearing concealed arms" was held unconstitutional, as infringing on the right of the people to bear arms in defense of themselves and of the State. But see *Nunn v. State*, 1 Kelly, 243; *State v. Mitchell*, 3 Blackf. 229; *Aynette v. State*, 2 Humph. 154; *State v. Buzzard*, 4 Ark. 18; *Carroll v. State*, 28 Ark. 99, 18 Am. Rep. 538; *State v. Jumel*, 13 La. Ann. 399; 1 Green, Cr. Rep. 481; *Owen v. State*, 31 Ala. 387; *Cockrum v. State*, 24 Tex. 394; *Andrews v. State*, 3 Heisk. 165, 8 Am. Rep. 8; *State v. Wilburn*, 7 Bax. 51; *State v. Reid*, 1 Ala. 612; *State v. Shelby*, 90 Mo. 302, 2 S. W. 468; *State v. Keet*, 269 Mo. 206, 190 S. W. 573, L. R. A. 1917 C, 60.

A statute prohibiting the open wearing of arms upon the person was held unconstitutional in *Stockdale v. State*, 32 Ga. 225, and one forbidding carrying, either publicly or privately, a dirk, sword-cane, Spanish stiletto, belt or pocket pistol or revolver, was sustained, except as to the last-mentioned weapon; and as to that it was held that, if the weapon was suitable for the equipment of a soldier the right of carrying it could not be taken away. See also *Ex parte Thomas*, 21 Okla. 770, 97 Pac. 260, 20 L. R. A. (N. S.) 1007, 17 Ann. Cas. 566.

In Idaho it has been held that a statute prohibiting private persons from carrying deadly weapons within the limits of a municipality violates the constitutional right to bear arms. *In re Brickley*, 8 Idaho, 597, 70 Pac. 609, 101 Am. St. Rep. 215, 1 Ann. Cas. 55.

In Kansas it has been held that the constitutional guaranty of the right to bear arms is a limitation on legislative power to enact laws prohibiting the bearing of arms in the militia, or any other military organization provided for by law, but is not a limitation on legislative power to enact laws prohibiting and punishing the promiscuous carrying of arms or other deadly weapons. *Salina v. Blaksley*, 72 Kan. 230, 83 Pac. 619, 115 Am. St.

Rep. 196, 3 L. R. A. (N. S.) 168, 7 Ann. Cas. 925.

In California it has been held that the constitutional right to keep and bear arms protects only the bearing of arms by citizens in defense of a common cause and not their use in private broils and affrays. *Ex parte Rame-niz*, 193 Cal. 633, 226 Pac. 914, 34 A. L. R. 51.

Under the guise of protection of game the legislature of a State may not disarm any class of persons falling within the constitutional guaranty of the right to bear arms in defense of themselves. *People v. Zerillo*, 219 Mich. 635, 189 N. W. 927, 24 A. L. R. 1115.

Where the Constitution of a State grants to aliens who are *bona fide* residents of the State the same rights in respect to the possession, enjoyment, and inheritance of property as native-born citizens, and to every person the right to bear arms for the defense of himself and the State, the legislature has no power to make it a crime for a person, alien or citizen, to possess a revolver for the legitimate defense of himself and his property. *People v. Zerillo*, 219 Mich. 635, 189 N. W. 927, 24 A. L. R. 1116, distinguishing *Patson v. Pennsylvania*, 232 U. S. 138, 34 Sup. Ct. Rep. 281, 58 L. ed. 539, which affirmed 231 Pa. St. 46, 79 Atl. 928. Compare *State v. Rheame*, 80 N. H. 319, 116 Atl. 758, and *Bandi v. McKay*, 87 Vt. 271, 89 Atl. 228, Ann. Cas. 1916 C, 130.

As bearing also upon the right of self-defense, see *Ely v. Thompson*, 3 A. K. Marsh, 73, where it was held that the statute subjecting free persons of color to corporal punishment for "lifting their hands in opposition" to a white person was unconstitutional. And see, in general, *Bishop on Stat. Crimes*, c. 36, and cases cited.

Unauthorized bodies of men may be prohibited the right to drill or parade with arms, and to associate as a military organization. *Com. v. Murphy*, 166 Mass. 171, 44 N. E. 138, 32 L. R. A. 606.